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DEMOCRACY AND THE RULE OF LAW

Current public administration reform efforts seem to be only weakly supported and their aim does not seem to fully take into consideration the situation and challenges. Despite the efforts of the HRM Service, whose competencies have been reduced over time, the political administrative context is not sufficiently receptive yet to the professionalisation of the civil service.

The main efforts should focus on strengthening checks and balances in the system. This calls for a more democratic constitution which allows for a better protection of the division of powers and more effective constitutional control mechanisms – for political and administrative control as well as control by citizens. In this regard, administrative justice and procedures and the streamlining of policies oriented towards more transparency in public decision-making are particularly important. Instrumental actions to accomplish this include strengthening independent bodies such as the Commissioner for Access to Information, the Ombudsman, the State Audit Institution and the Anti-Corruption Agency, consolidating the public finance system (including procurement/concessions), and improving the quality of policy and law-making.

Democracy

Although Serbia is constitutionally a democracy ruled by law and with a separation of powers between the executive, legislative and judiciary, the parliament is in practice not able to control the government effectively. In particular, the capacities of the National Assembly need to be developed to allow it to fulfil its control function.

The state appears to be largely captured by vested interests and the judiciary is currently in disarray as a result of a flawed judicial reform undertaken in 2009-2010. While priority should be given to actions with a multiplier effect, any policy or action that could directly or indirectly contribute to unravelling the current entanglement of politics, business interests, media ownership, and political party financing should be resolutely undertaken.

The Serbian State concentrates power in the hands of the executive, with a tendency to hinder the development of checks and balances, including the judicial system, ombudsman-type institutions, and external audit, thereby undermining the public governance accountability system.

Access to public information is severely constrained in practice, although improvements are taking place as a result of the efforts of the current Commissioner for Information. This lack of institutionalisation poses sustainability problems. Individual privacy has been under attack through legal reforms implemented in 2010. A better regulation is needed to, on the one hand, ensure transparency, and on the other, to protect state secrets, personal data and confidential information, in order to set a sounder balance between transparency and confidentiality in administrative action.

Rule of Law

The extent to which the public governance system adequately espouses the rule of law remains a serious concern. The rule of law can be defined as a set of principles that require a separation of powers between the judicial, executive and legislative branches of government, compliance with the law by government, individuals and economic operators, the proper functioning of the judiciary, and the consistent application of fair procedures by the administration.

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

Implementation of laws remains a problem. This is exacerbated by the fact that the social and political role of the law is not fully understood and by poor managerial capabilities in the administration. Frequently, public sector institutions do not hesitate to disregard legal provisions or binding procedures as they see fit. Current administrative procedures do not add to predictability and legal certainty and are not fully aligned with democratic standards. This downplaying of the role of the law seems to be a matter of legal culture, which would need to evolve towards the internalisation of democratic values.

Any policy or action geared towards promoting the confidence of citizens should be undertaken; this should be a central policy of the state. Greater importance should be given to building public trust in the role of law and in public governance institutions. The first indispensable step is to promote and respect individual rights.

Constitution

The Constitution provides for most of the guarantees of a democratic state ruled by law. However, the full respect of fundamental principles is a matter of concern. Likewise, the Constitution departs from mainstream European standards in too many respects, an issue already raised by the Venice Commission in 2006.

Parliament

Despite the enactment in 2010 of an unusual law which regulates the National Assembly's powers, the Assembly has a weak capacity to politically control the government. Furthermore, according to the Ombudsman and the Commissioner for Information, the new rules of procedures have showed to be problematic. Some recent parliamentary practices to control the government go in the right direction but are still too fragile and can hardly offset the blank resignation of MPs permitted by article 102 of the Constitution. To function as an effective check on the power of the executive, the National Assembly would also need to be significantly strengthened in terms of professional support. The limited time the Assembly generally spends on discussing draft legislation, and the executive's weak law drafting preparation and consultation and policy analysis mean that the laws passed by the Assembly are in general of poor quality and difficult to implement.

Government

Since 2000, governments have been coalitions, which distribute institutional power and administrative spoils among coalition members (*lottizzazione*). This affects staffing in ministries and agencies while disrupting already weak accountability mechanisms and policy coherence. The central policy system is under-resourced and under-exploited. The quality of policy development in ministries is poor. Although some change is being planned, its sustainability is an issue. Overall, the General Secretariat of the Government is too weak institutionally to be able to drive the policy system towards greater effectiveness and output quality.

The Serbian Office for European Integration (SEIO) manages European Integration (EI). The EI units in ministries have been set up and have been preserved, by Government decision, from the 2010 staff cuts. Overall, however, the same policy capacity weaknesses apply. The SEIO has shown professionalism in managing the questionnaire supporting Serbia's application for EU membership.

Public Administration

One characteristic of the public administration is the excessive concentration of the decision-making powers in the hands of politicians who do not delegate to the administration. This impedes the emergence of professionalisation in management.

The 2005 Law on Civil Servants (CSA) provides for a clear distinction between civil servants and political employees. However, the legislation does not guarantee a system based on merit, as recruitment, promotion and dismissal are based on managerial or political discretion. There is confusion between the notion of publishing vacancies and the concept of merit-based recruitment.

Although public bodies are bound by law in their decisions and activities, practice has shown that the respect of legality and equality before the law in administrative decision-making and administrative action needs to be upgraded in order to attain better alignment with European principles of administrative decision-making, especially in terms of stronger legal certainty and predictability.

Agencies, as specific “ad hoc” organisational forms of administrative technical services, were set-up in Serbia after 2000, their creation justified on the basis of conforming with EU practices. However, the reality has been the development of a kind of parallel state administration, without clear accountability, which further complicates the management of the state administrative organisation and the attainment of accountability and efficiency in governance arrangements.

This lack of clarity can also be found in the public procurement system, and in particular in concessions and public-private partnerships. The public procurement system needs to be legally and institutional reformed. The implementation of already adopted laws to comply with European standards and to provide effective services needs to be improved. In addition, public procurement is a major source of corruption in the country.

The public expenditure management system, including public internal financial control, is based on a comprehensive budget system law, which was again amended in 2010. The 2010 amendments could provide the basis for a strengthened system in the coming years, but the analytical capacity and the conceptual understanding of key concepts in effective public expenditure management is still weak. Managerial capabilities are very low in the state administration, meaning that managerial accountability remains a goal for the future goal, rather than today’s reality. The state audit institution has only now started to work effectively. It still needs additional staff and considerable capacity development to be able to fully exercise its functions.

Judiciary

A Law on Administrative Disputes (judicial review of administrative decisions) was passed in December 2009 but should be considered as a missed opportunity for creating a strong European-like administrative justice system. The Law was hastily prepared without the necessary consultation and consideration of basic rule-of-law tenets that a democratic state should respect and guarantee.

In 2009, the Government initiated changes to the judiciary to address its poor reputation. However, the remedies put in place by the High Judicial Council, in late 2009, have worsened the situation. The most salient measure was the dismissal and subsequent re-appointment process of judges, which resulted in the expulsion of almost a third of the judges. This process weakened the rule of law and further damaged the reputation of the judiciary as a whole. The same can be said of the overhaul of the prosecutorial services by the State Prosecutorial Council. These reforms illustrate disrespect for the independence of judges and prosecutors as well as the weak policy and implementation policies in the Ministry of Justice, although this problem is not unique to that Ministry. At the time of writing (February 2011), the matter remained to be solved.

Anti-corruption Policy

Improvements to regulations to prevent and combat corruption were made in 2010, but it is still too early to assess their general effectiveness. Amendments to the civil service law, the law on access to information and the law on the Anti-Corruption Agency (obligation for civil servants to report corruption, and protection of whistleblowers) represent improvements, but the protection of whistleblowers remains weak. Future positive effects may be produced by amendments to the Criminal Procedural Code to facilitate the investigation and prosecution of organised crime, and by a new Law on Political Parties that requires their re-registration and a foreseeable reduction of their number, which would, in principle, facilitate the control of their financing.

The launch of the Anti-Corruption Agency's operations in January 2010 is a positive development. The institution has already started to have some impact on the prevention of corruption, where much remains to be done. The Agency's capacity to cope with all the responsibilities it has been entrusted with remains to be demonstrated, especially regarding the verification of conflict of interest and asset declarations of the numerous categories of officials, including politicians, required to submit declarations.

Reform Capacities

1. The government's capacity to set priorities and adequate sequencing for reforms is limited. This is perhaps one of the consequences of the excessive fragmentation of the coalition government and of the low capacity to carry out meaningful political negotiations conducive to effective reform.
2. Reform is generally understood as a set of law-making operations, rashly undertaken and with little concern for implementation and little analysis of the impact of the legislation being passed. Moreover, managerial capabilities to implement reforms are very low. Poor policy-making and poor management capabilities are additional difficulties for reform.
3. Reforms are largely driven by pressure from outside the country, especially from the EU and other international organisations such as the IMF. This raises obvious concerns about the medium-term sustainability of these reforms.
4. Furthermore, the national consensus on NATO and EU membership is far from being established. In other countries, such a consensus has proved to be one of the main drivers and direction-setters for reforms. Better understanding of the issues at stake and more work is needed if Serbia is to follow resolutely the path of reforms required by membership of Euro-Atlantic institutions.
5. Within the current system, the SEIO is the main reform engine. But focusing governance reforms in the SEIO risks associating it with a political process – the EU integration – under threat, overloading the institution, and associating the reforms too closely with the European integration agenda. Without diminishing the SEIO's capacities and central role in promoting the European integration agenda, it is necessary to strengthen alternative engines of state and administrative reform, especially the Ministry of Public Administration and Local Self-Governments, Ministry of Justice, and Ministry of Finance, which are less dependent on the European agenda and whose more resolute involvement could reduce the perception that the reform thrust is driven from abroad. Overall, the national ownership of the reforms needs to be strengthened.

CIVIL SERVICE AND ADMINISTRATIVE LAW

Summary

Main Developments since Last Assessment (May 2010)

1. Legal Framework. There have been only slight changes in the civil service legal framework since May 2010. The major change has occurred in the regulation of salaries of civil servants. The Law on Salaries of Civil Servants and Employees was amended, and the salaries of the lowest-level civil servants were increased by 30–40%.

There is still no legal framework regulating the status of employees of public services, such as education and health employees, except in the domain of their salaries. In that respect, the Ministry of Labour, Employment and Social Policy has prepared amendments to the Law on Salaries in State Organs and Public Services, which were adopted by the government on 10 June 2010. There has been no progress in the regulation of the status of politically appointed personnel (ministers, state secretaries, political advisors, etc.).

The Ministry of Public Administration and Local Self-Government, in co-operation with the Standing Conference of Towns and Municipalities, has been preparing a draft Law on Local Officials, whose rights and responsibilities are still governed by the obsolete 1991 Law on Labour Relations in State Bodies. However, no official draft of the new law is available yet.

2. Staff Cuts. In accordance with the IMF Standby Arrangement, during 2010 and early 2011 government bodies finalised the reduction of staff. All civil service institutions adopted new Rulebooks on Internal Organisation and Systematisation, by which they reduced the number of actual staff by about 10%, in line with the Law on Determining the Maximum Number of Employees in the Republican Administration and the subsequent Government Decision determining the maximum number of staff employees in state administration organs. Ministries have showed little interest in engaging redundant employees from other ministries or institutions.

The number of civil servants and employees working in central government ministries and agencies has gradually decreased from 26,453 (in 2008) to 24,515 in 2010. In February 2011, the total number of public sector employees amounted to 438,786. Of this number 265,966 employees are financed from the state budget, 60,545 employees are financed by local governments and 112,275 by mandatory social insurance institutions (National Employment Service, Health Insurance Fund and Pension Insurance Fund).

The government has given its best efforts to complying with an agreement with the EU under the EC Budget Support Programme to maintain and develop the administrative capacities of relevant institutions and bodies and to exclude from the staff cuts any personnel working in priority areas for EU integration. For this reason, the government has carried out a consultation process with ministries and other agencies, the HRMS and the Serbian European Integration Office in order to ensure that the capacities for EU integration are not jeopardised by the staff cuts. To preserve EU-related capacities, the government has amended its decision of July 2010 on the maximum number of staff and has allowed individual institutions to slightly increase the number of posts in their Rulebooks on Internal Organisation and Systematisation.

3. Recruitment in the Senior Civil Service. The government was not able to fill all of the senior positions by the prescribed deadline of 31 December 2010, as required by the Civil Service Law amendments adopted in December 2009. The competition procedure was completed and staff were

appointed to approximately 170 senior civil service positions, whereas the overall number of vacant senior civil service posts was between 300 and 400.

4. Changes in the Public Employees Integrity System. The amendments to the Law on the Anti-Corruption Agency of December 2010 strengthened the legal basis for the protection of whistle-blowers in the public administration. In February 2011, central government bodies started to develop their integrity plans, in line with the guidelines provided by the Anti-Corruption Agency. It is expected that these plans will identify special corruption risks for each institution, which should result in the reduction of corrupt practices throughout the administration.

5. Reform of the Salary Scheme. As mentioned above, the civil service salary system has undergone important changes due to amendments to the Law on Civil Service Salaries adopted in December 2010. The coefficients of the lowest two levels of civil servants (junior clerk and clerk) have been increased by 40%, and the coefficients of the second lowest-level ranks (junior associate and associate) have been increased by 30%. As a result, the compression ratio for the salaries of civil servants of 1:9 (which was introduced by the Law on Salaries of Civil Servants and Employees in 2006) has been reduced to 1:6.4. The amendments came into effect on 1 January 2011. The salaries of the four lowest levels of employees have also been increased by around 30-40%. The coefficient of the lowest-level employees was increased by 35%, from 0.75 to 1, which means that the overall compression ratio in the civil service (including employees) was decreased from 1:12 to 1:9.

6. Training. The Human Resources Management Service in the Government Office (HRMS) adopted the General Programme of Professional Development for Civil Servants, which was then adopted by the government in January 2011. The thematic areas of the Programme are reform-oriented, encompassing a wide variety of topics, including senior management development and EU integration. The resources for the implementation of a majority of training events have been earmarked in the budget of the HRMS, while a certain number of training activities will be implemented by means of the support of various donors. One of the long-lasting problems with implementing training programmes is that senior civil servants very rarely attend them.

7. Staffing and Control. The data on the number of civil servants is not yet transparent and accessible to the public. The Law on Determining the Maximum Number of Employees introduced a requirement that the data on the number of employees in the administration had to be accessible to the public. The law requires civil service institutions to present this data on the number of personnel on their websites. There is a further requirement concerning the introduction of a register on the number of employees, which will be maintained by the Ministry of Finance and presented on the ministry's website. To date the register of civil servants has still not been completed and made available on the website of the Ministry of Finance.

8. Equality before the Law. The principle of equality before the law is one of the key principles guaranteed by the Serbian Constitution. This principle is further elaborated in the Law on the Prohibition of Discrimination, which regulates the general prohibition of discrimination, the forms and cases of discrimination as well as the means of protection against discrimination. The law establishes the institution of Commissioner for the Protection of Equality as an independent state body. The Commissioner for the Protection of Equality was appointed by parliament on 5 May 2010. Over the past 10 months, the Commissioner has struggled to obtain adequate premises for its work and expects to be able to have its offices refurbished by mid-March 2011. In November 2010, parliament approved the Commissioner's Rulebook on Internal Organisation and Systematisation with 60 approved positions. However, the annual staffing plan for 2011 allows the Commissioner to recruit only 25 staff in 2011.

To date the Commissioner has received approximately 140 complaints. As expected, a number of complaints do not concern issues of discrimination. In that case, the Commissioner advises the citizen to refer the complaint to a competent body (e.g. Ombudsman). In view of the relatively low number of complaints that the Commissioner has received so far, it is difficult to identify the key areas in which discrimination is the most visible. Nevertheless, it seems that one of the areas greatly affected by

discrimination is the area of private employment, as employment-related issues are obviously perceived by citizens as important, especially in a time of economic crisis.

9. Administrative Procedures. The Law on General Administrative Procedures was amended in May 2010 in order to align its terminology with the 2006 Constitution and with the new court organisation introduced in January 2010. However, no substantive changes in the general administrative procedures were made by the amendments. The Ministry of Public Administration has started working on a new Law on Administrative Procedures, which is expected to be finalised by mid-2011. The objectives of the new law are to simplify the current cumbersome and detailed rules of procedure, introduce modern, electronic means of communication, and harmonise it with democratic standards.

10. Balance between Transparency and Confidentiality. On 29 December 2010 parliament adopted amendments to the Law of Free Access to Information of Public Importance, which give to the Commissioner for Free Access to Information and Personal Data Protection important enforcement authority. According to the amendments, the Commissioner's decisions are to be binding, final and enforceable by coercive means (coercive action or fines, as appropriate), in accordance with the law pertaining to general administrative procedures. The government, on request, is to assist in the administrative enforcement of such decisions by taking actions within its sphere of competence, with recourse to direct enforcement, in order to ensure compliance with the Commissioner's decisions. These amendments represent an important improvement in the legal framework related to free access to information.

In co-operation with civil society, the Commissioner developed the Strategy of Development of Data Protection, which was adopted by the government on 20 August 2010. The objective of the Strategy is to raise the awareness of citizens of the need for protection of individual private data. The government has still not adopted the action plan for implementation of the Strategy.

11. The Ombudsman. A major novelty concerning transparency and integrity is the Code of Good Administrative Behaviour adopted by the Ombudsman, which was subsequently presented to parliament for adoption. The Code contains principles of good administration that are recognised in EU institutions and in EU Member States.

The new Rules of Procedure of the Serbian Parliament require parliament to discuss the Ombudsman's reports (and reports of other independent regulatory bodies, such as the reports of the Commissioner for Free Access to Information). It is therefore expected that the Ombudsman's reports will be discussed both before the parliamentary committees and in the plenary sessions of parliament in the near future.

12. Administrative Supervision and Inspection. Other, more traditional, instruments of supervision of administrative behaviour have not yet been regulated in accordance with European standards. In order to modernise the regulations on the supervision of administrative behaviour, the Ministry of Public Administration and Local Self-Government has finalised the preparation of the new draft Law on Administrative Supervision and the draft Law on Inspection Supervision. Both of these draft laws are expected to be adopted by the government in the near future.

13. Judicial Review. In January 2010 the Administrative Court was established and started to operate. Currently, the number of judges in the Administrative Court is 34, including the Court President. Each judge has his/her assistant. This staffing level is an important improvement compared to the previous situation, where the administrative section of the Supreme Court had only 15 judges with a smaller number of assistants. Overall, the number of judges envisaged by the Court's Rulebook on Internal Organisation and Systematisation is 36 judges, including the Court President. The Court has taken over a large number of cases from the administrative section of the former Supreme Court and from administrative sections of former county courts, which totalled 18,000 cases. In the course of 2010 the inflow of cases was also very high, amounting to 16,048. The Court managed to resolve 13,843 cases in 2010.

The new Law on Administrative Disputes also became effective as from 1 January 2010. One of the problems faced in the implementation of the new law is the unnecessary extension of certain procedures in

the preliminary phase of the trial. This new law will need to be reviewed in the short run to address its shortcomings and also to align it with the law on administrative procedures currently under preparation.

Main Characteristics

1. *The democratic rule of law should be reinforced in the public administration.* The constitutional support in Serbia to the building of a state ruled by law and able to adequately protect individual citizens' rights is problematic and needs to be better aligned with European principles and practices. A revision of the Constitution would be necessary prior to Serbia's entry into accession negotiations with the European Union. According to the Venice Commission (Opinion 405/2006), "in general many aspects of this Constitution meet European standards and adopt the criticisms made in the Venice Commission's 2005 Opinion. However, there are some provisions that still fall well below those standards and others where the hasty drafting is evident in provisions that are unclear or contradictory".

The rule of law is proclaimed by the Constitution as the fundamental principle of the state. Legal remedies are also constitutionally foreseen, although they still need to be further developed in practice.

The constitutional and legal definition of citizenship should be revised and brought into closer alignment with mainstream European approaches based on demos, rather than ethnos, as it bears significant consequences in terms of citizens' rights and duties before the state, relations with neighbouring countries, and the fight against corruption and organised crime. The obscure definition of the notion of Serbian citizenship is likely to lead to illicit discrimination and weak respect of legality, as well as to disrespect for the legality of neighbouring countries and has already raised tension with Montenegro.

The principle of equality before the law is constitutionally proclaimed and has recently been reinforced by law, although this principle is not always fully respected in practice. The recent adoption of the Law on the Prohibition of Discrimination has introduced new provisions and institutions to protect the fundamental human right to equality, but the effectiveness of these new legal provisions remains to be seen in view of the poor technical quality of that law and other shortcomings affecting the policy design supporting it.

The attribution to the Prosecutor of general powers for the protection of legality, outside the penal procedure, departs from European standards. The role of the prosecutor in a democracy is the protection of the general interest, concerned almost exclusively by criminal matters. Its intervention outside penal cases should be very restricted.

In summary, although public bodies are bound by law in their decisions and activities, practice has shown that the observation of legality and equality before the law in administrative decision-making and action needs to be upgraded. Some constitutional amendments are needed in order to enable the proper observation of these principles. The politico-administrative culture in Serbia is overly reliant on the enactment of new legislation to address any and every problem, and legislation is often prepared hastily, without taking into consideration the general legal order that already exists. This approach has led to contradictory regulations, difficulties in interpretation and implementation of laws, legal uncertainty and a poor understanding of the rule of law. Greater investment in managerial capacities and capabilities could reduce the dependence on legal instruments as the main way of attempting to resolve public problems.

2. *The organisational policy of the state administration should be streamlined.* The organisation of the administration in Serbia is excessively complex and confusing, which is detrimental to administrative transparency and to efficiency. In this regard, the passage of the Law on State Administration and the Law on State Agencies was a missed opportunity for increasing transparency in the organisational set-up of the state administration. These laws do not provide sufficient clarity concerning the distribution of administrative competencies among public authorities and the establishment of accountability lines between them. The Law on State Administration could have provided a better basis for defining the roles of various institutions, but instead it adopts a rather confusing typology of public organisations. The Constitution also contains provisions that cannot be implemented, such as the accountability of ministries to the government (article 125). In addition, as the detailed tasks of individual

public administration bodies are prescribed by special laws regulating the various areas, the competencies between the various bodies often overlap or contradict each other.

A new and sounder organisational policy for the state would be useful in clarifying the responsibilities of the various administrative bodies and organisations, increasing transparency and strengthening accountability and efficiency. Bringing to the fore a concern for transparency, efficiency, accountability and effectiveness of public policies and law implementation is a pressing need.

The typology of the various categories of existing public agencies is confusing, and this situation contributes to creating a rather opaque administrative environment. In addition, in practice these agencies are unaccountable to the government, as the accountability mechanisms established by law are rarely applied in practice. The administrative control based on administrative inspectorates seems to be rather formalistic and unconcerned with results. Inspectors focus only on legality and regularity, which is in itself positive, but they could be legally empowered to also assess the efficiency and effectiveness of public organisations.

Public enterprises are frequently used to finance political parties and to sustain patronage networks, which are outside the scope of the civil service legislation and are not controlled by the state audit institution yet. The lack of clear and precise legislation with regard to salaries and bonuses of officials in public enterprises and other public agencies leads to unmonitored spending of budget funds and to the partisan increase of salaries and financial bonuses for the top management, which usually are incommensurate with the results achieved.

More clarity is needed concerning the transfer of competencies and funds to local self-governments and the resolution of the problem of local self-governments' property rights.

In summary, no progress is noticeable in the area of state organisational policy. There continues to be insufficient clarity concerning the distribution of administrative competencies among public authorities. Although the Ministry of Public Administration and Local Self-Government intended to conduct a functional review of several ministries in order to determine duplicating functions within and between different institutions, there was insufficient political support to put this idea into practice.

The large number of agencies that operate under a separate regime, set out in the Law on Public Agencies is problematic. It should be noted that a number of agencies were allegedly established as a requirement for EU accession, while in fact most of them were purposefully created as forming a parallel administration established by the after 2000 authorities to circumvent the old Milosevic administration, which was mostly left untouched.

3. Accountability, transparency, and predictability should be more prominent in the architecture and activities of the state administration. Managerial accountability is virtually non-existent, as decision-making is limited to political decisions taken by ministers and politicians. There is no delegation of decision-making powers. As such delegation is not used as a regular management tool. One of the results of this concentration of power in the hands of politicians is the extreme difficulty for the implementation of laws and policies, even though some good managers and some technical capacity do exist, but they are the exception.

There seems to be a gap between the existing system of liability for damages caused by public administrations in Serbia and the common standards set in EU Member States, as laid down in national legislation or as defined by the case law of the European Court of Justice, which also include state liability for damages or loss of property caused in the case of lawful and regular operation of public services (objective or strict liability without tort).

The Administrative Inspection, as a supervisory instrument, is not aligned with European standards. The Law on State Administration (2005) prescribes that the operation of administrative inspection is to be regulated by a separate law. Currently, the provisions of the former Law on State Administration adopted in 1992 (articles 22-37 and article 92 regulating administrative inspections) are still applied.

The 1997 Law on Administrative Procedures is obsolete and does not meet democratic standards for administrative decision-making. The administrative decision-making system needs to be reformed in order

to become more reliable, more efficient and more capable of ensuring legal certainty for businesses and the general public. This reform should also aim to facilitate the delegation of decision-making as a managerial tool. The new law should also set out the basis for introducing electronic administrative procedures and for transposing certain principles, as required by the 2006 EU Directive on Services. However, it may not be possible to resolve major problems in decision-making through legislation only. The state needs to overcome the low trust in institutions due to the arbitrariness in delivering licenses and permits and to the widespread disrespect for due procedure as an essential notion in a democracy. Procedural rules are often circumvented for the sake of efficiency, which in fact is understood almost exclusively as rapidity.

A review of the Law on Administrative Disputes (LAD) should be undertaken in 2013 and should focus primarily on broadening its scope, ensuring that the Administrative Court has full jurisdiction concerning facts and the law. Mandatory hearings should be regulated with more precision. Likewise, clarification is needed in relation to the competency of the Administrative Court to take reformatory decisions. These amendments would better align the LAD with European standards, especially those derived from article 6 of the European Convention on Human Rights (ECHR).

The Ombudsman needs to be consolidated and strengthened. This institution, although progressively gaining in strength and credibility, is still poorly understood by the public. Its standing could be diminished with the proliferation of various commissioners and ombudsman-like institutions across the country, often with overlapping remits and competencies.

The situation with regard to free access to information, the lingering tendency towards secrecy in the public administration, and citizens' distrust of the administration all hamper the full implementation of the law. Transparency and accountability in the public administration have not yet been achieved, despite the efforts of NGOs and some institutions (especially the Ombudsman and the Commissioner for Access to Information of Public Importance). The legislation should better define the notion of state secrets and confidential information, as such a definition is needed to ensure a sounder balance between transparency and confidentiality in administrative action.

Many policies and legal amendments are geared directly or indirectly towards diminishing the authority of "independent" institutions (Ombudsman, Commissioner for Access to Information) or judicial oversight over the administration and towards enlarging the area of secrecy and uncontrolled administrative activity. This undermining is done indistinctly either fortuitously or by design. If this tendency persists, the Serbian system of administrative checks and balances, which is already weak, will be further weakened. This tendency is likely to further undermine the notion of an administration ruled by law and respectful of the rights of citizens. As a consequence, the democratic credentials of Serbia will be compromised in the eyes of its citizens and in the perception of future state partners in the EU.

4. *The merit system and professionalism of the civil service require significant improvements.* The civil service system in Serbia has for decades been implemented in a "cultural" framework in which access to positions in the public administration and internal promotions have been largely based on political affiliation, patronage or cronyism. As a result, although progress has been made in recent years, the merit system is still hampered by long-lasting "cultural" habits and traditions. The progress achieved is far from being sustainable. The fact is that the merit system is weak, even non-existent, and politicisation is continuing.

Although the 2006 Constitution contains scattered references to the civil service in the sections referring to fundamental rights and the organisation of public powers (including those of the public administration), these references are sufficient to provide an adequate constitutional basis for legally defining crucial aspects of the civil service in accordance with mainstream European practice. This situation notwithstanding, the ordinary legal framework for public employment only partially meets European principles, as too many sectors of the public employment system remain either poorly regulated or unnecessarily excluded from the general principles of the civil service. This exclusion applies especially to local self-governments and to those sectors exercising public force upon citizens, such as the police and the intelligence services. Their exclusion from democratic staffing principles and standards is unjustified.

Overall, the current Serbian public service is only partially independent from political parties. The CSA has contributed to a certain degree of depoliticisation, but the impartiality mechanism embedded in the system of recruitment is not difficult to circumvent as it is relatively weak. Despite the positive aspects of the regulations on recruitment and classification of the civil service, the merit system is not yet fully guaranteed and remains fragile, as recruitment decisions are still based excessively on discretion. There is a persistent confusion between the notion of the public advertisement of vacancies and the notion of merit-based recruitment. Publicity is necessary, but it is not sufficient to guarantee a merit-based recruitment system. An excessive dose of discretion in recruitment, coupled with the ethnicity principle of article 77 of the Constitution and its consequences on probable quotas for entering the civil service, will hamper the professionalism of the civil service, which can only be achieved by putting into practice meritocratic principles.

The existing procedure on performance appraisal is in line with European standards, and there is currently no need for any substantial revision or improvement with respect to the procedural and technical aspects of this instrument. However, the consequences of the performance appraisal, especially with respect to negative appraisal, are overly strict and severe, as they empower the hierarchy to terminate the employment of a civil servant within a period of only four months, which is contrary to fair performance appraisal practices and may destroy the trust in the instrument.

The classification and job evaluation system seems to be well designed and working appropriately. Salaries are fixed by law or other legal instruments, and the management has almost no discretionary leeway to determine the individual salaries of civil servants. This situation could deteriorate, however, if the envisaged performance-related pay scheme were to be introduced. The discretionary component of the individual salaries is foreseen to be greater for public employees than for civil servants.

A firmly established procedure and mechanism for personnel expenditure planning and management are in the hands of the Ministry of Finance, which in general enables a sound control. However, the Ministry of the Interior is not subject to this control, even though it is one of the largest employers in the state administration.

The regulation of the senior civil service seems to be relatively correct, but in practice this regulation leaves a lot to be desired in terms of the depoliticisation of the senior management. Practice has indeed shown how difficult it is to introduce a senior management corps in an administrative environment where politicisation is prevalent, the grounds for professionalism in public management are not sound, and managerial capabilities are weak.

In general the provisions concerning the promotion of integrity in the public service are well established, although perhaps the obligation of all public officials to submit asset declarations is unnecessary. The law should focus instead on those officials holding a higher office or those who are working in corruption-vulnerable positions so as to make the system more manageable. The promotion of integrity is still far from being considered as a managerial responsibility that should be embedded within the obligations of managers at each and every institution. The weak managerial capabilities in the civil service may lead to the defective design and implementation of the foreseen institutional integrity plans, which are otherwise a promising managerial instrument for identifying corruption risks and promoting integrity in public office.

The causes and procedures for termination of civil service employment are well regulated and offer sufficient remedies against arbitrary dismissal through appeal to court, but in practice they are open to abuse.

Although reform-linked training is being delivered, mainly due to the good efforts of the Human Resources Management Service (HRMS), it would be advisable to establish more accurate training needs analyses and to provide the HRMS with the necessary resources and premises to enable it to play a much needed role as a facility for human resources training and development. In the medium term, the transformation of the HRMS into a proper human resource development capacity or training school under the Ministry of Public Administration and Local Self-Government (MPALSG) should be envisaged. Public managers and senior civil

servants badly need training to improve their managerial capabilities and to understand better the essentials of running a democratic administration. Training for managers should be considered as part of their working obligations.

The roles are unclear and scattered regarding the overall responsibility for civil service management. In this area, the responsibility for policy-making, co-ordination and monitoring is with the MPALSG, the Ministry of Finance (MoF), the High Civil Service Council, the Secretary General of the Government, and the HRMS. Consideration is also being given to the creation of a directorate for administrative inspection to supervise the implementation of the legislation related to civil service – an administrative inspectorate is already foreseen in the Civil Service Act, article 173. The risk of increasing confusion in this area is high and should be assessed prior to the creation of such a directorate. Furthermore, functions with regard to civil service policy design and implementation are currently completely separate and sometimes run in parallel. This situation creates problems related to the quality and coherence of both functions in an environment like the one in Serbia, where policy-making and implementation have traditionally been exercised together.

Reform Capacities

The capacities to reform in the field of civil service and the general administrative law framework are relatively well established, even if some dysfunctions, mainly derived from poor management and the above mentioned politico-administrative fragmentation, could hamper the design, sequencing and implementation of the reforms. In order to overcome these dysfunctions some actions would be needed:

1. The current competences of the Ministry of Public Administration and Local Self-Governments (MPALSG) should enable it to be the main steering reform instrument in close cooperation with the Ministry of Finance. However, the MPALSG still shows shortages in the area of public administration reform. It would need more financial resources and staff and better internal distribution of responsibilities. In addition the limitations on supervision imposed by article 46-3 (“a ministry cannot be supervised by another ministry”) of the Law on State Administration should be removed.
2. The Human Resource Management Service (HRMS), currently under the Government Secretariat, should be integrated into the MPALSG and become fully the human resource development capacity providing the necessary training associated to the reform needs. It should also become the reference in knowledge and evidence-based reform policies, which today are badly needed in the country. Its transformation into an Institute of Public Administration could be an option
3. After initial efforts to establish the civil service system in the first years of its operation, the HRMS is now building its capacities to attract and retain qualified personnel in the civil service and of focusing on the career development of civil servants. This is a positive trend, as it will strengthen the development role of the HRMS in addition to its monitoring role. However, the number of staff currently employed in the HRMS is not sufficient to carry out its core functions effectively. There is also a need to strengthen the capacities of HRM units in ministries and other agencies. Very often the number of civil servants in these units is quite small, which limits their potential and restricts the time at their disposal to deal with human resources development functions. These weaknesses are obstacles to the reform.
4. The Serbian European Integration Office (SEIO) is one of the main engines for the reform insofar as European integration is concerned, which nevertheless is quite a large domain overlapping many others. The administrative reform should not be only driven by EU integration, however, but by the own needs and rights of Serbian citizens. Therefore, while SEIO should play a central role in the EU integration process of the country, the training and developments endeavours should be better coordinated, starting by the phase of training needs analyses, with the HRMS and ultimately with the MPALSG.
5. The current fragmentation of the political leadership in the government is not able to overcome the difficulties associated to a reform which needs cutting horizontally across the whole state

administration. Furthermore, the concentration of decision-making powers in politicians impedes the emergence of professional management in the public service. These factors represent serious hindrances to the reform, which along with relatively high staff turnover and shortages in areas key for the reform may make it difficult to achieve the reform goals. The confusing organisational policy in the state administration further adds for reform difficulties.

6. The weak managerial capabilities currently existing in the state administration institutions represent a major obstacle to the design and implementation of the reforms. This managerial weakness cannot be replaced by international technical assistance, but by truly developing badly needed managerial capabilities adapted to the Serbian politico-administrative context.

Recommendations

Short-term Reforms

1. The General Law on Administrative Procedures, and its implementation, currently under preparation should be adopted in 2011 or early 2012, and its implementation needs to be carefully managed and monitored, as it will introduce an important cultural shift in administrative decision-making processes, including the delegation of powers, increased e-administration, and a different pattern of relations between the public administration and citizens.
2. The policy and regulation on state liability for damages and loss of property should be revised so as to provide for objective liability without tort, in compliance with European standards, and to introduce additional accountability mechanisms into the state administration.
3. The approach to the policy on monitoring the activity of the administration should be streamlined in order to introduce better accountability mechanisms for civil servants, public managers and administrative institutions. Consideration should be given to the reform of the current administrative inspectorates in the context of designing a better policy for managerial and institutional accountability and improving the quality of services delivered to the public.
4. The policies on official state secrets and open access to information should be revised in order to strike a sound balance between the two and to adapt them to emerging European standards on administrative transparency, so that the "right to know" becomes an effective general rule and the denial of access to information the exception. The protection of private data should be improved and the unbridled access to an individual's privacy by state bodies restricted to information that is really indispensable. In this regard, the institutions of the Ombudsman and the Commissioner for Access to Information of Public Importance and Data Protection should be strengthened in terms of financial and staff resources as well as legal powers.
5. The legal framework for public employment should be revised in order to enlarge the scope of the civil service, with the necessary adaptations, to include local self-governments and the security services. The legislation on public service employees needs to be modernised in order to guarantee equal access to public employment, fair working conditions, and increased capability and capacity to ensure high quality in the services delivered to the public.
6. The weakness of the merit system in recruitment should be addressed, as quickly as possible, through a revision of the Law on Civil Service.
7. Managers throughout the administration and public bodies should be made responsible for the promotion and protection of integrity in public office, and this obligation should be adequately monitored.
8. The same situation concerns training in public management. Senior officials should be encouraged to participate in in-service training as a means of surmounting current managerial weaknesses.
9. A better set-up for the management of policy preparation, implementation and management of the civil service is necessary. The Ministry of Public Administration and Local Self-Government

(MPALSG) should ensure homogeneous management standards across all state administrative settings and preserve the unity of the civil service system (the cancellation of article 46-3 of the Law on State Administration, which prohibits a ministry to supervise another one, may be necessary). The Human Resources Management Service (HRMS) should be integrated into the MPALSG and progressively become institute school of public administration with civil service development responsibilities through training and other means as well as serving as the main repository of policy-oriented knowledge on public administration and public management. Human resources management units in ministries and agencies should also be reinforced.

Medium-term Reforms

1. The Constitution should be revised and better aligned to the European democratic, rule-of-law standards. Ideally, a revision of the Constitution should take place before undertaking other major reforms, as constitutional reform should lay the foundations for these other reforms.
2. The current organisational policy of the Serbian State and administration should be streamlined in order to improve the capacity to govern the country, ensure more effectiveness in applying the *acquis communautaire*, and increase efficiency in the functioning of the state administration. This streamlining process would imply a thorough revision of a package of laws, including the Law on State Administration, Law on Agencies, Law on Ministries, and Law on Public Enterprises. Ideally, this revision should terminate in 2014, but discussions on the new organisational policy should commence in 2011. The current fiscal strain would favour the acceleration of these reforms, though.
3. The 2009 Law on Administrative Disputes should be revised in the light of the experience of the Administrative Court and the legal profession in its application, and it should be made consistent with the General Law on Administrative Procedures that is now under preparation. This revision should take place in 2013 or 2014 at the latest, provided that the Law on Administrative Procedures is effectively previously enacted.

1. The Importance of the Democratic Rule of Law in the Public Administration

1.1 Protection of Legality and Equality in the Public Administration

Article 198 of the Serbian 2006 Constitution states that “individual acts and actions of state bodies, organisations with delegated public powers, bodies of autonomous provinces and local self-government units must be based on the law” and the “legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject to reassessing before the court in an administrative proceedings, if another form of court protection has not been stipulated by law”. Article 36 grants to citizens access to courts and other state bodies to seek legal remedy against any decision concerning their rights, obligations or lawful interests. Article 67 provides for the right to professional legal assistance under the conditions established by law.

Article 35 establishes the right of citizens to obtain compensation for material or immaterial damages inflicted by the unlawful or irregular work of a state body, entities exercising public powers, and bodies of the autonomous provinces or local self-governments.

Article 51 recognises the right to obtain accurate, timely and complete information on issues of public importance and imposes on the media (but not on state bodies) the obligation to respect this right.

Article 56 establishes the right to petition; it states that “no person may suffer detrimental consequences for opinions stated in the petition or proposal unless they constitute a criminal offense”.

Article 136 declares that the public administration is bound by the Constitution and the law, and that it is autonomous, bound by the law and accountable to the government. Public administration affairs are the competence of ministries and other public bodies according to the law. The internal organisation of ministries and other public bodies is to be regulated by the government.

The law may allow for the delegation of public powers to the autonomous provinces and local self-governments (article 137) as well as to other public bodies or enterprises. Article 12 states that “the state power is restricted by the right of the citizens to provincial autonomy and local self-government” and only subject to supervision in terms of its constitutionality and legality. A similarly unusual configuration of autonomy of provincial and local governments as a right of the citizens is stated in article 176.

The Constitution ensures legal remedies and judicial review of administrative acts by stating that: “everyone shall have the right to an appeal or other legal remedy against any decision on his rights, obligations, or lawful interests” (article 36-2). “The legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject to reassessing before the court in an administrative dispute, if other form of court protection has not been stipulated by the Law” (article 198-2). The Ombudsman (Protector of Citizens) is given constitutional standing (article 138) to “monitor the work of public administration bodies”. Courts are excluded from the remit of the Ombudsman.

The Public Prosecutor is given the task of taking measures “to protect constitutionality and legality” (article 156), a responsibility that departs from the Council of Europe recommendation to the effect that the public prosecutor should be competent only in criminal cases¹. Moreover, the possibility given to the public prosecutor to re-open a procedure on which a final administrative decision has been taken (see below) jeopardises the principle of legal certainty because that decision may be declared null and void *ex officio*.

In addition, this responsibility is somewhat shared by the Constitutional Court (article 166), which is attributed by article 167 a number of functions that usually belong to administrative courts. The Constitutional Court may undertake actions on its own initiative (article 168), which is counterproductive,

¹ Council of Europe Recommendation no. (2000)19 states that “public prosecutors are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system”. Implicitly this recommendation may mean that the public prosecutor should not be entitled to intervene outside criminal justice cases.

since it means giving to the Court an unwelcome legislative role and therefore unduly pushing it into the political arena.

The new Law on the Public Prosecution (*Official Gazette* of 27 September 2008) continues to entrust the public prosecutor's office with taking measures for the protection of constitutionality and legality, thereby departing further from the recommendations of the Council of Europe. The Law on Administrative Disputes (LAD) of 2009 confers on the public prosecutor the active legitimacy to initiate an administrative dispute before the administrative court, although not explicitly, i.e. the active procedural legitimacy of the prosecutor is to be inferred from provisions in the LAD itself or in the 2008 Law on the Public Prosecution.

The role of the Public Prosecutor in the protection of the principle of legality in administrative action is manifested through several modalities. The existing Law on the General Administrative Procedure (*Official Journal of the Federal Republic of Yugoslavia*, nos. 33/97 and 31/01) states: "The Public Prosecutor and the Public Attorney, if empowered by law, may file an appeal against a decision violating the law to the detriment of the public interest" (article 213-2); "The Public Prosecutor may request reopening of procedure under the same terms and conditions as the party" (article 240-4); "A decision may at any time be declared null and void *ex officio* or at the request of the party or the Public Prosecutor" (article 258-1); "The Public Prosecutor shall be entitled to submit a request for protection of legality against the decision adopted in an administrative matter where an administrative dispute proceeding is not allowed and court protection is not provided outside the administrative dispute proceeding, if such decision is deemed to violate the law" (article 252).

Civil servants also have an obligation to protect legality in the performance of the public administration, as according to article 18 of the Law on Civil Servants (Law No. 79/2005), a civil servant is obliged to execute his/her superior's verbal order unless he/she deems that the order is contrary to the law or rules of the profession, or that its execution might cause damage. In such cases, the civil servant is to communicate this objection to the superior, and in the event that the superior re-issues the same order in writing, the civil servant must then execute the order and notify in writing the "principal" (secretary of ministry or director of the relevant authority). A civil servant must refuse to execute a verbal and/or written order that, if executed, would represent a criminal offence, and he/she must notify the head of the authority (principal) of the case in writing, indicating when the order was issued. However, given the authoritarian administrative culture that still exists in Serbia, it is unlikely that civil servants will have the resolve to object to the fulfilment of illegal instructions.

An adequate hierarchy of domestic legal acts is contained in articles 194 and 195 of the Constitution, which is a key reference for promoting the principle of legality and the legal certainty of administrative decision-making. However, the introduction of international treaties into the domestic legal order is extremely problematic because of the combination of the provisions of articles 16 and 194, as explained below.

There are several issues in the 2006 Constitution that are problematic from the viewpoint of the democratic rule of law. Article 20, in connection with article 202, is inconsistent with mainstream human rights regulations and its wording is vague, which may lead to unfair restrictions, suspensions and abrogation of basic human rights at the impulse of the government and/or parliament. This article was also opportunely criticised by the Venice Commission² and by the International Crisis Group.

Articles 16, 167-2 and 194 pose problems for European integration as they give pre-eminence to the Constitution over international treaties, as these treaties do not automatically become part of domestic law. This point was also made by the Venice Commission and by the International Crisis Group (see documents referred to in the previous footnote) as a matter for concern, not only with regard to European integration but also with regard to the Vienna Convention on International Treaties and the obligations already assumed by Serbia concerning its membership in the Council of Europe.

² Venice Commission's Opinion No. 405/2006 of 17 March 2007 and International Crisis Group's Europe Briefing No. 44 of 8 November 2006.

***In view of the above provisions, it appears that constitutional support for the building of a state that is ruled by law and able to adequately protect individual citizens' rights is problematic in Serbia, and these constitutional provisions need to be better aligned with European principles and practices. A revision of the Constitution would be necessary prior to Serbia's entry into accession negotiations with the European Union. According to the Venice Commission, "in general many aspects of this Constitution meet European standards and adopt the criticisms made in the Venice Commission's 2005 Opinion. However, there are some provisions that still fall well below those standards and others where the hasty drafting is evident in provisions that are unclear or contradictory"*³.**

1.2 Legal Approach to Serbian Citizenship in connection with the Principles of Equality and Legality

Article 1 of the 2006 Constitution declares Serbia as a state of Serbian people ruled by law and social justice, the principles of civic democracy, and commitment to European principles and values, thus amalgamating the notions of a civic democracy based on the individual citizen and an ethnic-based state ("the state of Serbian people and all citizens who live in Serbia") in a rather perplexing way, which counters the mainstream European understanding of liberal democracy based on individual rights rather than on ethnic or collective rights⁴. According to the Venice Commission, "while this definition may be criticised for emphasising the ethnic character of the state, no legal consequences should follow from it in practice"⁵. Nevertheless, some practical consequences for the public administration derive from this ethnocentric definition, as we will see below, even if some Serbian commentators have dismissed this article of the Constitution as inconsequential in practical terms⁶.

This ethnocentric definition had an effect on the 2004 Law on Serbian Citizenship, which was amended in September 2007 to align it with the current Constitution. This law confirmed that the road was open for ethnic Serbs from former Yugoslavia and from abroad to acquire Serbian citizenship simply by signing a written statement that they "consider Serbia to be their country", without having to renounce any other citizenship (articles 23 and 52 of the Law on Citizenship of Serbia)⁷.

Taking the law to the letter, most of the population of neighbouring countries may become Serbian citizens by a mere statement. Estimations by Rava⁸ suggest that almost the entire population of the *Republika Srpska* and more than a third of the Montenegrin population could be considered as citizens of Serbia. One prominent example is Milorad Dodik, Prime Minister of the *Republika Srpska*, who is also a citizen of Serbia.

The 2007 law smoothed the way for Montenegrin citizens living in Serbia to acquire Serbian citizenship, but also for those Montenegrin citizens who declared themselves as ethnic Serbs, which placed Serbia in conflict with Montenegro, since the latter forbids dual citizenship. Furthermore, Kosovo declared independence from Serbia in 2008. Serbia does not recognise the independence of Kosovo but considers its citizens as Serbian citizens, although renewal of citizenship documents has become increasingly difficult for ethnic Albanians, as the Serbian State is generally concerned only with ethnic Serbs living in Kosovo.

³ Venice Commission, op.cit., page 3.

⁴ For a discussion on ethnic rights as opposed to civic or civil democracy, see Smooha, Sammy (2001) "The Model of Ethnic Democracy", European Centre for Minority Issues, ECMI Working Paper no. 13, October 2001. Available at http://www.ecmi.de/uploads/tx_lfpubdb/working_paper_13.pdf.

⁵ Venice Commission, op.cit., page 4.

⁶ See Markovic, Ratko (2006), "Republic of Serbia Constitution of 2006 – A Critical Review" in: The Annals: UDK 342.4 (497.11) "2006", page 10. According to the author, "the entire article 1 is a political declaration which, except for psychological and emotional, has no other and especially no legal significance".

⁷ See Vasiljevic, Jelena (2010), "Serbia: Ethnocentric Citizenship, Undefined Citizenry", paper presented at *UACES: Exchanging Ideas on Europe: Europe at a Crossroads*, Bruges, Belgium, 2010. See also Rava, Nenad (June 2010), "Country Report: Serbia at the EUDO Citizen Observatory", Robert Schuman Centre for Advanced Studies, European University Institute, Florence.

⁸ Rava, Nenad, op.cit.

Serbia's ethnocentric approach to citizenship and related administrative practices towards new applicants for citizenship from the "Region"⁹ – again, an elusive concept that seems to refer mainly to Bosnia and Montenegro, but not only – or towards Kosovo's residents render Serbia's citizenship regime highly unstable and undefined.

In summary, the constitutional and legal notion of Serbian citizenship is "elusive and ambiguous" (Rava, 2010), with practical consequences that are problematic for maintaining smooth relationships among the countries that emerged from former Yugoslavia and for administrative practices concerning the rights of citizens (e.g. on access to the civil service). In the former Yugoslav context, this problem should be addressed as a political issue and not merely a faulty legal issue. The issue also bears consequences concerning access to public services and to the justice system (equality before the law). On the other hand, the possibility of holding multiple citizenships poses difficulties to the bodies responsible for maintaining law and order, especially in the persecution of organised crime across the porous borders of former Yugoslavia¹⁰.

The constitutional and legal definitions of citizenship should be revised and brought into closer alignment with mainstream European approaches, based on demos rather than ethnos, in a constitutional review prior to Serbia's entry into accession negotiations with the EU. This issue bears significant consequences in terms of citizens' rights and duties before the state, in terms of relationships with neighbouring countries, and in terms of combating corruption and organised crime.

1.3 Solutions to the Problem of Equality before the Law

Article 21 of the Constitution states a general protection of equality: "Prohibition of discrimination: All are equal before the Constitution and law. Everyone shall have the right to equal legal protection, without discrimination. All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited. Special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination."

However, the notion of the constitutionally guaranteed equality of every individual before the law and before the public authorities remains open to interpretation, as the ambiguous wording of article 1 on the "state of Serbian people and citizens living in Serbia" could open the door to ethnic or other kinds of discrimination. Ordinary law may supplement these constitutional shortcomings.

In this vein the Law on Prohibition of Discrimination of 26 March 2009 (*Official Gazette RS*, no. 22/2009) proclaims that: "All are equal and enjoy equal treatment and equal legal protection, regardless of individual features. Everyone must observe the principle of equality and the prohibition of discrimination" (article 4). It is nonetheless disputable whether a general law like this one is the adequate policy instrument for combating illicit discrimination and whether or not this law was necessary at all. Instead of adopting a new law and creating a new institution, a better approach perhaps would have been to reinforce the mechanisms that would make the constitutional equality principle more respected and more enforceable by reviewing, if necessary, the relevant sectoral legislation, especially the labour code and the civil code.

⁹ According to Rava (op.cit.), the notion of "Serbs in the Region" is new to the Serbian legal order. It was introduced by the 2009 Law on Diaspora and Serbs in the Region (*Official Gazette of the Republic of Serbia*, no. 88/2009) in order to differentiate between the Serb diaspora residing "far abroad" and the Serbs in the "near abroad", which refers to Serb autochthonous ethnic groups resulting from the disintegration of former Yugoslavia now residing outside Serbia.

¹⁰ The EC's 2010 Progress Report on Serbia identifies serious weaknesses in the surveillance of Serbia's borders with the former Yugoslav Republic of Macedonia, Montenegro, Bosnia and Herzegovina and Croatia and of the Administrative Boundary Line with Kosovo. These weaknesses affect the persecution of organised crime as well as the establishment of adequate migration mechanisms. One of the causes of this situation is also the flawed notion of Serbian citizenship, which allows for the possession of several passports "of the region".

Discrimination is prohibited in all procedures before public authorities: “Everyone has the right to equal access and equal protection of his rights before the courts and organs of public authority. Discriminatory behaviour by officials and the responsible person in the organ of public authority is deemed as a serious breach of work duty, in accordance with the law” (article 15).

The Law of 22 March 2009 created a Commissioner for the Protection of Equality (articles 28 and ff.). The creation of this position may convey the idea that protecting equality before the law and respecting the right to equal treatment of all human beings are the responsibilities of the Commissioner and not of all public – and private – institutions in the country. The Commissioner was appointed by the Serbian Parliament on 5 May 2010. Over the past 10 months, the Commissioner had difficulties in securing adequate premises, but now expects to be able to have its offices refurbished by mid-March 2011. In November 2010, parliament approved the Commissioner’s Rulebook on Internal Organisation and Systematisation with 60 approved positions. However, the annual staffing plan for 2011 allows the Commissioner to recruit only 25 staff. The Commissioner has appointed two assistants so far and has several staff working under contractual arrangements. The Commissioner has started to establish the organisational structure of her office. The office has three sectors: 1) Sector for complaints 2) Sector for international cooperation 3) Sector for general affairs. The office has also adopted its Rules of Procedures. Nevertheless, it is too early to assess the actual performance of the institution.

To date the Commissioner has received around 140 complaints. As expected, a number of complaints do not concern issues of discrimination. In that case, the Commissioner advises the citizen to refer the complaint to a competent body (e.g. Ombudsman). In view of the relatively low number of complaints that the Commissioner has received so far, it is difficult to identify the key areas in which discrimination is the most visible. Nevertheless, it seems that one of the areas greatly affected by discrimination is the area of private employment, as employment-related issues are obviously perceived by citizens as important, especially in a time of economic crisis.

Initially, the Commissioner focused on the Bosniak minority (this was the topic of her first report) and was concerned mainly about the respect for the National Councils of Ethnic Minorities, which enable the exercise of collective ethnic-related rights (cultural, language, press, etc.). Most of the complaints lodged so far with the Commissioner deal with issues concerning labour discrimination related to political party and trade union affiliation and to ethnic-based discriminatory acts and decisions by employers.

The institution of the Commissioner largely overlaps with the competences of the Protector of Citizens (Ombudsman institution) created in 2005, which started its operations in 2008. Some have argued – unconvincingly – that the Commissioner for the Protection of Equality is a hybrid institution, with the authority of an administrative supervising agency because it adopts administrative decisions, while the Protector of Citizens’ authority focuses on protecting the rights of citizens vis-à-vis administrative agencies.

Law 22/2009 indeed creates a confusing set of responsibilities involving several authorities: a) The Commissioner for the Protection of Equality reports to parliament and its responsibilities overlap with those of the Ombudsman (civic defender). The Commissioner has weak executive competences, as this position has competence only to recommend action to the relevant authorities, to attempt a reconciliation, to “name and shame” publicly the authority or individual who committed the discriminatory act, and to lodge a lawsuit in court on behalf of the party supposedly aggrieved by a discriminatory act; b) The Ministry of Human and Minority Rights has a vague responsibility for monitoring the implementation of the law; and c) the courts, which have an unclear role for the time being.

Apparently the Ombudsman and the Commissioner for Equality have tried to reach an understanding aimed at preventing conflicts of competences between them. The Commissioner will only be concerned with violations of equality. If a citizen mistakenly lodges a complaint with the wrong institution (which is very likely to happen, given the proliferation of institutions and agencies with overlapping remits), the complaint is rejected and returned to the complainant.

In addition, article 45 of Law 22/2009 contains a legally risky inversion of the burden of proof that may render an anti-discrimination lawsuit unfair to the defendant, who is obliged to prove that a discriminatory

act has not occurred. The fines contained in articles 50 to 60 of this law will be difficult to apply, as their definition seems to be in itself discriminatory and is deficiently worded, thereby probably rendering penalisation unviable. Moreover, it is unclear who has the competence for imposing fines, although from the context it seems that the competence lies with the same administrative authority that committed the discriminatory offence, not with the Commissioner, which may be tantamount to letting many discriminatory acts go unpunished.

In conclusion, in the decision-making process, all administrative institutions are bound by the Constitution and laws and must observe the principle of legality. The rule of law is proclaimed by the Constitution as the fundamental principle of the state. Legal remedies are also constitutionally foreseen, although they still need to be further developed in practice. The mystified definition of the notion of Serbian citizenship is likely to lead to illicit discrimination and weak respect of legality and to disrespect for the legality of neighbouring countries.

Overall, the Constitution contains sufficient guarantees that public authorities will be bound by the law and will implement their competences as defined by and within the limits set by law. Nevertheless, some constitutional amendments are needed in order to better align the Constitution with European mainstream principles and standards.

The principle of equality before the law is constitutionally proclaimed, and recently it has been reinforced by law, although this principle is not always fully respected in practice. The recent adoption of the Law on the Prohibition of Discrimination has introduced new provisions and institutions for protecting the fundamental human right to equality, but the effectiveness of these new legal provisions remain to be seen in view of the poor quality of that law and other shortcomings explained above.

The attribution to the prosecutor of general powers for the protection of legality, outside the penal procedure, seems to depart from European standards.

In summary, although public bodies are bound by the law in their decisions and activities, practice has shown that the observation of legality and equality before the law in administrative decision-making and action needs to be upgraded. Some constitutional amendments would be required in order to make this possible.

2. Organisation of the Administration

With regard to the distribution of administrative competencies amongst public authorities, a number of overlapping tasks and functions between various ministries and state administration organs need to be clarified and the organisational landscape streamlined. In order to establish proper accountability lines in practice, it would be necessary to examine the actual distribution of competencies between individual public bodies. The Public Administration Reform Strategy, adopted in 2004, envisaged that this would be done by conducting vertical and horizontal functional reviews, which would identify the functions of the various bodies, point out overlaps and duplication, and facilitate the establishment of adequate reporting lines between these bodies. The Ministry of Public Administration and Local Self-Government was expected to take leadership in this field, as envisaged by the PAR Strategy, but it was not able to move this agenda forward.

The new Action Plan for the implementation of the government's PAR Strategy, adopted by the government in July 2009, again envisaged conducting functional reviews in pilot ministries by the end of 2009, to be followed by functional reviews of all ministries and other state organs by the end of 2012, under the leadership of the Ministry of Public Administration and Local Self-Government. It remains to be seen whether the ministry will have sufficient political sway and operational capacity to conduct such a comprehensive, and perhaps useless, exercise, as the current confusing situation emerges from a constitutional and electoral system that makes coalition governments inevitable. In order to keep the

coalition together, the *lottizzazione*¹¹ of the state administration is the method that is used the most often. Although the ministry had intended to conduct functional reviews of several ministries in order to identify duplicating functions within and between various institutions, there has not been sufficient political support to put this idea into practice.

The state organisation is excessively complex. Organisational structures are chiefly based on tasks or functions rather than on jurisdiction (legal competencies or responsibilities¹²), which makes it necessary to provide a detailed list of tasks when defining the responsibilities of a public organisation, and this list is subsequently subject to constant revisions, thereby adding to the instability of public organisations.

The distinction is confusing between the various categories of existing administrative units within ministries (integrated authorities, inspectorates, directorates and special organisations) and public agencies at arm's length from ministries, which contributes to creating a rather opaque administrative environment. The distinction between "administrative agencies", "public agencies" and "special agencies" is unclear. The complexity of their regulation is conducive to weak accountability.

Furthermore, the existence of a large number of agencies that operate under separate regimes, set out in the Law on Public Agencies, further complicates the administrative landscape. As agencies are envisaged to function at arm's length from the government, there are no proper accountability mechanisms concerning their operation. In addition, employees of agencies are not within the scope of the Civil Service Law, and as a result these employees have a much more flexible status and much higher salaries than ordinary civil servants. This situation creates tensions in the civil service and is a source of dissatisfaction among civil servants who exercise equally or more responsible functions than employees in regulatory agencies. It should be noted that often regulatory agencies are presented as being required by European integration and a significant number of them were indeed established and justified as a requirement for EU accession, which is not the case. In fact most of them were purposefully created by the authorities in 2000 to form a parallel administration in order to circumvent the old Milosevic administration, which was mostly left untouched.

Public enterprises are rather outside of the control of supervisory bodies, such as the State Audit Institution and others. The lack of clear and precise legislation with regard to salaries and bonuses of officials in public enterprises and the lack of control by the State Audit Institution lead to unmonitored spending of budget funds and partisan increase of salaries and financial bonuses for the top management, which are usually incommensurate with the results achieved by those public enterprises. Many corruption scandals are linked to the way in which public enterprises are organised, controlled and managed.

The shortcomings of the current organisational policy can hardly be resolved through functional review exercises. These exercises may be useful for gathering information conducive to internal restructuring of administrative units, but they are inappropriate for designing a more holistic state organisational policy. The current shortcomings basically stem from a defective design, which has many causes, including power distribution negotiations among political parties to form coalitions. If these political negotiations occur

¹¹ *Lottizzazione* is an Italian word used internationally in political science to designate the act of apportioning lots of bureaucratic power to political parties as a result of political negotiations and in accordance with power-sharing criteria, not with the efficiency or effectiveness of public bodies. In this vein, public bodies are sometimes created only to satisfy certain members of a coalition government.

¹² The legal competency of an organ or administrative authority is established in legislation and defines the breadth of its powers in dealing with and deciding on a given matter or policy domain and in producing administrative acts. Competence, a notion mainly derived from EU continental administrative law, may be likened to the notion of *ultra vires* and *intra vires* that in British law defines the notion of jurisdiction. The competence or jurisdiction of administrative authorities is founded in constitutions and derived legislation issued by parliaments or established in "delegated legislation". The main obligation of a competent authority is to exercise its jurisdiction. The administrative authority cannot refuse that exercise or abstain from it, even if certain doubts could appear as to whether an authority has or does not have jurisdiction over a given matter. In these cases the authority must act, and if a third party disputes the jurisdiction (be it an individual person or another administrative authority), the legislation foresees mechanisms for conflict resolution ("conflict of attributions") among administrative authorities or judicial review if the challenger is a third party. From a legal and organisational viewpoint, it is better to assign competencies (or jurisdictions) rather than tasks or functions.

within a confusing legal framework on organisational matters, the most probable result is more opaqueness and inefficiency in the functioning of public bodies.

In order to address the core problems of the present situation, it is necessary to have a different organisational policy on the state administration which, among other goals, should shield public organisations from excessive political *lottizzazione* by bringing to the fore a concern for transparency, efficiency, accountability and effectiveness of public policies and law implementation. This new policy should be conducive to reviewing the main laws which make up the current legal framework on the matter, namely the Law on State Administration, Law on Agencies and Law on Ministries, among others.

It may be sensible to undertake a revision of the current organisational policies in the Serbian State, especially now that the country is preparing itself for major reforms that will enable it to be better equipped to respond to the challenges associated with its EU integration ambitions. These challenges will require improved capacity to govern the country and increased administrative effectiveness to apply the *acquis communautaire*.

A powerful additional reason is the need to be more efficient in the allocation of public funds, particularly in these moments of financial and economic crisis when the pressure on Serbia to cut unnecessary public spending is overwhelming. A sound organisational policy is likely to bring about considerable efficiency gains in the functioning of the Serbian state administration.

In summary, the negative fact is that, in any event, there is insufficient clarity concerning the distribution of administrative competencies amongst public authorities. The Law on State Administration (*Official Gazette of RS*, nos. 79/05, 101/07), which is the basic law on the organisation of the administration, could have provided a good basis for defining the roles of the various institutions, but it adopted a rather confusing typology of public organisations. In addition, as a more detailed jurisdiction of individual public administration bodies is prescribed by special laws regulating the different areas, it is not rare that competencies between the various bodies overlap or contradict each other.

2.1 State Government

The government is fully subject to the Constitution and to the legislation adopted by the National Assembly, as stated in article 2.1 of the Law on the Government (*Official Gazette RS*, nos. 55/05 and 71/05), which predated the 2006 Constitution. According to this law, the government oversees the functioning of state administration authorities as well as the constitutionality and legality of “acts of general applicability” of autonomous provinces, local self-governments, and any other institution or body exercising public powers (by delegation from institutions of the Republic). The government is politically accountable to the National Assembly for the state of affairs and execution and implementation of laws in all policy areas under its jurisdiction, as well as for the performance of state administration authorities. A new Law on Ministries was passed in 2008 (*Official Gazette RS*, no. 65/08).

The Law on the Government was implemented by means of a number of organisational and functional regulations: Rules of Procedure of the Government, Organisation of the Cabinets of the Prime Minister and Deputy Prime Minister, General Secretariat of the Government, Office for Accession to the EU, Office for Co-operation with the Media, and other services of the government.

However, the actual implementation and compliance with these rules of procedure seem to be defective¹³, especially with regard to the requirements and procedures to be followed for submission, discussion and approval of government decisions (bills of laws, by-laws, general acts and even singular decisions). Such requirements and procedures are circumvented when ministers want the government to adopt urgent decisions, a situation which seems to happen too frequently and has an obvious impact on the quality of

¹³ See SIGMA's 2011 assessment report on Policy-making and Co-ordination in Serbia. See also OSCE (21 October 2009), “Preliminary Assessment of the Legislative Process in the Republic of Serbia”, Warsaw [Legis Paper-Nr.121/2009], available at www.legislationonline.org.

decisions, both in formal terms and in terms of the proper assessment of the implications and impacts of these decisions.

2.2 State Administration

With regard to the state administration, the Law on State Administration (Official Gazette, nos. 79/05 and 101/07) sets forth the following “working principles” (articles 7-11):

- autonomy and legality: although autonomous in the execution of their tasks, state administration authorities are to act “within and in accordance with the Constitution, statutory legislation (laws), other regulations and acts of general applicability and under the supervision of the government;
- expertise, impartiality and political neutrality, by providing for everyone’s equal legal protection in exercising rights, obligations and legal interests;
- efficiency in dealing with parties’ rights;
- balance (proportionality) and respect for rights, personality and dignity of parties;
- transparency (principles of publicity and free access to information).

The public administration in Serbia is primarily regulated by the Law on State Administration. According to this law, the main organisational forms of public administration bodies are ministries, administrative organs within ministries, and special organisations. The Law on Ministries defines the number of ministries and special organisations as well as their scope of competence. The state administration is considered as a direct administration exercising state powers and comprised of ministries, administrative authorities within ministries, and special organisations and administrative districts (article 1).

However, according to article 28, within a ministry there may be several administrative authorities with differentiated legal personality and autonomy (called “integrated authorities”), which causes confusion when considering that the notion of a public agency is regulated by a separate law. Integrated authorities are of three types, namely “authorities”, “inspectorates” and “directorates”, with a bewildering attribution of responsibilities, which are set out in article 29. In addition to these authorities, there are “special organisations” (article 33), whose differentiated existence is justified by the need for “greater autonomy” than that required by an “integrated authority”. A “special organisation” (article 34) may be a secretariat or bureau and may also have a differentiated legal personality.

The de-concentrated administration of the state is entrusted to the administrative districts in the territory (article 38 ff.), established by a decision of the government. The 29 districts are managed by a head and co-ordinated within the state administration and with local governments and provinces by an administrative district council (article 42), which includes the head of the district and the presidents of municipalities and mayors of the cities located within the district’s territory.

According to the Law on State Administration, the competences or “domain” (area of responsibility, mandate) of state administration authorities are to be regulated by statute (article 2). The competences of the state administration are summarised as policy analysis and law-drafting, monitoring (inspection), and implementation of legislation, including adjudication of administrative decisions and issuing of administrative acts (article 17).

The law devotes a chapter (articles 45-50) to internal oversight and administrative inspection (see below) and to the monitoring of tasks delegated by the state, referred to as “conferred state administration tasks” (articles 51-57). The resolution of conflicts of attribution among administrative authorities is regulated in articles 58-60 and is attributed to the government. These articles also regulate the system of administrative appeals within the state administration.

Article 64 establishes the principle of compulsory administrative co-operation and information-sharing among administrative authorities.

The Law on State Administration was followed by the adoption of a number of by-laws: on Principles of Internal Organisation and Staffing of Ministries, Special organisations and Services of the Government; on Administrative Districts; etc.

2.3 Public Agencies

Rules on the establishment and common legal regime of agencies are provided in a separate law (Law on Agencies, Official Gazette RS, nos. 18/05 and 81/05). Agencies are defined as organisations established to carry out developmental, specialised and/or regulatory tasks of public interest that do not require a constant direct political supervision, provided that such tasks can be more efficiently performed by this type of organisation than by a state administration authority and in particular when the tasks can be entirely or mainly financed from the fees or charges paid by the users of the services rendered. The establishment of an agency with competences over the whole territory of Serbia must be authorised by an act of the government (article 8) and published in the Official Gazette. Sub-national governments (provinces and local self-governments) may also establish public agencies for the implementation of their own competences.

In the Serbian system of public administration, a distinction should be made between “administrative agencies”, “public agencies” and “special agencies”. The establishment of “administrative agencies” has its legal basis in the Law on State Administration (e.g. Agency for the Protection of the Environment within the Ministry for the Environment and Area Planning). The establishment of “public agencies” has legal grounds in the Law on Public Agencies (e.g. Privatisation Agency). The establishment of “special agencies” has a legal basis in special laws (*lex specialis*), e.g. Law on BIA – Security Information Agency (Official Gazette RS, no. 42/02).

Agencies may be given the power to issue normative acts to implement primary legislation in the relevant area. They have their own separate legal entity. The rules related to the state administration apply to a public agency with regard to the legality of its operations, professionalism, political neutrality, impartiality and other aspects (use of official language and script, etc.). As public entities, public agencies are entrusted with certain public administration authority, but they are not state administration organs. Public agencies are autonomous in their work and the government cannot directly instruct them.

The Law on Agencies foresees the removal of the manager as the main mechanism for ensuring the accountability of an agency to the founding state or local administration authorities. The oversight of an agency is carried out through the appointment and dismissal of members of the management board and the director and through the approval of annual action and financial plans. Public agencies should be responsive to customers and users of their services, and transparency in the work of public agencies should be one of the main elements of their public accountability. In practice, however, the situation is quite different. A number of pre-existing organisations are now governed by this law (Privatisation, Development of SMEs, Tobacco, Spatial Planning, Commercial Registries, Medications and Medical Equipment, etc.).

Agencies, as specific, ad hoc organisational forms of administrative technical services, proliferated in Serbia after 2000, allegedly as a response to the need for harmonising national legislation with that of the EU. The term “agency” was used to distinguish them from other administrative services, as they differed in terms of the tasks they were to perform, i.e. technical tasks without political supervision (i.e. “at arm’s-length from the government”). Initially, the largest number of agencies was established in the form of administrative services, and subsequently some of these services were set up as either a) “agencies”, i.e. special organisations performing technical tasks related to the promotion of development in certain fields; or b) “public agencies” which, on the basis of special legislation, apart from performing technical tasks in certain fields, were entrusted with performing particular administrative tasks. Public agencies were also supplied with concrete authority to enact regulations as well as individual decisions.

A number of agencies have not achieved the aims for which they were established (as was the case of the Agency for the Development of Local Self-Government Infrastructure and the Agency for Energy Efficiency). The poor results of some agencies may be due to the “artificial” detachment of a narrow segment of

administrative tasks from the ministries to special organisational forms, the unsatisfactory communication of the agencies with their parent ministry, and the general lack of supervision. The poor results of the agencies may also be the result of the failure of ministries in policy formulation, drafting legislation and setting up managerial capabilities within the state administration. In general the government should be alarmed by the weak accountability of many public bodies and by the conspicuous lack of managerial capabilities in state administration organisations. The current administrative control, based on administrative inspectorates, seems to be rather formalistic and unconcerned with results. Inspectors are only concerned with legality and regularity, which is positive, but they could also be legally empowered to assess the efficiency and effectiveness of public organisations.

2.4 Public Enterprises

Public enterprises are regulated by the Law on Public Enterprises and Performing Activities of General Interest (Official Gazette RS, nos. 25/00, 25/02, 107/05, 108/05). The activities of public enterprises are autonomously regulated by their internal decisions – statutes and other documents (article 17).

The appointment of directors and members of the management board of the most significant public enterprises often reaches the spotlight of public controversy. The director (article 12) and members of the management board of public enterprises (article 14) are appointed by the founder (e.g. the republic, city, or municipality). Tensions usually rise between political parties as they struggle to ensure that their “people” are appointed, since public enterprise top management is not appointed in public competition procedures, but according to political party interests.

2.5 Local Self-Governments

The role of local self-governments in providing public services is regulated by the Constitution of Serbia as well as in the following laws: Law on Local Self-Government (Official Gazette RS, no. 129/07), Law on Territorial Organisation of the Republic of Serbia (Official Gazette RS, no. 129/07), Law on the Capital City of Belgrade (Official Gazette RS, no. 129/07), Law on Local Elections (Official Gazette RS no. 129/07) and Law on Local Self-government Finance (2006). According to the Law on Territorial Organisation, there are 150 municipalities and 23 towns in Serbia.

The Constitution specifies provincial autonomy and local self-government (article 176). There are three types of local self-government – municipalities, towns and the City of Belgrade (article 188). The Constitution lists the competences of municipalities (which at the same time are the competences of towns and the City of Belgrade). “The municipality shall, through its bodies, and in accordance with the law: regulate and provide for the performing and development of municipal activities; regulate and provide for the use of urban construction sites and business premises; be responsible for construction, reconstruction, maintenance and use of local network of roads and streets and other public facilities of municipal interest; regulate and provide for the local transport; be responsible for meeting the needs of citizens in the field of education, culture, health care and social welfare, child welfare, sport and physical culture; be responsible for development and improvement of tourism, craftsmanship, catering and commerce; be responsible for environmental protection, protection against natural and other disasters; protection of cultural heritage of the municipal interest; protection, improvement and use of agricultural land; perform other duties specified by the law” (article 190).

The Law on Local Self-Government enumerates 39 original competences of municipalities (art. 20), thereby regulating the number of original constitutional municipal competences in greater detail. As in the Constitution (art. 178), this law also provides that the Republic may entrust particular administrative tasks to all or some of the municipalities if it is in the interest of more efficient and more rational realisation of the rights and duties of citizens and the fulfilment of the needs of their everyday life and work. Means for the realisation of the delegated tasks are provided in the budget (article 21).

As mentioned above, the Constitution of Serbia does not make any substantial difference between municipalities and towns with regard to competences and the provision of services. However, there is a

specific feature introduced by the Law on Local Self-Governments that relates to the possibility of establishing a local (city) police force (article 24-2).

According to the Law on the Capital City (article 8), the City of Belgrade performs the competences of both the municipality and the town, as established by the Constitution and the law. Belgrade has wider competences related to particular areas, such as water management, construction and reconstruction of streets and roads, city police and fire prevention. The City of Belgrade is also authorised by this law to establish television and radio stations.

There has been no substantial change in local government responsibilities since 2004. Municipalities retain a wide range of communal and utility services, but a law establishing municipal rights to ownership of property is still missing, which causes difficulties in the management of communal and utility services. Some new pieces of legislation are under preparation, but are still not enacted, including a new law on local self-government (expected to regulate municipal ownership rights) and a new law on territorial organisation. The devolution of tax collection and tax administrative functions to local governments has produced mixed results because of poor political and technical management of the process.

A Law on Local Public Finance was enacted in 2006 and came into effect along with the 2007 budgets. The law introduced an equalisation rule and determined the size of the General Grant pool that the national government allocates for general revenue of local governments. The law also gave a 40 % share of Personal Income Taxes collected in their jurisdictions to local governments and made property tax a local government own revenue. Unfortunately, the improvements in local finance in terms of adequacy, predictability and equity were short-lived¹⁴, as in the wake of the economic crisis the national government decided to suspend the law in 2009 and 2010, while maintaining some transfers of responsibilities and financial burdens to local self-governments (e.g. rising wages for pre-school teachers, creation of communal police forces, gender equality commissions, and youth offices)

Serbia is among the few countries in Europe in which local self-government units do not possess property. The Constitution (*Official Gazette RS*, no. 98/06) stipulates that the Republic of Serbia regulates and protects property relations and all forms of property (article 97). The Constitution introduced a new type of property – public property, which it defines as “state property, property of the autonomous province and property of local self-government units” (article 86). The Constitution also distinguishes “state property” from other types of property and provides that the property of the autonomous province and the property units of local self-government, as well as the mode of their use and disposal, are to be regulated by law (article 87).

The current legislation, namely the Law on the Means in the Possession of the Republic of Serbia (*Official Gazette RS*, nos. 53/95 and 3/96), prescribes that all possessions used by the republic, autonomous province, city, municipality, public enterprise, public institutions, and other legal entities whose founder is the republic, autonomous province or unit of local self-government are owned by the state. The provisions of this law are not in compliance with the current Constitution and must therefore be corrected and harmonised.

According to this law, municipalities and cities must have the consent of the Republic’s Directorate for Property for every action regarding property. This requirement lowers the efficiency of the utilisation of state property and limits the options for local self-government units to invest in modernisation, infrastructure and local development. Substantive local autonomy, to which Serbia is committed by having ratified the European Charter on Local Authorities in 2007, calls for the adoption of new legislation in this area. In 2008 in Belgrade and other cities, a public debate was held on the draft Law on Public Property, Property, and Other Property Rights of the Republic of Serbia, Autonomous Province and Units of Local Self-Government (prepared by the Ministry of Finance). The draft law had been in urgent parliamentary procedure in December 2008, but was subsequently withdrawn.

¹⁴ See Levitas, Tony (October 2010), “The Effects of the Suspension of Serbia’s Law on Local Government Finance on the Revenue and Expenditure Behavior of Local Governments: 2007-2009”, Urban Institute Center on International Development and Governance, Washington DC [IDG Working Paper no. 2010-05], available at www.urban.org/publications.

The organisation of the administration seems to be excessively complex and confusing, which is detrimental to administrative transparency. In this regard, the passage of the Law on State Administration and the Law on State Agencies was a missed opportunity for increasing transparency in the organisational set-up of the state administration. There is no sufficient clarity concerning the distribution of administrative competencies amongst public authorities. The Law on State Administration could have provided a better basis for defining the roles of various institutions, but it adopted a rather confusing typology of public organisations. In addition, as detailed tasks of individual public administration bodies are prescribed by special laws regulating the various areas, it is not rare that competencies between different bodies overlap or contradict each other.

A new and sounder state organisational policy would be useful in clarifying the responsibilities of the various administrative bodies and organisations, increasing transparency and strengthening accountability. Bringing to the fore a concern for transparency, efficiency, accountability and effectiveness of public policies and law implementation is a pressing need.

The distinction is confusing between the various categories of existing public agencies, and this situation contributes to creating a rather opaque administrative environment. Furthermore, public agencies in general are producing poor results because of poor managerial capabilities. In addition, in practice they are unaccountable to the government, as the accountability mechanisms established in the legislation are rarely applied in practice. The administrative control based on administrative inspectorates seems to be rather formalistic and unconcerned with results. Inspectors are only concerned with legality and regularity, which is positive, but they could also be legally empowered to assess the efficiency and effectiveness of public organisations.

Public enterprises are frequently used to finance political parties and sustain patronage networks, as they are outside the scope of the civil service legislation and are not controlled by the State Audit Institution. The lack of clear and precise legislation with regard to salaries and bonuses of officials in public enterprises and other public agencies leads to unmonitored spending of budget funds and to the partisan increase of salaries and financial bonuses for the top management, which usually are incommensurate with the results achieved.

More clarity is needed concerning the transfer of competences and funds to local self-governments and the resolution of the problem of local property rights.

3. Accountability, Transparency and Predictability in the State Administration

Accountability institutions of a constitutional character, such as the ombudsman, external audit institution, and general state prosecutor, still do not have sufficient powers to guarantee acceptable accountability standards and mechanisms. The Commissioner for the Access to Information of Public Importance and Personal Data Protection is becoming a key institution in promoting transparency and accountability, as it has now (since the May 2010 amendments to the Law) the power to impose fines in certain cases and can launch proceedings before misdemeanour courts and lodge criminal lawsuits for illegal collection of personal data. The Ombudsman has no sanctioning powers, but it can (as well as the Anti-Corruption Agency) propose the sanctioning of a public manager, including dismissal. The State Audit Institution became operational only in 2009, four years after its establishment by the Law on the State Audit Institution, and it produced its first report at the end of 2009. The effectiveness of the Anti-Corruption Agency, which has been operational since 1 January 2010, remains to be seen, but it is expected to take the lead in anti-corruption actions and initiatives.

The quality of legislation also needs to be improved in order to enhance the rule of law and the accountability framework. The removal of outdated regulations through a comprehensive regulatory revision has been initiated, but this task has not yet been completed. There is therefore a need to improve

the management of the policy cycle¹⁵, strengthen the capacity of the Council for Regulatory Reform, and improve the co-ordination between bodies working on legislative projects.

3.1 Accountability, State Liability and Compensation for Damages

The existing legislation foresees the accountability of the bodies of the state administration – accountability of the relevant minister to the government and of the government to parliament. To this end, ministries and special organisations all have to submit annual performance reports, giving an account of the implementation of their respective annual business plans, which are adopted in December for the following fiscal year. Overall, these reports are rather formalistic exercises, however.

It is almost impossible to demand accountability in the absence of the capacity to take decisions or in an environment where the delegation of authority as a managerial tool is not used. The existing legal framework and the Law on Civil Servants regulate the accountability and direct liability of staff in the public administration. However, the implementation of the managerial accountability principle is limited, as hardly any responsibility is delegated to the staff, i.e. the minister signs nearly everything and often takes responsibility for even routine decisions. Since the staff are usually not empowered to take responsibility, it may take some time before they will think in accountability terms when preparing or taking decisions. Nevertheless, an amendment to the Law on Civil Servants (*Official Gazette RS*, no. 116/08) authorised the dismissal of a civil servant on the recommendation of the Protector of Citizens (Ombudsman).

Article 35 of the 2006 Constitution establishes the right of citizens to obtain compensation for material or immaterial damages inflicted by the unlawful or irregular work of a state body, entities exercising public powers, or bodies of the autonomous provinces or local self-governments. Article 5 of the Law on State Administration states the liability of the state for damages caused to natural or legal persons by unlawful or improper operations of state administration authorities. The proceedings for recovery of damages caused to citizens or private legal persons by illegal acts or unlawful actions of public officials are decided, on the petition of the aggrieved party, by the regular district courts that have competence in the location where the damage occurred. This damage is compensated for by the state or local government in which the official who is deemed responsible for the damage is employed. The municipal or district courts of general jurisdiction also decide on lawsuits arising from contracts concluded between government administrative agencies and private physical or legal persons.

The aggrieved party has the right to claim compensation directly from a civil servant when the damages were caused by him/her intentionally or as the result of gross negligence. In such cases, after the state or local government administration has compensated the third party for the damages caused, the administration may then – within six months of the date of payment – reclaim compensation from the civil servant. Therefore, the state or local government is entitled to recover any compensation paid for damages from the person whose unlawful or negligent action caused the damages. Objective liability without tort is unknown in the Serbian state liability regulations, however. Public officials discharging administrative duties are criminally liable before regular municipal or district courts, and they can be prosecuted without any previous hierarchical permission.

Finally, according to article 46-3 of the Law on State Administration, a ministry cannot monitor the activities of another ministry, which in practice poses problems to those ministries with responsibilities on horizontal public management issues, such as the Ministry of Finance or the Ministry of Public Administration. Nevertheless, these ministries have control systems and inspectorates, which in fact monitor the activity of other ministries, despite the above-mentioned legal provision. This is an example, among many others, of defective law-drafting leading to inconsistencies in the legal framework.

Managerial accountability is almost non-existent, as decisions are political decisions taken by ministers and politicians. There is no delegation of decision-making powers as a regular management tool.

¹⁵ See SIGMA's 2011 assessment report on Policy-making and Co-ordination in Serbia.

There seems to be a gap between the existing system of liability for damages caused by public administrations in Serbia and common standards set in EU Member States, as laid down in national legislation or as defined by the case law of the European Court of Justice, which also include state liability for damages caused in the case of the lawful and regular operation of public services (objective or strict liability without tort).

3.2 Administrative Inspectorate

The Law on State Administration contains a chapter on internal oversight. In this chapter, a distinction is made between “supervision of work”, “inspectoral control” and “other forms of supervision regulated by a separate statute”. Supervision of work – the sole form of internal control regulated in this law – has two main modalities: legality (compliance with and adequate implementation of laws and regulations pertaining to the service) and “purpose”. The second modality aims to assess the “efficiency, cost-effectiveness and purposefulness” of the organisation of business and decision-making. Ministries are mainly responsible for both types of supervision with regard to integrated authorities and, if established by law, to special organisations as well.

Specifically, the internal supervision of the work of the administration is addressed in article 45 of the Law on State Administration. “Inspectoral control” is to be regulated by a separate law, which has not yet been enacted, although the Ministry of Public Administration and Local Self-Government is working on its preparation. An Administrative Inspectorate has been in operation since 1995, first within the Ministry of Justice and since 2003 within the Ministry of Public Administration and Local Self-Government. Inspectors are not concerned with exercising internal financial control or with ensuring the quality of public services, but only with the regularity and legality of administrative operations. Inspectors act according to an annual inspection plan, but they may also act upon the request of a citizen or civil servant.

The competence of the Administrative Inspectorate embraces all public administrations (state and local administrations as well as judicial offices). These inspectors examine compliance with existing laws and regulations and the proper application of the Law on Civil Servants and the general Labour Law, the use of the official language and script, the use of the state stamp/seal, the electoral census, etc. Each inspection activity must result in minutes, which could contain, *inter alia*, a list of measures that the inspected state or local authority must take to rectify the irregularities that have been found. The Inspectorate is also competent to inspect court offices. The Administrative Inspectorate reports to a deputy minister of the Ministry of Public Administration and Local Self-Government.

Heads of offices are personally liable to comply with the Inspectorate’s requirements. Non-compliance is administratively described as an abuse of power and may be considered as a criminal offense (articles 359 and 361 of the Penal Code). Inspectorate minutes constitute presumptive evidence in court cases.

Ministries and other central administration bodies do not have specific internal inspection services or units. Only the city of Belgrade has its own administrative inspectorate, which performs its functions with total separation and independence from the state inspectorate. There is usually co-operation between the Administrative Inspectorate and other state bodies, such as the state Ombudsman or existing municipal or provincial ombudsman institutions.

The Administrative Inspection, as a supervisory instrument, is not aligned with European standards. The Law on State Administration (2005) prescribes that the operation of administrative inspection is to be regulated by a separate law. Currently, the provisions of the former Law on State Administration adopted in 1992 (from articles 22-37 and article 92 regulating administrative inspections) are still applied.

In order to modernise regulations on the supervision of administrative behaviour, the Ministry of Public Administration and Local Self-Government is working on the preparation of a new draft Law on Administrative Supervision and a draft Law on Inspection Supervision. Both of these drafts are expected to be adopted by the government in the near future. However, the scope of these draft laws is likely to create further confusion. The new draft Law on Administrative Supervision regulates the supervision of the

implementation of civil service legislation and also of the Law on Free Access to Information. The Law on Inspection Supervision regulates the operation of various kinds of inspections (financial, labour, etc.).

Administrative supervision is currently performed by a sector of the Ministry of Public Administration and Local Self Government. The sector has 18 employees, including 15 inspectors, which is not sufficient to carry out all of its competencies effectively. The ministry hopes to increase the number of personnel to 35-38 and to transform the current sector of the ministry into a separate directorate for administrative inspection.

3.3 Administrative Procedures

The Law on General Administrative Procedures is based on the former Yugoslav law of 1986, which in turn was based on the Austrian law of 1925. Some changes were made when the Federal Republic of Yugoslavia passed a new law in 1997. This law was last changed in 2001, when the regulations on penalties were amended. A completely new draft was produced in 2004 and submitted for public consultation, but it was never tabled in parliament. Comments from various sources, including SIGMA, were aimed at improving the draft and ensuring its alignment with European standards.

The Law on General Administrative Procedures was amended in May 2010¹⁶ in order to align it with the 2006 Constitution and with the new court organisation introduced in January 2010. However, no substantive changes in the general administrative procedures were made by the amendments. These amendments do not deal with substantive issues related to administrative procedures but focus on terminology (e.g. article 20 of the amendments states that the term “federal or republic government” is to be substituted by the term “government”). However, one significant amendment (article 22) deals with the changed procedure for decision-making concerning a “request for the protection of legality”.

One of the key problems regarding the current legal framework for administrative decision-making is the existence of numerous special administrative procedures regulated by special laws. This situation further complicates and adversely affects the transparency of the decision-making process and poses problems for both citizens and the business community in their day-to-day activities. Numerous problems in this respect have occurred with regard to tax procedures. The Chamber of Commerce has recently established good co-operation with the Tax Administration regarding the introduction of the electronic filing of tax returns, which is expected to accelerate the process, increase transparency and reduce the costs of the business community in tax-related procedures.

Effectively, numerous special substantive laws prescribe “special administrative procedures”, which make administrative decision-making confusing and hamper the application of the principle of legal certainty. It is true that since the year 2000, when the transition process in Serbia started, efforts have been made to modernise legislation and adjust it to the concept of a modern, free-market economy. The National Alliance for Local Economic Development (NALED) has identified over 200 excessive administrative procedures, which are indicated in NALED’s Grey Book I and II. These procedures represent a redundant burden imposed on businesses and also a barrier to business entry in the market. They also create additional costs, and their simplification would contribute to the creation of a more business-friendly environment¹⁷, which could serve as a means of promoting private investment and economic development.

According to the Law on General Administrative Procedures, “the legal provisions, which due to the specific character of administrative matters in certain administrative domains provide for the necessary exceptions to the rules of the general administrative procedure, shall comply with the basic principles specified herein” (article 3). These guarantees are provided through basic procedural principles, *inter alia*: the principle of

¹⁶ Amendments to the Law on General Administrative Procedures, *Official Gazette of the Republic of Serbia*, no. 30/10.

¹⁷ See Zelovic, Milan (July 2010), “Cost of Doing Business due to Excess of Administrative Procedures”, NALED and USAID, Belgrade, available at <http://www.naled-serbia.org/documents/lavirint/Cost%20of%20Excessive%20Administrative%20Procedures%20-%20FAE%20analysis.pdf>.

legality in administrative decision-making; the principle of the protection of civil rights and the protection of public interest; the principle of efficiency; the principle of truth; the principle of conducting hearings; the principle of admission of evidence; the principle of autonomous decision-making; the principle of higher instance (the right of appeal); the principle of finality of decisions; the principle of cost-effectiveness and the principle of assistance to the parties (articles 5-15).

The existing law regulates the basic principles of administrative procedures, but it is rather complicated and creates lengthy procedures with uncertain outcomes. In addition, as indicated above, numerous special administrative procedures are regulated by special laws, which further complicate administrative decision-making processes and, more generally, adversely affect the transparency of public decisions and legal certainty in administrative decision-making. Moreover, several issues that are important for a modern administration are not regulated in the law, such as issues linked to electronic tools or certain legal constructs.

The law regulates, in special provisions, the “inspection of documents and information on progress of the procedure”, whereby “the parties with a legal interest have the right to inspect the case files and to write down or photocopy the necessary documents at their own expense. (...)The authority may request the requesting persons to provide a written or oral explanation of the existence of their legal interest. An appeal may be filed.” (article 70)

The law sets out an obligation of public authorities to inform the interested party of his/her right to appeal: “Written decisions shall contain the preamble, wording (text), rationale, notice of legal remedy, name of the authority, number and date of the decision, signature of the officer and stamp of the authority. In the cases provided for under the law or other regulation, decisions need not contain all of those elements” (article 196). Moreover, the right to be informed of the right to appeal is ensured by the principle of assistance to the parties (article 15).

The Serbian administrative procedure applies the principle of double instance within the administration. Citizens have the right to request the review of an administrative act by a supervisory agency, and this review is also an essential precondition for filing an administrative lawsuit in court. Individual decisions or rulings of state administration authorities addressed to specific parties can be appealed and overruled through a timely internal recourse. If the decision was taken by a minister, the adjudication of the internal appeal belongs to the government. A consequence of this double administrative instance before going to court is that the subject matter of an administrative dispute is most frequently an administrative act decided in the second instance.

Nevertheless, an administrative act decided in the first instance may become final and as such constitute the subject matter of an administrative dispute if the petition to the second-instance administrative authority in specific matters is expressly precluded by law or if the rules of organisation of the agency whose administrative act is in question do not provide for administrative review.

The Serbian Government, through the Ministry of Public Administration and Local Self-Government, is currently preparing a new draft Law on Administrative Procedures, which is expected to be finalised by mid-2011. The objectives of the new law are to simplify the current cumbersome and detailed rules of procedure, reduce the number of special procedures, align administrative decision-making more clearly with European democratic principles, and introduce modern, electronic means of communication.

The 1997 Law on Administrative Procedures is obsolete and does not meet democratic standards for administrative decision-making. The administrative decision-making system needs to be reformed so that it is more reliable and efficient and capable of providing legal certainty for businesses and citizens at large. It should also facilitate the delegation of decision-making as a managerial tool.

The upcoming law needs to provide higher legal standards – by better balancing the protection of individual versus public interests – and to attain a closer alignment with European principles of administrative decision-making, especially in terms of more solid legal certainty. The new law should also

***set out the basis for the introduction of electronic administrative procedures and for the transposition of certain principles, as required by the 2006 EC Directive on Services*¹⁸.**

3.4 Judicial Review of Administrative Acts

The legality of individual acts of public and delegated authorities that impinge upon rights, duties or “legally grounded interests” is always subject to judicial review (article 198 of the Constitution). Within the Serbian legal context¹⁹, the term “administrative act” does not refer to all acts of public authorities, but only to individual acts: “Consequently, normative acts (rules), material acts, and contracts cannot constitute the subject matter of administrative lawsuits because they are not administrative acts by definition, even though they are acts of public administration. An unlawful material act of government administration or a contract may be challenged in a regular civil or commercial lawsuit. A normative act (rule) of the administration or some other government agency cannot be directly challenged in an administrative judicial action”²⁰.

A Law on Administrative Disputes – LAD (judicial review of administrative decisions) was passed in December 2009, but it should be considered as a missed opportunity for creating a European-like administrative justice system. The law was hastily prepared, without the necessary consultation and in-depth comparison with the basic rule-of-law tenets that a democratic state should respect and guarantee. The new LAD is one example of how time pressures directly obstruct good results in the legislative process. This piece of legislation, the development of which required several years in some of the “old” EU Member States, had to be drafted within a few months. The end product turns out to be unsatisfactory. It is true that the new law achieves a remarkable level of administrative justice, but it still requires a thorough review to bring the administrative court system completely into line with EU standards. One of the problems facing the implementation of the new LAD is the unnecessary length of certain procedures in the preliminary phase of the trial. According to the Ministry of Public Administration and Local Self-Government, in 2011 and 2012 the application of the law will be closely monitored and by the end of that period the ministry will decide whether any amendments are necessary.

The new Law on the Organisation of Courts (*Official Gazette RS*, no. 116/08) provides that one type of court of special jurisdiction is the Administrative Court: “The Administrative Court adjudicates in administrative disputes. The Administrative Court also performs other tasks set forth by law. The Administrative Court is established for the territory of Serbia with seat in Belgrade, but can have departments outside the seat” (articles 29, 13). This law also states that the Supreme Court of Cassation is the court of the highest instance (article 12) and is the immediately higher instance to the Administrative Court. Misdemeanour courts also review, in misdemeanour proceedings, decisions passed by administrative authorities (article 27).

The Administrative Court was established and started operations on 1 January 2010. It took over the cases from the Constitutional Court dealing with the legality of administrative decisions. The Administrative Court is staffed by 33 main judges plus a president, and it also has an assistant judge for each of the main judges. Assistant judges prepare the decisions of the court. This arrangement is an important improvement compared to the previous situation, where the administrative section of the Supreme Court had only 15 judges and a lesser number of assistants. Overall, the number of judges envisaged by the Court’s Rulebook on Internal Organisation and Systematisation is 36 judges, including the Court President. The Court’s equipment (computers and legal database) has also improved.

The Administrative Court took over a large number of cases from the administrative section of the former Supreme Court and from the administrative sections of former county courts, which amounted to 18,000

¹⁸ Directive 2006/123/EC.

¹⁹ See Vučetić, Dejan (2005), “Serbian Judicial Review of Administrative Acts and European Standards for Administrative Disputes” in: *Facta Universitatis*, Series Law and Politics, Vol. 3, No. 1, pp. 73-90.

²⁰ *Ibid.*, page 75.

cases. In the course of 2010 the inflow of new cases was also very high, amounting to 16,048. The Court managed to adjudicate on 13,843 cases in 2010, which was quite an achievement. Judges agreed to first resolve cases dating from 2007 and 2008, and they accomplished this objective by the end of 2010. There is a plan to resolve in the first half of 2011 all cases that were initiated in 2009. In this way, the current backlog of cases will be significantly reduced. However, the reduction of the backlog will require very strong efforts by all of the judges and their assistants.

In its first year of existence the level of compliance of administrative authorities with Administrative Court rulings was deemed to be satisfactory by the administrative judges themselves. The Court can impose fines on those managers of administrative bodies who do not comply with the rulings of the Court. However, even if administrative judges are independent according to the Constitution and the law, politicians tend too often to lambast publicly the rulings of the Court when they are not favourable to their interests, a practice that should be precluded for the sake of preserving the independence of the judiciary.

The access to justice may be difficult for those who do not possess sufficient financial resources, as even if the Court may waive the payment by an applicant of the Court's fee, it cannot exempt the applicant from paying his lawyer, and the state does not provide any subsidy in such cases.

In broad terms, among the main shortcomings of the LAD are its too narrow scope and the lack of clarity as to whether or not the law awards full jurisdiction to the Administrative Court.

The scope of the LAD is addressed in its article 3 when referring to "final administrative acts" (paragraphs 1 and 3), "other individual acts" (paragraph 3) and "other acts against which administrative disputes can be initiated" (paragraph 3d). Furthermore, some other provisions, such as article 4 (definition of the administrative act), article 5 (definition of an administrative matter), and articles 11 to 16. According to these regulations, the scope of the LAD seems to include only "administrative and individual acts" and unilateral administrative decisions.

However, in order to ensure legal protection against all administrative actions, judicial review needs to encompass not only administrative acts but also administrative contracts and any other administrative action executed under administrative law that is related to citizen's rights, duties and legal interests, such as delivery of information, warning, reporting, publication of expert opinions, or matters dealing with complaints or petitions of citizens. Moreover, administrative inaction (administrative silence) should be referred to in the legal text as a form of administrative decision, which it should be possible to review before the court. Finally, legal protection against general regulatory acts through judicial review is not provided by the LAD, and it should be.

Furthermore, in Section 3 of the LAD, "Rulings in a Dispute of Limited Jurisdiction", article 42 states: "If the complaint is granted, the court shall annul the contested administrative act in full or partially and shall return the case to the competent authority for repeated decision, except when in such a situation no new act is needed. This paragraph means that in proceedings for annulment the judge cannot decide on his/her own the action to be taken to satisfy the litigant. The judge cannot order the administration to take certain measures to give full effect to his/her decision but must ask the administration to adopt a new decision. The administration is therefore obliged to take a new decision, which takes more time, and this new decision may not be consistent with the judgment. The administration's delay or failure to apply the judgment would impose on the complainant the obligation to file a new complaint in court.

Section 4 of the LAD, "Rulings in a Dispute of Full Jurisdiction", establishes that "a dispute of full jurisdiction shall be excluded when the subject of the administrative dispute is an administrative act adopted under a discretionary assessment." (article 43). This limitation of the jurisdiction of the court is worrying. Indeed, discretionary issues are *per se* those issues where the latitude of action opens the door to arbitrariness.

These LAD provisions seem to be in opposition with the right to a fair trial. Indeed, article 6 of the European Convention on Human Rights provides the detailed right to a fair trial, including within "reasonable time". According to this article, the court must decide all questions of fact and law raised by the complaint, and the ruling of the court must also be fully implemented.

In Chapter VII of the LAD, Section 1 on “Establishing facts”, in particular its article 35, prevents the Administrative Court from holding full jurisdiction on facts. According to paragraph 3 of this article, the Administrative Court has to return the matter to the administrative body for a review of the factual situation if doubts arise on the correctness of facts established in the administrative procedure. However, article 6 of the European Convention on Human Rights (ECHR) requires that in principle evidence has to be produced before the court by the parties and can be challenged by them. In order to meet this requirement, administrative courts shall not only be entitled to establish the facts of a case themselves but shall be obliged to do so *ex officio* if the facts are not clear or are disputed. As a consequence, hearings of the parties before courts of first instance shall in principle be mandatory, which according to article 30 of the LAD is not the case, since, as a rule, the decision to hold a hearing is left to the discretion of the Administrative Court.

It is not clear whether, and to what extent, article 38 of the LAD entitles the Administrative Court to take reformatory decisions. The question “reformatory instead of only cassation power” arises if the Court concludes that an administrative body has illegally refused to issue an administrative act in favour of a citizen (e.g. building permit). If the Court can only repeal (annul) the challenged administrative act (i.e. cassation decision) and return the case to the administrative body, very often the case is sent back to the Court, and in some cases even several times, which leads to a so-called “ping-pong effect”, which has damaging effects on the economy of the process and on the legal certainty of decisions taken by state powers.

This issue should be clarified, not only because the reduction in the number of incoming cases and the efficiency of court procedures are at risk, but above all because the effective legal protection of citizens’ rights requires that the Administrative Court is competent to order an administrative body to render the requested administrative act (i.e. reformatory decision) or even that the Court itself takes a reformatory decision. Article 38 does not clearly regulate this problem. Paragraphs 3 and 4 of this article seem to allow the Court “to settle the administrative issues”, whereas paragraph 8 refers to “repeating the administrative procedure”. The article does not clearly indicate what the general rule (reformatory decision?) is or what the legal conditions are for an exception to the general rule.

The LAD should be reviewed in 2013 so as to broaden its scope, ensure full jurisdiction on facts and law, and regulate mandatory hearings with more precision, among other concerns. Likewise, clarification is needed regarding the competence of the Administrative Court to take reformatory decisions. These amendments would better align the LAD with European standards, especially those derived from article 6 of the ECHR.

3.5 The Ombudsman (Civic Protector)

The Serbian Constitution of 1991 did not recognise the Ombudsman as having a constitutional standing. The 2006 Constitution awards that standing to the Ombudsman in article 138, where the “civic defender is described as an independent state body which shall protect citizens’ rights and monitor the work of public administration bodies, of the body in charge of legal protection of propriety 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”. The Ombudsman does not have the authority to monitor the work of the National Assembly, the President of the Republic, the government, the Constitutional Court, courts and public prosecutor’s offices.

The Ombudsman, or Protector of Citizens, is appointed and dismissed by the National Assembly and is accountable to it. According to the Venice Commission of the Council of Europe, “it is regrettable that there is no protection of the Civic Defender [Protector of Citizens] against unjustified preterm dismissal by the National Assembly. While the Civic Defender [Protector of Citizens] should indeed present reports to the National Assembly, it seems questionable to state that the National Assembly supervises the Civic Defender [Protector of Citizens] (see Article 99) and that the Civic Defender [Protector of Citizens] shall account for

his/ her work to the National Assembly”²¹. This is especially questionable if this accountability is understood as the possibility of early removal of the incumbent from office for reasons that are not foreseen in the law. Unfortunately, the 2010 Law on the National Assembly (article 15) insists on this relationship of subordination of the Ombudsman to parliament.

The current Law on the Ombudsman predates the 2006 Constitution, as it was adopted in September 2005. According to provisions in the law, parliament was to have appointed the Ombudsman within six months of adoption of the law (i.e. by January 2006), but this appointment did not occur until June 2007, and the appointed Ombudsman took office in July 2007. The number of complaints lodged with the Ombudsman rose steadily from 406 in 2007 to 2,650 in 2010, of which 41% referred to general human rights and 38.5% to issues related to good governance²².

The Ombudsman has jurisdiction in two main areas: human and minority rights and freedoms (it is in this area where overlaps and conflicts of competence with the Commissioner for Equality may occur, see above) and the functioning of the administration in all areas dependent on the executive branch of the government. The Ombudsman’s remit does not include judicial offices. The Ombudsman can decide, on his own, to initiate investigations. The creation in March 2009 of the Commissioner for the Protection of Equality may be the source of some confusion for the general public because of the rather overlapping responsibilities of the Commissioner and the Ombudsman.

Most complaints registered with the Ombudsman refer to shortcomings in the public administration (lack of administrative response, lengthy administrative and court procedures, pension rights, passports, identity cards, naturalisation, poor treatment in prisons, labour relations, etc.). The analysis of citizens’ complaints lodged with the Ombudsman should be a source of serious reflection on the social demand for administrative reform and also for judicial reform because, even if the Ombudsman has no competence to deal with complaints against the judiciary, most complaints refer to the malfunctioning of the court system. In fact, the Ombudsman is preparing a sort of Code of Good Governance, which has already been submitted to the Speaker of the National Assembly for consideration. The Law on the National Assembly (*Official Gazette*, 26 February 2010) establishes (article 58) the obligation of parliament to consider and discuss the reports of the Ombudsman as well as those of other independent bodies. However, it is difficult to see how this obligation will be enforced in case of non-compliance by parliament.

The Ombudsman’s Office has temporarily overcome its capacity shortage by delegating certain cases to provincial and local ombudsman institutions appointed by cities/towns or municipalities. The Local Government Act of 2002 provided the legal basis and the possibility for units of local self-government to establish a civic defender or ombudsman to protect individual and collective rights and interests of citizens and to conduct overall control of administrative functioning. This law envisages the possibility, not the obligation, of establishing civic defenders at local self-government level, but only if such an institution is considered to be necessary and if it is possible to be financed by the local self-government. The institution of local ombudsman may add to the confusion with regard to bodies that are responsible for protecting human rights if their relationships are not properly managed.

Constitutionally (article 138-1), the Republic’s Ombudsman has the competence to monitor provincial and local government administrations. Legal regulations have not yet set out in full the relationship between local self-government ombudsmen and the Republic’s Ombudsman. Essentially they both have the same attributions, i.e. protection of human rights and supervision of the administration. Their work is complementary with regard to a violation of human rights at either local or state level. It is often impossible to clearly distinguish local violations of citizens’ human rights if these violations were caused by decisions

²¹ See Venice Commission’s *Opinion on the Constitution of Serbia*, Opinion No. 495/2006 adopted by the Commission at its 70th plenary session, Venice, 17-18 March 2007 [CLD-AD(2007)004, page 13].

²² See “Answers to the European Commission Questionnaire” (January 2011), available on the website of the Serbian European Integration Office (<http://www.seio.gov.rs/code/navigate.asp?Id=20>).

and actions of state administrative authorities²³. There are real possibilities of mutual encroachment between ombudsman institutions at the various levels and the Commissioner for Equality. This problem has to be worked out carefully if these institutions are to perform smoothly.

The Ombudsman's Office is satisfied with the responses to its requests that it has received from state administration bodies. In 90% of cases, public bodies have provided the information requested by the Ombudsman's Office within the prescribed deadline (15 days). There has also been an increase in enforcement of the Ombudsman's recommendations, even before the official procedure has been finalised. So far, state administration bodies have complied with 66% of the Ombudsman's recommendations, while work is still in progress concerning 20% of the recommendations.

The Ombudsman needs to be consolidated and strengthened. The institution, while progressively gaining credibility, is still little understood by the public. Its standing could be diminished with the proliferation of various commissioners and ombudsman-like institutions across the country, often with overlapping remits and competences.

3.6 The Commissioner for Access to Information of Public Importance and Personal Data Protection and the Balance between Confidentiality and Transparency

Article 51 of the Constitution recognises the right to obtain accurate, timely and complete information on issues of public importance and curiously imposes on the media (but not on state bodies) the obligation to respect this right. Everyone has the right of access to information kept by state bodies and organisations with delegated public powers, in accordance with the law. On the other hand, while article 42 of the Constitution also guarantees the protection of personal data, its article 46 authorises the restriction by law of the right of free access to information when that restriction is required to protect, among other things, "the morals of a democratic society and the national security of the Republic".

The Law on Free Access to Information of Public Importance (LFAIPI) has been in force since November 2004, with several amendments. This law gives any person the right to demand information from public authorities, including state bodies, organisations vested with public authority, and legal persons funded wholly or predominantly by a state body. The request should be in writing, but if it is made orally, the public authority should record it and treat it in the same way as a written request. Public authorities are required to respond to a request within 15 days.

Access to information is restricted or limited in the cases described in article 9 of the LFAIPI. These limitations include the denial of the right of access if that access would "make available information or a document qualified by regulations or an official document based on the law, to be kept as a state, official, business or other secret, i.e. if such a document is accessible only to a specific group of persons and its disclosure could seriously legally or otherwise prejudice the interests that are protected by the law and outweigh the access to information interest" (article 9-5).

Article 13 of the law confers a rather arbitrary power to public authorities by stipulating that "a public authority shall not allow the applicant to exercise the right to access information of public importance if the applicant is abusing the rights to access information of public importance, especially if the request is irrational, frequent, when the same or already obtained information is being requested again, or when too much information is requested"²⁴.

To implement the right of access to information of public importance held by public authority bodies, a Commissioner for Information of Public Importance was established by the law (article 1) as an autonomous state body, independent in fulfilling its authority, and appointed by the National Assembly for

²³ See Dimitrijević, Predrag (2005), "Do We Need Local Ombudsman –Protector of Human Rights?" in: *Facta Universitatis*, Series Law and Politics, Vol. 3, No. 1, pp. 25–35.

²⁴ For emerging European standards on access to information, see OECD/SIGMA (2010), *The Right to Open Public Administrations in Europe: Emerging Legal Standards*, OECD, Paris (Sigma Papers no. 46), available at http://www.oecd-ilibrary.org/governance/the-right-to-open-public-administrations-in-europe_5km4g0zftq27-en.

a seven-year term that is renewable for another seven years. Article 35 describes the competences of the Commissioner, who is to monitor compliance with the law, hear cases relating to denial of access to information, delays, excessive fees, and refusal to provide information in the form or language requested by the applicant. The Commissioner can also propose amendments to legislation and inform the public of ways in which it can make use of the rights granted by law. The Commissioner's decisions are binding on public authorities. If the relevant body fails to release the information requested, the Commissioner has the authority, since May 2010, to impose fines or lodge lawsuits in misdemeanour courts.

On 29 December 2010 the Serbian Parliament adopted amendments to the Law on Free Access to Information of Public Importance²⁵ that give to the Commissioner important enforcement powers. According to the amendments, the Commissioner's decisions are to be binding, final and enforceable. The Commissioner is to enforce his/her decisions by coercive means (coercive action or fines, as appropriate), in accordance with the law pertaining to general administrative procedures. In the procedure of administrative enforcement of the Commissioner's decisions, complaints against enforcement are not to be admissible. If the Commissioner is unable to enforce his/her decisions as provided for in the law, as amended, the government, on request, is to assist in the administrative enforcement of such decisions by taking actions within its sphere of competence, with recourse to direct enforcement, in order to ensure compliance with the Commissioner's decisions. This provision represents an important improvement in the legal framework related to free access to information.

The Law on Personal Data Protection of October 2008 attributed the competence for data protection to the same Commissioner as from 1 January 2009 and renamed the position "Commissioner for Information of Public Importance and Personal Data Protection". This approach, which follows the British and Slovenian approaches, may create difficulties and future conflicts, as the goal of access to information is diametrically opposed to the goal of personal data protection. Effectively, in order to establish the facts, the Commissioner or a person specially authorised by the Commissioner is legally enabled to have access to personal data, data filing systems, and all documentation involving the collection of data and other means of processing information. This competence is limited only in the event that it seriously jeopardises the interests of national or public security, the country's defense, or actions to prevent, detect, investigate or prosecute a criminal offence²⁶. Giving to the Commissioner or his/her representative the authorisation to consult personal data on the basis of the right of free access to information may counteract the individual's right to privacy, which is protected by the legislation on personal data protection. Only the personal good judgment of the incumbent Commissioner can ensure a sound balance between the two, and this arrangement may make the whole system too reliant on the personal judgment of an individual.

This issue notwithstanding, seen from another perspective, this arrangement facilitates the Commissioner's demands from those in power to release information to ordinary citizens and the media, while protecting the privacy of citizens in the face of possible violations of individual privacy by state bodies. All in all, the system can work, and in fact it seems to be working well, but from a systemic viewpoint it is overly reliant on the personal judgment of the incumbent Commissioner.

The Commissioner has two deputies, one concerned with the access to information of public interest and another with data protection. The same seven-year renewable term applies to the deputy commissioners.

The Commissioner published reports on the implementation of the LFAIPI in March 2006, March 2007, March 2008 and March 2009 and March 2010. The Commissioner's Office is still understaffed (some 30 staff compared to a systematisation of 70), and the fact that its premises and financial resources are

²⁵ Amendments to the Law on Free Access to Information, adopted on 29 December 2010, *Official Gazette of the RS*, no. 100/10.

²⁶ According to the Report of the Commissioner, this limitation – set by article 45, para 2 – is contrary to the Council of Europe's *Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data and Additional Protocol to the Convention*. A provision introducing restrictions in the authority of a competent authority that by definition is independent is an unprecedented solution in comparative law. Source:

<http://www.escort.co.rs/poverenik/images/stories/dokumentacija-nova/izvestajiPoverenika/izvestaj-za-08en.pdf>.

insufficient prevents the Commissioner from completing the staffing foreseen in the systematisation. The effects of understaffing have become even more serious as a consequence of the additional competences on personal data protection attributed to the Commissioner.

The Commissioner is currently dealing with some 1300 complaints. The Office lodged 14 misdemeanour charges against directors of public bodies between December 2010 and February 2011.

The difficult balance between openness and the protection of privacy and confidentiality

There is a need to raise awareness in Serbia of the obligation of public bodies to respect privacy and personal data, but the reform action plan of the government is rather unconcerned with this problem, as more determined privacy protection policies are needed. As an example, the Law on Electronic Communication, passed by the National Assembly on 29 June 2010 (*Official Gazette* no. 44/2010), ignored any concern for privacy protection and raised a lively debate in the country, as its provisions obliged operators to retain for 12 months data on the source and destination of a communication; on the starting time, duration and time of termination of the communication; and on the location of the customer's terminal equipment. Those data can be accessed freely by the intelligence services without a court authorisation. The provisions of this law may represent an unacceptable disclosure of the information sources of journalists. Many consider the law to be unconstitutional. Provisions of the law have been challenged before the Constitutional Court by the Commissioner for Personal Data Protection and by the National Civic Defender (Ombudsman).

In co-operation with civil society, the Commissioner developed a Strategy for the Development of Data Protection, which was adopted by the government on 20 August 2010. The objective of the Strategy is to raise the awareness of citizens of the need for the protection of individual private data. The government has not yet adopted the action plan for the implementation of the Strategy.

The Commissioner's report of 2009 indicated that "the effects of implementation of the Law on Free Access to Information would undoubtedly have been far better if only the competent authorities had been more willing to eliminate certain administrative and other obstacles impeding the implementation of the law. In order to convey a more realistic sense of the actual achievements, this report reiterates facts about key obstacles that significantly affected the implementation of the law, to which we have been drawing the attention of competent authorities for three years with little success" (page 19).

Among these obstacles, the Commissioner has pointed out the following: 1) failure to enforce the law and absence of liability for infringements; 2) failure to enforce the decisions of the Commissioner; 3) inadequate normative environment, with blatant inconsistencies between the LFAIPI and other laws and the fact that the competent authorities seem unaffected by this lack of consistency of the legal system; 4) lack of relevant complementary legislation, such as a sound law on state secrets and confidentiality and sound legislation on data protection; 5) absence of sanctions for non-compliance with the Law on Access to Information.

Effectively, many procedural laws, including the Law on Criminal Procedure (*Official Journal of the Federal Republic of Yugoslavia*, nos. 70/01 and 68/02, and *Official Gazette RS*, nos. 58/04, 85/05, 115/05, 49/07, 122/08 and 20/09), still contain provisions that effectively restrict access to information to certain persons (e.g. parties in the proceedings) or impose a requirement according to which a person has to demonstrate "justified" or "grounded" interest in order to access information. This is contrary to the provisions of the LFAIPI, which explicitly provides that "(...) it shall be deemed that there is a justified interest of the public to know, unless proven otherwise by the public authority" (article 4).

Other laws also contain restrictive provisions on the access to public information. For example, the Law on Police (*Official Gazette RS*, no. 101/05) and the Law on Tax Procedure and Tax Administration (*Official Gazette RS*, nos. 80/02, 84/02, 23/03, 70/03, 55/04, 61/05, 85/05, 62/06, 61/07 and 20/09) refer to the confidentiality of data. These provisions were intended to deny access to requested information by default, even in cases when this denial was not justified according to the LFAIPI, i.e. when there was no evidence that such an action was necessary to safeguard a legitimate interest and that disclosure of the requested information could result in severe legal or other consequences.

A Law on Data Secrecy, adopted in December 2009, further amended the Law on Free Access to Information of Public Importance and curtailed the competences of the Commissioner for Access to Information and of the Ombudsman. Prior to becoming law, the draft law was criticised by the OSCE for the excessive vagueness of some of its key provisions and for the far-reaching categorisation of information classifiable as state secrets. The law was also criticised by oversight bodies, especially by the Commissioner for Access to Information and the Ombudsman, because it subjected inquiries into certain administrative bodies to the condition of a previous authorisation by the Office of the National Security Council, which is presided over by the President of the Republic. In this way, the “right of citizens to know” was severely curtailed.

The Ministry of Justice is of the opinion that such a law is not different from legislation in other countries, but according to OSCE, “restricting access for oversight bodies raises especially serious concerns, as it effectively undermines checks and balances in the classification policy. The existence of an independent oversight body with the power of monitoring classification and ordering re-designation of secrecy levels and/or declassification of information is key to preventing an arbitrary implementation of secrecy laws”²⁷. The Criminal Code prohibits the disclosure of state secrets.

The Law on the Security Information Agency – BIA (*Official Gazette*, nos. 42/2002 and 111/2009) entered into force on 1 January 2010 in its current version, with vague legal competences formulated in imprecise ways, for example the provision that the Agency is to carry out tasks related to the security of the Republic of Serbia (article 2). This agency, an independent body reporting to parliament and to the government, may interfere with and obstruct the exercise of the competencies of both the Ombudsman and the Commissioner for Access to Information. The BIA has been placed under tighter control under the President of the Supreme Court of Cassation, who has to issue a prior authorisation concerning the usage of certain “working methods” regarding the inviolability of correspondence and privacy (article 14), but the Director of the BIA can nevertheless obviate this authorisation by declaring the matter as one of urgency (article 15). The BIA is also given powers in article 16 that may be considered of an exorbitant character.

In practice the Security Information Agency (BIA) disputes the right of free access to information by administratively classifying documents as confidential on a discretionary basis. The legal situation is still chaotic concerning the balance between administrative transparency and confidentiality or secrecy. Many disparate regulations still impose confidentiality obligations. These regulations, which were mainly concerned with keeping state activities away from the public eye, are obsolete and represent an obstacle to the free access to information. In the present legal system, there are over 400 regulations containing provisions related to the “secrecy” and classification of information. These regulations significantly hamper the implementation of the LFAIPI and confuse the persons responsible for ensuring compliance with the LFAIPI as well as the public at large.

It is noteworthy that the Ministry of the Interior, which is the parent ministry for most security services and agencies, is not listed in the responses to the European Commission Questionnaire²⁸, and this issue is dispatched, without any reason being given, in an “NB” on page 167. The rationale is that the actual staff numbers and the systematisation of the Ministry of the Interior and all related organisations and agencies are considered as a state secret²⁹. This secrecy also affects the salary system of the police and information services, which is set out in a regulation on salaries for employees of the Ministry of the Interior; that regulation is also classified as confidential.

Confidentiality and vagueness in the regulation of state secrets are liable to give ample margin for arbitrariness in decision-making and to create real risks of undermining the rule of law in the state administration. Some researchers have voiced their suspicions of the continuing existence of links between

²⁷ OSCE (12 October 2009), “Comments on the Draft Law of the Republic of Serbia on Secrecy of Information” [Opinion Nr-FOI-SRB/141/2009], accessible at www.legislationline.org.

²⁸ <http://www.seio.gov.rs/code/navigate.asp?id=20>, see responses to question 37.

²⁹ See “Draft Reports on Human Resource Management in the Ministry of Interior of Serbia – Gap Analysis”, prepared by the joint project of the OSCE and the Kingdom of Norway (mimeo).

secret services and organised crime, since all organisational changes in the Ministry of the Interior “have occurred in a context of almost complete organisational secrecy”³⁰, and almost no calling to account for past crimes and misdemeanours has been carried out in the security organisations.

In summary, there is no adequate balance between freedom of information regulations and individual data protection concerning administrative files. One of the main reasons for this imbalance is that the government has not yet adopted all necessary secondary legislation for implementation of the Law on Data Secrecy (or on Confidential Information), such as the decree on protection of particularly sensitive information, regulation on protection of biometric data and supervision of operation of private detective agencies.

Ensuring freedom of information and protecting individual data are both performed by a single institution, the Commissioner for Free Access to Information and Data Protection, which does not yet have adequate human resources and financial support for carrying out its functions. Whereas the Commissioner has been carrying out the tasks related to free access to information since 2004, he only started discharging functions related to data protection as from 1 January 2009 (after the entry into force of the Law on Personal Data Protection) and does not have adequate support to perform both functions³¹. As indicated above, according to the Rulebook on Internal Organisation and Systematisation of Posts, the Commissioner’s Office is envisaged to have 69 staff, but due to the limited financial resources provided for 2010 and 2011, the number of filled positions is only 30. The Commissioner enjoys the confidence of the public and currently is dealing with 1300 appeals for infringement of the rights of free access to information and privacy of data.

The situation with regard to free access to information, the lingering tendency towards secrecy in the public administration, and citizens’ distrust of the administration all hamper the full implementation of the law. Transparency and accountability in the public administration have not yet been achieved, despite the efforts of NGOs and leading figures in the administration (especially the Ombudsman and the Commissioner for Free Access to Information and Data Protection). The legislation should better define the notion of state secrets and confidential information, as this definition is needed to ensure a sounder balance between transparency and confidentiality in administrative action.

Many policies and legal amendments are geared directly or indirectly towards diminishing the authority of so-called independent administrative bodies (Ombudsman, Commissioner for Free Access to Information and Data Protection) or of judicial oversight over the administration and towards enlarging the area of secrecy and uncontrolled administrative activities. If this tendency persists, the Serbian system of administrative checks and balances, which is already weak, will be further weakened. This tendency is likely to further undermine the notion of an administration ruled by law and respectful of the rights of citizens. As a consequence, the democratic credentials of the country will be compromised in the eyes of its citizens and in the perception of future state partners in the EU.

4. Merit System and Professionalism in the Civil Service

4.1 Constitutional Set-up of the Civil Service

The constitutional basis of the civil service meets mainstream European standards. The 2006 Serbian Constitution contains scattered references to the civil service in the sections referring to fundamental rights and to the organisation of public powers (including that of the public administration).

Article 53 of the Constitution recognises and guarantees, as a fundamental right, the right of citizens to participate in the management of public affairs and to assume public service functions on equal conditions.

³⁰ See Edmunds, Timothy (January 2008), “Intelligence Agencies and Democratisation: Continuity and Change in Serbia after Milosevic” in: *Europe-Asia Studies*, Vol. 60, No. 1, pages 25-48.

³¹ *Official Gazette of the Republic of Serbia*, no. 97/08.

Article 55 guarantees the right of all citizens to political affiliation and party membership (except for the ombudsman, judges, public prosecutors, military personnel and police).

The basic labour rights of all employees (article 60), including the right to trade union membership and the right to strike, are recognised for all citizens, although those rights may nevertheless be restricted by the law in accordance with the “nature or type of business activity”, which gives constitutional grounds to the possibility of restricting the exercise of fundamental rights to a group of citizens (e.g. civil servants) for the sake of the public interest.

Furthermore, Article 6 of the Constitution prohibits the performance of public functions in cases of conflict with other functions, occupations or private interests (as a fundamental principle), under the conditions established by law.

Finally, article 136 establishes the somehow unclear notion of “independence” (perhaps it would be better understood as “objectivity”) of the public administration, which is only bound by law and accountable to the government.

Although the 2006 Constitution contains scattered references to the civil service in the sections referring to fundamental rights and to the organisation of public powers (including that of the public administration), these references are sufficient to provide an adequate constitutional basis for legally defining crucial aspects of the civil service, in accordance with mainstream European practice.

4.2 Legal Framework and Scope of the Civil Service

The Civil Service Act (hereafter referred to as the CSA) was adopted by parliament in September 2005.³² It entered into effect almost one year later, on 1 July 2006, after all necessary by-laws, such as decrees on recruitment, classification of positions and performance appraisal, were adopted. The CSA was amended on several occasions, which is a commonplace practice in Serbia, mainly due to the generally defective quality of policy design and law-drafting. One reason for amending the CSA was the need to extend the deadline for appointment of senior officials. For this reason, the CSA was amended on three occasions: after extraordinary elections in 2007³³ and 2008³⁴, and again at the end of 2009,³⁵ as the government once again did not manage to finalise the appointment procedure for all senior officials based on an open competition procedure within the established legal time frame.

The CSA provides civil service status to persons who perform administrative and other related activities within the structure of the core executive (government departments and agencies and support structures of the President of the Republic), the court administration, and the support structures of parliament. The prevailing attitude has been that the law should not include persons employed in local government and those employed in other parts of the public sector. The law thus introduces a narrow definition of the civil service. It was expected that the guarantee of special status to a limited number of central government employees would provide a basis for the establishment of a professional civil service based on merit principles.

The CSA also makes a distinction between civil servants, who carry out administrative functions, and state employees, who perform technical functions. Special legal protection is provided only to civil servants, while auxiliary functions fall under the general employment legal regime. This distinction was meant to enable a greater mobility of technical staff.

Other laws that are important for the management of civil servants are: the Law on State Administration, discussed above in this report, and the Law on Salaries of Civil Servants and State Employees.

³² Official Gazette of the Republic of Serbia, no. 79/05.

³³ Official Gazette of the Republic of Serbia, no. 67/07.

³⁴ Official Gazette of the Republic of Serbia No.116/08.

³⁵ Official Gazette of the Republic of Serbia 104/2009.

The vertical scope of the civil service is not regulated by the Civil Service Act, but by the Law on State Administration, which was adopted in September 2005³⁶. The law establishes a clear hierarchy of positions in ministries and agencies and makes a distinction between political and civil service posts. The position of state secretary (which had previously been referred to as deputy minister) is a *political post*. A state secretary is appointed and dismissed by the government on a minister's proposal, and his/her mandate terminates with the termination of the minister's mandate.³⁷ To enable ministers to obtain "political advice", the Law on State Administration allows ministers to appoint up to three special advisors³⁸; these are also political posts.

The positions of secretary of ministry and assistant minister (heads of sector) are envisaged to be senior *civil service* posts, however. The CSA introduces mandatory recruitment by open and internal competition for these positions and establishes professional requirements that potential candidates have to meet in order to apply for senior civil service posts: university education and at least nine years of relevant work experience³⁹. It is important to note that senior civil servants do not have tenure, but are appointed by the government for a period of five years⁴⁰, which goes beyond the mandate of any individual government and should thus reduce politicisation. Although this may not be a fully satisfactory solution, it constitutes an important improvement from the previous system in which the posts of secretary of ministry and assistant minister were subject to simple government appointment, often based solely on political grounds.

A separate Law on Civil Servants' and State Employees' Salaries was adopted in 2006 and entered into force in January 2007. The law governs salaries and rewards of civil servants and also introduces the performance-related pay component.

The conflict of interest of civil servants is regulated by the Civil Service Law, but there is also a subsidiary implementation of the Law on the Anti-Corruption Agency⁴¹, which regulates issues of conflict of interest in general, as discussed in more detail in SIGMA's 2011 assessment report on the Public Integrity Framework in Serbia.

There is no appropriate legal framework regulating the status of employees of public services, such as those in public education and health care. Employees of public services are not considered as civil servants and their employment status and working conditions are governed by general labour law, including collective bargaining agreements between the government and representative trade unions. The Ministry of Labour, Employment and Social Development recently formed a working group, which has started to draft a law on salaries in public services. This is a positive development, but does not address the need to regulate all employment-related issues of public sector employees. At the time of writing (February 2011), there is still no legal framework regulating the status of employees of public services, such as education and health employees, except in the domain of their salaries. In that respect, the Ministry of Labour, Employment and Social Policy has prepared amendments to the Law on Salaries in State Organs and Public Services, which were adopted by the government on 10 June 2010, but have not yet been passed by parliament. The proposal introduces performance-related pay for health sector employees in order to facilitate the introduction of per capita payment for health sector institutions.

Police, security and armed forces, as well as foreign affairs personnel are still subject to separate and specific employment statutes. The employment legal framework, including remuneration, of those working

³⁶ Law on State Administration, *Official Gazette of the Republic of Serbia*, no. 79/05.

³⁷ *Ibid.*, article 24.

³⁸ *Ibid.*, article 27.

³⁹ The requirement of nine years of relevant work experience has been criticised as being too restrictive as it ignores the fact that democratic changes in Serbia began only in 2000 and therefore ensures that most senior positions are obtained by personnel who gained their experience under the Milosevic regime (see CMI, "Corruption in Serbia 2007: Overview of Problems and Status of Reforms", draft paper, 11 May 2007).

⁴⁰ Law on State Administration, article 25, paragraph 3 and article 26, paragraph 3.

⁴¹ Law on the Anti-Corruption Agency, adopted on 23 October 2008, *Official Gazette of the Republic of Serbia*, no. 97/08.

in the Ministry of the Interior (police) and in Defence (military and State Security Agency) is considered to be a state secret, and is therefore not made public and is not accessible to the public.

Rights, duties and responsibilities of directly appointed political staff, e.g. the General Secretary of the Government but also political advisors and local government staff, are still regulated by the largely obsolete Law on Labour Relations in State Bodies⁴² (LRSB), by general labour law and by many other pieces of legislation, which leave their status rather unclear. For some time during the spring and autumn of 2007 there was a clear will of the Government Secretariat for Legislation to draft a new law on functionaries (directly appointed and elected officials), but due to the presidential election and later the parliamentary elections this activity was left to the future government for a decision. That decision is still pending at the time of writing (February 2011). No changes have therefore been made in the regulation of the status of politically appointed personnel (such as ministers, state secretaries and political advisors).

Since early 2010 the Ministry of Public Administration and Local Self-Government, in co-operation with the Standing Conference of Towns and Municipalities, has been preparing a draft Law on Local Officials, whose rights and responsibilities are still governed by the obsolete 1991 Law on Labour Relations in State Bodies⁴³. However, there is still no official draft of the new law. At this juncture, consideration should be given to the possibility of enlarging the scope of the Civil Servants Act in order to accommodate civil servants of local self-governments (with adaptations necessary to preserve the autonomy of local self-governments – regarding supervision and management – and special working conditions – more flexible job descriptions, for instance). In fact, considering the adjustments that the whole public administration is facing (and will be facing in the near future), a single statute and a unitary salary system would facilitate those adjustments, especially through increased opportunities for staff mobility.

The number of civil servants and employees working in central government ministries/ agencies has gradually decreased from 26,453 (in 2008) to 24,515 in 2010⁴⁴. In February 2011, the total number of public sector employees amounted to 438,786. Of this number 265,966 employees are financed from the Serbian state budget⁴⁵; 60,545 employees are financed from local government budgets and 112,275 from the mandatory social insurance institutions (National Employment Service, Health Insurance Fund, and Pension Insurance Fund).

There are estimations⁴⁶ (not actual numbers, as they are secret) that reckoned the Serbian police as having been 33,000-strong in 2006 (or 440 policemen per 100,000 inhabitants, which would make Serbia one of the most policed states in the world), although too much information has remained confidential on the management of this corps. This secrecy may constitute a risk for the establishment of the democratic rule of law. An overall and thorough review of the various legal regulations currently applying to those public employees who are not civil servants should therefore be launched, with a view to harmonising them with the general civil service principles and standards.

There have been two major programmes of downsizing of public employment under the IMF Standby Arrangement – the first was conducted in 2004/2005 and the second in 2010. In 2004 the government had agreed with the IMF to reduce the number of staff in central government ministries/agencies by 10% across

⁴² Law on Labour Relations in State Bodies, *Official Gazette of the Republic of Serbia*, nos. 48/91 and 66/91.

⁴³ Ibid.

⁴⁴ This information includes all state administration bodies, services of the government and support services of administrative districts, including the bodies not subject to the provisions of the Law on Determining the Maximum Number of Personnel Employed in Republic Administration (*Official Gazette of RS*, no. 104/09) and whose maximum number of personnel employed for an indefinite period of time has not been laid down by the Decision on the Maximum Number of Personnel in State Administration Bodies, Public Agencies and Mandatory Social Security Organisations. The information does not include the number of personnel in the Ministry of the Interior and the Security-Information Agency.

⁴⁵ The Serbian state budget provides financing for employees of central government bodies, employees of the Ministry of Interior and Security Information Agency, the Ministry of Defence, Prison Administration, Judiciary, Ministry of Culture, and social security, sports and education employees.

⁴⁶ Draft report by the OSCE and Kingdom of Norway on Human Resources Gap Analysis in the Ministry of the Interior.

the board. In order to facilitate the exercise of carrying out the requested staff reductions, staffing needs assessments of several institutions (Ministry of Finance, Ministry of Agriculture, Ministry of Capital Investment, Hydro-Meteorological Service and Geodetic Authority) were carried out, supported by co-ordinated donors' assistance under the World Bank's leadership. The reviews of staffing needs⁴⁷ that were conducted showed that, whereas some key line ministries were generally understaffed (such as the Ministry of Finance), many other central government agencies and governmental support services were overstaffed (such as the Hydro-Meteorological Service, the Geodetic Authority and the Statistics Office). However, despite the reviews, which were aimed at preventing across-the-board civil service staff cuts, the initial rightsizing measures brought about exactly what everyone wanted to prevent, i.e. a reduction in the number of staff by 10% in all institutions.

A similar downsizing exercise was undertaken in the course of 2010, under the new Standby Arrangement with the IMF. It was agreed that the number of staff in central government institutions would be reduced by around 10%. At the same time, however, the Serbian Government had made an agreement with the EU under the EC Budget Support Programme to maintain and develop the administrative capacities of relevant institutions and bodies and to exclude from the staff cuts any personnel working in priority areas for EU integration. In order to be able to comply with the IMF requirements, parliament passed in December 2009 the Law on the Maximum Number of Employees in the Republican Administration⁴⁸. The maximum total number of civil servants allowed by law for the Republican administration was set at 28,400, which represented the 7.26% cut relative to the previous total number of employees in Republican administrative bodies of 30,624.

The downsizing policy and the concomitant law did not apply to the Ministry of Interior, Ministry of Defense, Information Services (BIA), Ministry of Justice (penitentiary), Ministry of Finance (Treasury), Hydro-meteorological Service, Statistics Office, and Geodetic Authority.

At the same time, the government carried out a consultation process with ministries and other agencies, the Human Resources Management Service (HRMS) and the Serbian European Integration Office in order to ensure that the capacities for EU integration would not be jeopardised by the cuts. In this way, the EU had a positive effect on generally preserving EU capacities in the Serbian administration.

In the course of 2010 and early 2011, government bodies finalised the staff reduction processes. All civil service institutions adopted new Rulebooks on Internal Organisation and Systematisation, by which they reduced the number of actual staff by around 10%, in line with the Law on Determining the Maximum Number of Employees in the Republican Administration⁴⁹ and the subsequent Government Decision determining the maximum number of staff employees in state administration organs⁵⁰. In order to preserve EU-related capacities, the government amended its decision on the maximum number of staff in July 2010 and allowed individual institutions to slightly increase the number of posts in their Rulebooks on Internal Organisation and Systematisation⁵¹.

⁴⁷ World Bank (2005), *Serbia – Staffing Needs Assessment* [Report No. 32554 – YF].

⁴⁸ The concept of the “Republican administration” was introduced by the Law on Determining the Maximum Number of Personnel Employed in the Republic Administration of December 2009. As defined by the law, the Republican administration comprises state administration organs (ministries and special organisations, governed by the Law on State Administration), public agencies (i.e. regulatory bodies governed by the Law on Public Agencies) and social security bodies, such as the Health Insurance Fund and the Pension Insurance Fund (governed by the Law on Public Services). The exceptions are the Ministry of Interior, the Ministry of Defense, the Security-Information Agency (BIA) and the Penitentiary Service under the Ministry of Justice (prisons).

⁴⁹ Law on Determining the Maximum Number of Employees in the Republican Administration, adopted on 11 December 2009, *Official Gazette of the Republic of Serbia*, no. 104/09.

⁵⁰ Government Decision on the Maximum Number of Employees in State Administration Organs, adopted on 25 December 2009, *Official Gazette of the Republic of Serbia*, no. 109/09.

⁵¹ In July 2010, the government adopted amendments to the Decision on the Maximum Number of Employees in State Administration Organs, by which it allowed the following institutions to increase the number of staff: the Customs Administration, from 2509 to 2539; the Tax Administration, from 6347 to 6367; the Treasury, from 984 to 986; the Ministry

The Human Resources Management Service (HRMS) has published on its website data on the qualifications of civil servants who were made redundant so as to enable ministries and other public bodies to employ them if they need staff with such qualifications. However, ministries have shown little interest in hiring the redundant employees.

In summary, the legal framework for public employment only partially meets European principles, as too many sectors of the public employment system remain either poorly regulated or unnecessarily excluded from the general principles of the civil service. This situation applies especially to local self-governments and to those corps exercising public force upon citizens, such as the police and information services. Their exclusion from democratic staffing principles and standards is unjustified.

4.3 Selection: Recruitment, Promotion, Mobility and Performance Appraisal

4.3.1 Recruitment

Recruitment is not based on merit, as managers can choose one candidate from a shortlist made up of the three best-scored candidates, irrespective of the score obtained by the selected candidate and without any legal obligation to give reasons for the specific choice made and for the rejection of those not chosen (article 57 of the CSA). That decision, however, is an administrative act based on discretion, which may be appealed before the Administrative Court, which scrutinises the reasons for the decision in order to ascertain whether discretion has been used in the public interest.

In addition, the common practice of hiring temporary employees for permanent needs (outside of the normal process for recruiting permanent staff), who later can become permanent civil servants is a way of bypassing the Civil Service Act regulations. As a consequence, the quality of recruitment is reduced and politicisation and patronage increase⁵².

The merit system would be better guaranteed if the law made it mandatory for the manager to simply choose the best scored candidate, thereby removing the possibility of any managerial discretion, because the public interest is better served if the constitutional right (articles 53 and 21 of the Constitution) to non-discriminatory equal access to the civil service is adequately protected in recruitment procedures. The 2005 CSA nevertheless introduced positive changes in the way in which civil servants were to be selected and recruited. All vacancies in state authorities are now publicly advertised, on the institutional website for internal recruitment and in the *Official Gazette* for external recruitment. These positions are available to all citizens meeting the recruitment requirements under equal conditions, and the overall selection of candidates is based on their professional qualifications, knowledge and skills.

The general requirements for entering the civil service (article 45) stipulate that any adult citizen of Serbia⁵³ who satisfies the required professional qualifications and other requirements prescribed by a statute, other regulation or decree on the internal organisation and staffing table may enter the civil service, except if his/her previous employment with a state authority had been terminated due to a serious breach of employment-related duties or if he/she had been convicted of a crime resulting in imprisonment for more than six months. In addition, a university degree and at least nine years of relevant professional experience are required to qualify for a senior position.

No recruitment can be made unless the post is vacant and has been included in the "systematisation" and "human resources plan" of the relevant institution and in the budgetary allocations for the relevant fiscal year. Prior to the 2009 amendments to the CSA, each recruitment procedure had three successive phases in the case of failure of the preceding phase: it started with internal recruitment within the institution,

of Agriculture, from 60 to 62; the Ministry of Labour and Social Policy, from 165 to 166; the Ministry of Environmental Protection and Spatial Planning, from 340 to 341; etc.

⁵² According to the HRMS, as at 30 November 2010 there were 1169 fixed-term employees, six trainees and 80 in ministerial cabinets (see Answers to the Questionnaire, page 223).

⁵³ For the problems associated with the legal notion of the term "citizen of Serbia", see above.

followed by internal recruitment within the civil service, and terminated with external recruitment announced to the general public. This scheme was reputed to be long (it lasted about three months).

The amendments to the CSA adopted in December 2009 introduced important changes in the recruitment of civil service positions (from junior clerk to senior counsellor). Recruitment of “ordinary” civil service positions was decentralised, as individual institutions were given the competence to advertise vacancies. This arrangement is in contrast with the provisions of the 2005 CSA, which granted to the Human Resources Management Service (HRMS) the authority to advertise vacancies. The amended article 55 of the CSA prescribes the content of the vacancy advertisement in great detail in order to ensure general consistency in the advertisement process. It also reduces the deadline for submission of applications from 15 to eight days in order to improve the efficiency (understood as rapidity only) of the recruitment process.

Another change introduced by the 2009 CSA amendments is that prior internal competition is no longer a mandatory selection and recruitment procedure. The priority in the recruitment procedure is instead given to the transfer of a civil servant to another position in the same institution or an agreement on the transfer of a civil servant between different institutions. This change again represents a return to the traditional practices of recruitment and career advancement that existed before the adoption of the CSA in 2005. The requirement of internal competition has been recognised as one of the weakest points in the civil service system, as it has not yielded the expected benefits in terms of recruitment of the best quality candidates for individual positions, but it has significantly slowed down the recruitment process. This shift to traditional practices shows that the Serbian authorities are not very concerned about offering to incumbent civil servants ways and means of career development and promotion, which may have negative consequences in the medium term.

According to the 2005 Law on Police, article 112-1, employment in the Ministry of the Interior should be based on open competition. However, article 112-2 states that competition is not mandatory and article 112-3 opens up the possibility to make appointments without prior public advertisement. It can be argued that the wording of article 112 increases the risk that employment without competition will become the general rule rather than the exception in the Ministry of the Interior. As a consequence of this vaguely regulated recruitment, Serbian citizens have unequal access to employment in the Ministry of the Interior. This state of affairs is in harmony with neither the Serbian constitutional provisions granting equal access to the civil service – and it therefore contravenes the merit principle – nor with mainstream European principles and standards of recruitment in security bodies.

A key positive change under the 2005 CSA was that some 360 positions formerly reserved for political appointees were classified as senior civil service positions and declared vacant, while a recruitment process to fill them through internal competition was opened. Senior civil service positions (referred to as “appointed” positions in articles 33 and 34 of the CSA) encompass positions ranging from directors/assistant directors of integrated services up to secretaries and assistant ministers in ministries (and in special organisations – directors, deputy directors and assistant directors). These positions are to be filled through either internal or open competition and recruitment is to be administered by a selection panel designated by the High Civil Service Council (HCSC), in which only one of the members may be a civil servant from the state authority in which the vacant position is located. Internal competition has to precede open competition if the vacant position is in the core administration. This procedure is intended to eliminate the use of political appointments for senior management positions. A direct appointment to one of these positions is only possible if the candidate has passed the professional examination or the judicial examination.

After the testing and interviews, the HCSC prepares a shortlist of three candidates from which the minister may then choose. The duration of appointment to a senior civil service position is five years, but the appointment may be extended. According to the HCSC, one half of all candidates for senior civil service positions are external, but their number is rather low (an average of two or three candidates per post) because it is quite difficult to meet the requirements and salaries are low. Nevertheless, the system is assessed as positive by the HCSC.

The recruitment process for senior civil service positions continued during 2010 to be carried out on the basis of open competition, in accordance with the above-mentioned Civil Service Act requirements. However, the government was not able to fill all senior positions by the prescribed deadline of 31 December 2010, as required by the Civil Service Act amendments adopted in December 2009⁵⁴. Of overall number of 300 – 400 senior civil service posts, the competition procedure was completed and staff appointed to about 170 senior civil service positions. As a result, the deadline for filling senior civil service positions has not been respected for four years in a row, which demonstrates the difficulties encountered with the depoliticisation of the Serbian civil service.

The system described here for the appointment to senior civil service positions applies to the state administration and the services of the government only, whereas the civil service in the judiciary, parliament, the State Prosecutor's Office and other state authorities is regulated by the respective by-laws issued by the Supreme Court of Serbia, the Administrative Committee of Parliament or the Secretary of Parliament, the Public Prosecutor, etc.

In legal terms, political affiliation considerations are completely excluded from recruitment (even for top managerial positions) and from mobility/promotion rules and procedures, as well as for pay determination. However, in spite of all of the legal provisions and guarantees, it is apparently still possible for the government to exercise its influence on appointments to senior civil service positions and even to positions at lower levels. It is to be noted, in this respect, that positions classified for "appointment" are filled by a decision of the government, which may reject the candidates shortlisted by the High Civil Service Council and call for a new competition. Apparently it is also still feasible for ministers and state secretaries (the two main political positions) to circumvent by various means the main purpose of recruitment procedures (selection based on professional qualifications and merit).

4.3.2 Promotion

Promotion in the Serbian civil service has traditionally been based on seniority. Although the principle of seniority is naturally present in most continental European career systems, it has proved to have an adverse effect on the development of the Serbian civil service system for two main reasons: 1) a slow and gradual career/wage growth principle created strong disincentives for young staff to remain in the civil service, where these staff stayed for two or three years to gain experience and then moved to an expanding private sector, which had much more competitive salaries; 2) there was in the civil service a large number of end-of-career officials, whose salaries were significantly higher due to increments for years of service, while younger officials considered that they performed similar jobs and should not have been paid less.

For the above-mentioned reasons and under the influence of international organisations, the CSA was amended so that promotion to a higher position was no longer based automatically on seniority. In the new system a civil servant cannot be promoted unless there is a vacant higher position. In addition, in the new system, promotion and pay are linked to positions and jobs rather than to the length of service, and the focus is on selecting the best-suited candidate for each position, either through a system of competition or as a result of performance appraisal.

There are two key preconditions for a position to be filled through promotion: there must be a vacancy, which has to be foreseen by the Rulebook on Internal Organisation and Systematisation, and the filling of the vacant post is in compliance with the personnel plan/approved budget for that year. On fulfilment of both of the above conditions, it is up to the head of an institution to decide whether it is necessary to fill the vacant post (article 47 of the Civil Service Act).

A civil servant may be promoted to an immediately higher civil service rank within the same institution on the basis of the results of a performance appraisal. The head of the institution may promote a civil servant who has obtained an "exceptional" grade twice in a row or an "excellent" grade at least four times in a row to an immediately higher position if there is a vacancy and if the civil servant meets the other requirements for the post. Exceptionally, a civil servant who has already been promoted to a higher position, after having

⁵⁴ Amendments to the Civil Service Law, adopted on 11 December 2009, *Official Gazette of the Republic of Serbia*, no. 104/09.

been awarded an exceptional grade twice in a row in performance appraisals, may be further promoted to yet another immediately higher position if he/she has obtained an exceptional grade, even if the requirement with respect to professional experience has not been met (article 88 of the Civil Service Act). In this way, young professionals in the civil service are given an opportunity for rapid promotion if they show exceptional results in their performance. Civil servants may also be “promoted” horizontally into a higher salary group (rank) while remaining in the same position, in accordance with the Law on Civil Service Salaries.

Promotion based on successive excellent performance appraisals created problems in practice. As the Civil Service Law entered into effect on 1 July 2006 and annual performance appraisal started to be introduced in 2007, no promotions were possible until early 2009, i.e. two and a half years after the beginning of implementation of the CSA. Promotion based on the results of internal competition was also possible only if a candidate had two subsequent excellent performance appraisal marks, which also reduced the importance of internal competition as an HRM instrument. This problem has been resolved by the 2009 amendments to the CSA, which has eliminated the excellent performance appraisal as a precondition for participating in an internal competition procedure.

4.3.3 Mobility

Mobility in the civil service has somewhat improved. This improvement is mainly due to the 2009 Civil Service Act amendments, which have allowed for a direct transfer of a civil servant to another position in the same institution or an agreement on the transfer of a civil servant between different institutions. However, due to the process of reduction in the number of staff, mobility has still not been fully enabled.

Recruitment, promotion and mobility procedures are under the inspection of the Administrative Inspectorate, and decisions made by selection panels or by appointing authorities can be appealed to independent boards of appeal (one for organisations depending on the government, one for the judiciary and public prosecutor’s offices, and others for parliament and other institutions). The decisions made by these boards of appeal are subject to judicial review.

4.3.4 Performance Appraisal

The 2005 Civil Service Act and the 2006 Decree on Civil Servants’ Performance Appraisal govern the conduct of performance appraisal in Serbia. In general, all civil servants are supposed to be subject to performance appraisal. However, there are several exceptions to this rule, which apply to: the manager of the state authority, a civil servant who has worked less than three months during the appraisal period, and any civil servant employed for a fixed term. Performance appraisal is conducted annually. The appraisal period runs from 1 January to 31 December of each year. The formal appraisal procedure (appraisal form, interview) starts after the end of each appraisal period, which is in January of the following year, and is to be completed at the latest by the end of February.

Performance appraisal is conducted by an immediate superior of the civil servant concerned. Therefore, depending on the hierarchy in the respective state authority, each civil servant (appraisee) will have his/her own evaluator. In many cases and for most civil servants the head of the respective department will have the role of evaluator for all of his/her subordinates. An important role in the performance appraisal is also given to a “counter-signer”, who provides for checks and balances in the appraisal process. A “counter-signer” is the immediate superior of the evaluator, and as such he/she is further away from the work of the appraisee than the evaluator but has some specific knowledge of the work involved and the performance achieved. The counter-signer has the right to add his/her comments to the appraisal and to the proposed grade on the standard appraisal form in order to express his/her view as to whether the appraisal is realistic and properly justified, etc.

The key performance appraisal criteria are “results achieved in the realisation of tasks of a job position and agreed work objectives”, which indicate agreed outputs or target agreements. Work objectives/target agreements of the appraisee have to be identified and defined in advance at the beginning of the

assessment period. Other appraisal criteria are independence, creativity, initiative, precision and diligence, as well as quality of the appraisee's co-operation with others.

A scale of five possible grades is applied in the performance appraisal: unsatisfactory, satisfactory, good, very good and exceptional. According to the Decree on Performance Appraisal, an "unsatisfactory" mark is given to a civil servant who has failed to reach even the minimum performance score when working towards achievement of work objectives and satisfaction of regular job requirements. A "satisfactory" mark is given to a civil servant who has achieved the specified work objectives and satisfied the regular job requirements at a minimum performance level. A "good" mark is given to a civil servant who has achieved the specified work objectives and satisfied the regular job requirements at an average performance level. The mark "excellent" is given to a civil servant who has achieved the specified work objectives and satisfied the regular job requirements at an above average performance level. And finally, the mark "exceptional" is given to a civil servant who has achieved the specified work objectives and satisfied the regular job requirements at an exceptionally high performance level.

The consequence of an "exceptional", an "excellent" and to a certain extent also a "good" rating is the chance of promotion. With regard to promotion, two categories have to be distinguished: outperforming executive civil servants who have been given an "exceptional" mark at least two consecutive times or an "excellent" mark at least at four consecutive times may be promoted to a higher-ranking job position. However, it has to be underlined that there is no automatic promotion. In each case it is necessary for a vacant position to be available and for the civil servant to fulfil the requirements for working in the higher position.

Pay progression through horizontal pay-steps is based on performance. A civil servant whose performance has been assessed as "exceptional" for two consecutive years is promoted by two pay-steps. A civil servant whose performance has been assessed as "excellent" for two consecutive years, or as "exceptional" and "excellent", irrespective of the sequence of the assessments, is promoted by one pay-step. A civil servant whose performance has been assessed as "good", or as "excellent" and "good", irrespective of the sequence of the assessments, for three consecutive years is promoted by one pay-step.

There are also, however, rather harsh negative consequences of performance appraisal. If a civil servant has received a negative quarterly performance appraisal on the basis of attainment of his/her work objectives, he/she would be demoted to either a lower pay-step or, if there is no lower pay-step in his/her pay-grade, to a lower rank/position. After a negative quarterly performance appraisal, a civil servant is subject to an extraordinary performance appraisal, which has to be conducted within a period of 30 days following the negative appraisal. If a civil servant then receives a subsequent negative appraisal, his/her employment shall be terminated.

The identification of training needs constitutes an integral part of the performance appraisal process. However, not all managers identify the training needs of their personnel in the course of the performance appraisal. Training needs that are identified in the course of performance appraisal are also taken into account in the process of designing general training plans. The HRMS staff claim that the training needs determined in the course of performance appraisal are one of the main sources for drafting the annual general training plans.

Performance appraisal is applied in practice to a large extent. All ministries and agencies have conducted performance appraisal over the past three years (since the passage of the decree on performance appraisal), with the exception of the Hydro-Meteorological Service, whose director refused to sign performance appraisal decisions, as he was of the opinion that the grades assigned to civil servants were neither accurate nor realistic.

The attitude of managers and ordinary civil servants towards performance appraisal is mixed. There was an initial resistance against this instrument, which has now largely been overcome. Managers support this instrument, as it enables them to follow up the work of their personnel, but they tend to complain that the process of performance appraisal is overly time-consuming and formalistic, as it requires them to quarterly (every three months) assess the attainment of work objectives by civil servants, which takes quite a lot of

time and makes the process overly bureaucratic. Ordinary civil servants do not consider appraisals to be objective in many cases, which triggers a certain amount of hostility towards this instrument and towards their superiors.

In summary, the CSA establishes a performance appraisal system that, in theory, could contribute to improving civil service performance. The principles of the appraisal are well stated, and the rules and procedures are quite clear. However, the obligation of quarterly review meetings for follow-up is time-consuming and constitutes a burden on the work of managers. In general, performance appraisal is not perceived in practice as an important managerial tool for developing civil servants' capacities and for improving the quality of public administration. It is therefore irrelevant, poorly implemented and unbalanced in terms of the ratings given. High ratings are the most common.

It can be concluded that at the present time the Serbian public service is only partially independent of political parties; the CSA has contributed to a certain depoliticisation, but the impartiality mechanism embedded in the system of recruitment is not difficult to circumvent as it is relatively weak. In spite of the undeniable positive aspects of the regulations on recruitment and classification of the civil service, the merit system is still not fully guaranteed and remains fragile, as recruitment decisions are still based too heavily on managerial discretion, and this discretion is the final criterion for recruitment.

There is a persistent confusion between the idea of the public advertising of vacancies and the idea of merit-based recruitment. The publication of vacancies is necessary, but it is not sufficient to guarantee a merit-based recruitment system. An excessive dose of discretion in recruitment, coupled with the ethnicity principle of article 77 of the Constitution and its consequences on likely quotas for entering the civil service, will hamper the professionalism of the civil service, which can only be achieved by putting into practice meritocratic principles.

The existing procedure for performance appraisal is in line with European standards, and there is currently no need for any substantial revision or improvement with respect to the procedural and technical aspects of this instrument. However, we are of the opinion that performance appraisal consequences, especially with regard to negative appraisal, are overly strict and severe, as they enable managers to terminate the employment of a civil servant within a period of only four months, which is contrary to established performance appraisal practices in other countries.

The civil service system in Serbia is being implemented in a "cultural" framework in which, for decades, access to positions and jobs in the public administration, as well as internal promotion, was largely based on political affiliation, patronage or cronyism. As a result, although enormous progress has been made in recent years, the introduction of the new rules and procedures laid down in the CSA is still hampered by long-lasting "cultural" habits and traditions. The progress that has been made is far from being sustainable.

4.4 Classification and Job Evaluation of the Civil Service

The Law on State Administration (2005) and the Civil Servants Act (CSA) provide a clear classification of civil service positions, encompassing two main groups: "appointed" positions (senior civil servants) and "executorial" positions. Within each of these two main groups, the various positions are clearly defined, on the basis of the tasks and professional qualifications required. Senior civil servants are those holding powers to direct and co-ordinate the activities of a state authority (article 33, CSA). In the state administration, these positions include assistant minister, secretary of a ministry, director and assistant director of an administrative body within a ministry, director and deputy director of a special organisation or of a government service, director of the government's general secretariat, director of an administrative district, and the public attorney.

Executorial positions (article 35, CSA) are defined negatively as those that are "not appointed", i.e. those that are not senior positions even if they involve the management of internal units within a state authority. In the state administration these positions include senior counsellor, independent counsellor, counsellor, junior counsellor, associate, junior associate, clerk and junior clerk. Staffs in the category of "ordinary or

executorial civil service” have permanent civil service status. They are classified within different ranks, which are defined on the basis of civil servants’ educational qualifications, experience, and a broad definition of the level of the job.

Prior to the 2009 amendments to the CSA, there was a clear distinction between rank and position in the civil service. Whereas a rank was a personal category, which basically depended on the years of service, the position depended on the duties that a civil servant performed. For instance, someone could perform the duties of an administrative inspector or head of department and be in one of the ranks ranging from professional associate to higher associate. One of the key novelties introduced by the CSA is a new classification and grading system, which has facilitated the classification of all civil service posts within different ranks on the basis of complexity and responsibility of tasks and not on the basis of years of service. In this way, the distinction between the rank and the position has been blurred. Each position is now evaluated in terms of its complexity, responsibility, level of independence, etc., and assigned to a certain rank. In this way it is not possible for persons who are performing the duties of administrative inspectors to be assigned to different ranks, but only to the rank that corresponds to the level of complexity and responsibility of the tasks performed.

International institutions have had an important role in the redesign of the Serbian classification and grading system. There was primarily a substantive influence of the World Bank in introducing the position-based system and the new classification of posts based on the complexity and responsibility of tasks, especially as this redesign of the system was also a requirement linked to the Bank’s conditionality for budget support. The European Agency for Reconstruction provided support through technical assistance and advice in the design of the new classification and grading system and in the introduction of the principles of job evaluation and classification of posts.

The Law on State Administration for the first time introduced the position of a “special advisor to the minister”, who is to provide policy support to the minister. According to this law, a special advisor prepares proposals and opinions and performs other tasks for the minister. The rights and duties of a special advisor are stipulated by the employment contract, according to labour law rules, and the remuneration is determined by a government regulation. The number of special advisors to the minister is determined by the Government Act for each ministry. The number of special advisors is nevertheless limited to a maximum of three (article 27 of the Law on State Administration).

A genuine form of ministerial cabinet was introduced by new civil service legislation in 2005/2006. The decree on the principles of internal organisation and systematisation of posts in ministries, special organisations and services of the government stipulates that the cabinet of the minister is to be formed with the aim of carrying out advisory and protocol-related activities, public relation activities, and administrative/technical activities that are of importance for the work of the minister. Employment in the cabinet is on a fixed-term basis and cannot exceed the duration of the minister’s mandate. Special advisors to the minister do not enter into employment in the formal sense. The cabinet is managed by the head of the cabinet, who reports to the minister on his/her own work and on the work of the cabinet as a whole. Ministerial cabinets may have up to eight members, and the exact number is determined by a government decision.

The classification and job evaluation system seems to be well designed and to be working appropriately.

4.5 Senior Civil Service

The professionalisation and political neutrality of the senior civil service were among the priorities of the Serbian public administration reform of 2005. One of the first steps undertaken towards this goal was the creation of a separate corps of senior civil servants and the enactment of rules that would in an unambiguous manner establish their position in the Serbian public administration *vis-à-vis* political appointees on the one hand and ordinary civil servants on the other.

The definition of senior civil servants, who hold “appointed positions”, is laid down in the CSA, where they are defined as civil servants who are appointed by the government to direct and co-ordinate the activities

of a ministry or central agency. According to the Law on State Administration, the corps of senior civil servants in ministries and other central agencies includes the following positions: assistant minister, secretary of a ministry, director and assistant director of an administrative body within a ministry, director, deputy director and assistant director of a special organisation or government service.

As mentioned above, the Law on State Administration makes a clear distinction between political and civil service posts. The state secretary and political advisors to a minister are politically appointed, and their term of office is linked to the government's mandate. The senior ranks of the ministerial bureaucracy, on the other hand, do not enjoy the right to permanent employment as ordinary civil servants, but are appointed by the government for a period of five years, which can be further extended for equal periods.

Most of the provisions governing the positions of "ordinary civil servants" also apply to senior civil servants, with the exception of the provisions on transfers and probationary work. Senior civil servants cannot be transferred to another position or to another administrative organisation, and they are not subject to probationary work.

The recruitment provisions for senior civil servants closely resemble the recruitment provisions for "ordinary" civil servants. The major difference between the two sets of procedures lies in the more important role given to the High Civil Service Council (HCSC) for the recruitment of senior civil servants. The initiative for recruitment is taken by the minister, and the selection process can commence after the HRMS and the HCSC have verified that there is a vacant senior civil servant position in both the Rulebook on Internal Organisation and Systematisation of Job Positions and the annual staffing plan of the ministry.

The recruitment and selection process is managed by a Competition Committee, whose members are designated by the HCSC, which should ensure the Committee's independence from political interference. The Committee has a minimum of three members. One of the members is a representative of the HCSC, and another member is an external expert in the relevant field. The law provides for the possibility that one Committee member is a civil servant from the state authority in which the vacant position is located. The Competition Committee is always chaired by the representative of the HCSC. The heads of internal units do not belong to the corps of senior civil servants, although their position does involve a certain level of managerial responsibilities. The recruitment and selection process for these positions is conducted in accordance with the provisions for filling the positions of ordinary civil servants.

The Competition Committee conducts the recruitment and selection process in accordance with a mixture of the selection rules governing recruitment for an ordinary civil servant's post and the special rules for the selection of senior officials, as set by the High Civil Service Council in the Rulebook on the professional qualifications, knowledge and skills which are examined during the selection procedure, examination methods and selection criteria for employment in state bodies. The professional qualifications and knowledge of the candidate for the senior civil servant position are assessed on the basis of his/her application and a personal interview. Besides testing the capacity of the candidate to successfully carry on the tasks assigned to the vacant post, the system of entrance examinations for senior officials places special emphasis on assessing candidates' knowledge of EU law. The skills tested in the course of the selection procedure are logical and analytical reasoning, communication skills, organisational skills and leadership skills. The entry examination consists of two parts. In the first phase the professional qualifications, knowledge and communication skills of the candidate are assessed on the basis of the application and the personal interviews. The candidate's logical and analytical reasoning, organisational skills and leadership skills are examined in the second phase by means of standardised tests.

Upon completion of the selection procedure, the Competition Committee proposes to the minister a shortlist of a maximum of three candidates. The minister then proposes his/her choice to the government for its approval. In contrast to the recruitment of an ordinary civil servant, the minister is not obliged to choose any of the proposed candidates but in that event the minister must inform the High Civil Service Council and the HRMS of the reasons for such a decision. Although the Competition Committee has an important role in ensuring transparency and the principle of merit in the selection process, the minister has the final say as he/she can veto the proposal of the Competition Committee by not choosing any of the proposed candidates. In that case he/she can appoint an acting senior civil servant to the respective senior post.

The mandates of a state secretary and of special advisors to the minister terminate with the termination of a minister's mandate. Other senior civil servants (such as assistant minister or secretary of the ministry) do not have a permanent position either, but they are appointed by the government for a period of five years⁵⁵, which extends beyond the mandate of any individual government and should thus reduce politicisation. Although this arrangement may not be a fully satisfactory solution, it constitutes an important improvement from the previous system, in which the posts of secretary of the ministry and assistant minister were subject to simple government appointment, often based solely on political grounds.

However, actual practice has shown that, by and large, the appointments of senior civil servants are still based on political and party affiliations. Most senior civil servants' positions are still filled in accordance with the transitory provisions of the CSA that allow for temporary political appointments to senior positions pending completion of the new selection procedures. This practice leads to the clear conclusion that the appointments of senior ministerial cadres are directly related to political bargaining between the parties forming the governing coalition, which usually results in the proportional allocation of high-level jobs to each party in the coalition.

The role of the minister in the selection process might, in various ways, outgrow the role assigned to a minister by the provisions of the CSA. One of the greatest concerns is that a minister could circumvent the merit-based selection by repeatedly rejecting the candidates who are shortlisted by the Competition Committee, in which case he/she has the right to fill the vacant senior position through a temporary appointment. As there is neither a limit to the number of calls for open competition nor an alternative way of filling a vacant position in the case of repeatedly unsuccessful public competitions, this arrangement often leads to situations where the minister uses temporary appointments as long as his/her mandate lasts. In that way the minister can make sure that the senior civil servant post is held by the person whose main qualification is political loyalty rather than professional merit.

It has been estimated that at least half of all candidates for senior civil service positions come from the private sector. The nine years of professional experience as the main requirement for participation in the public competition for a senior civil service position is often difficult to meet by external candidates, especially taking into account the way in which this requirement is interpreted by members of the High Civil Service Council. It is not rare for an application for a senior position to be rejected because the applicant's professional experience was gained in the private sector, in an NGO sector or in an international organisation, i.e. outside Serbian public sector institutions. This requirement effectively confines in practice the participation in senior civil service competitions to career bureaucrats.

Termination of the appointment to a senior civil service position can take place for several reasons: 1) due to the expiry of the period of appointment, 2) upon submission of a written resignation, 3) if the senior civil servant has been appointed to another management position in another administrative organisation, 4) in the event of the abolition of the position, 5) if the appointed civil servant has fulfilled the conditions for retirement, 6) if the employment of the senior civil servant has been terminated as a result of his/her written resignation, and 7) in the case of the dismissal of the senior civil servant.

The appointment of a senior civil servant is revoked if: he/she is convicted to a sentence of six months' imprisonment, if his/her employment in the civil service is terminated in the course of disciplinary proceedings, in the case of negative performance evaluations, or in certain cases when his/her dismissal is requested by the Ombudsman or the Anti-Corruption Agency. The list of serious breaches of duty that can lead to the revocation of the appointment of a senior civil servant is identical to the list that applies to ordinary civil servants.

The early dismissal of a senior civil servant can also result from unsatisfactory performance. The CSA links performance evaluation to both the selection of officials at senior level and the grounds for their dismissal. A civil servant is dismissed from a senior position if he/she is given a negative performance appraisal rating

⁵⁵ Law on State Administration, article 25, paragraph 3 and article 26, paragraph 3.

in the course of an extraordinary assessment or if his/her work performance has been evaluated as “unsatisfactory” in two consecutive evaluations.

The last group of reasons for which the appointment of a senior civil servant can be revoked is related to the role of the Ombudsman and of the newly established Anti-Corruption Agency. Namely, the appointment of senior ministerial staff can be revoked if one of these two bodies issues a public recommendation to the government to remove a senior civil servant from office and if the government decides to comply with this recommendation. The law does not provide for the possibility of appeal against the decision by which the appointment of a senior civil servant was terminated, but he/she can lodge a complaint with the Administrative Court.

If a manager leaves the ministry or agency, he/she is entitled to receive severance pay for an amount equivalent to six average salaries. This right can be extended for an additional six months if the official becomes eligible for retirement in the course of the first six-month period. After the expiry of the mandate, resignation or termination of appointment due to administrative reorganisation, if there is no adequate vacant position, a civil servant will be made redundant. The same will happen in the case of an early dismissal resulting from unsatisfactory performance or of the revocation of the appointment as a consequence of the public recommendation of the Ombudsman or the Anti-Corruption Agency. If the termination of the appointment is the consequence of a disciplinary sanction, along with the revocation of the appointment the senior civil servant will lose the status of civil servant and all related rights.

The regulation of the senior civil service seems relatively correct, but in practice changes are needed in terms of reducing the politicisation of senior management. Practice indeed has shown how difficult it is to introduce a senior management corps in an administrative environment where politicisation is prevalent, the foundations for professionalism in public management are not solid, and managerial capabilities are weak.

4.6 Rights and Obligations, especially Integrity and Impartiality

In its section on the basic principles of the civil service, the CSA provides that civil servants shall act in accordance with the principle of professional integrity, in an impartial and politically neutral way. The principle of political neutrality of civil servants is further emphasised in the same section by a provision that explicitly prohibits civil servants from expressing or representing their political beliefs when at work. The principles of professional integrity and political neutrality are binding for all categories of civil servants, i.e. both ordinary and senior civil servants. With regard to the concrete legal mechanisms that should ensure civil servants’ observance of the principles of political neutrality, fairness and impartiality, two legal acts have particular importance, the CSA and the Law on the Anti-Corruption Agency. The provisions of the CSA only regulate to some extent the relevant obligations of senior civil servants, as they are mainly concerned with the anti-corruption restrictions and requirements imposed on ordinary civil servants. The 2008 Law on the Anti-Corruption Agency provides for the mechanisms aimed at preventing corruption among public officials, a category that includes both political appointees and senior civil servants.

The applicable legal framework provides for a number of legal mechanisms that should prevent corruption in state administration bodies, such as restrictions on the political and economic activities of civil servants, declaration of assets, disciplinary sanctions, and codes of conduct. The CSA establishes a clear legal framework for determining the situations in which a civil servant has a conflict of interest due to the political or economic activities he/she is pursuing.

The restrictions on the political activities of civil servants apply to both categories of civil servants. These restrictions are not very severe, as it is *only* on the premises of state administration bodies that civil servants are not allowed to manifest their political views. There are no restrictions on the membership of civil servants in a political party and no limitations regarding the roles they could assume in a political party.

With regard to restrictions on economic activities, the CSA allows civil servants to work outside their normal working hours for another employer, provided that they have obtained the written consent of their superior. Such additional work should not be prohibited by the law or by any other regulation, and it should

not create a situation of conflict of interest or affect the impartiality of the civil servant's work. The written consent is not required for an additional scientific or research work or for participation in artistic, humanitarian, sports or other similar activities. However, even in these cases, the head of an administrative organisation can prohibit a civil servant from working elsewhere if this additional work could lead to a conflict-of-interest situation, damage the reputation of the administrative organisation, or affect the impartiality of the civil servant.

The CSA also includes a ban on the establishment of commercial entities or public services and prohibits civil servants from engaging in any type of entrepreneurship. These restrictions are prescribed by the CSA only in a general manner, while the mechanisms for the transfer of managerial rights in a commercial or other entity are provided in the Law on the Anti-Corruption Agency.

The conflict of interest of senior civil servants is primarily regulated by the Law on the Anti-Corruption Agency⁵⁶. This law is applicable to "officials", who are defined by the law as persons "elected, appointed or nominated to the bodies of the Republic of Serbia, autonomous province, local self-government unit, bodies of public enterprises, institutions and other organisations established by the Republic of Serbia, autonomous province, local self-government unit and other person elected by the National Assembly".

The Law on the Anti-Corruption Agency prohibits all public officials, including MPs, from concurrently holding two or more public offices. The law nevertheless allows exceptions to this rule in cases where public officials obtain the explicit approval of the Agency.

The law allows public officials, including senior civil servants and political appointees, to be elected by the managing bodies of a political party and to participate in party activities, provided that this participation does not impede the efficient discharge of the public office that they hold. However, public officials should not use public resources and public meetings that they attend in a professional capacity for the promotion of a political party. Moreover, public officials are required at all times to unequivocally indicate to their interlocutors and to the general public whether they are presenting the views of the body in which they hold office or the views of the political party to which they belong.

During their term of office public officials are not allowed to perform other jobs or enter into work engagements that would require signing an employment contract. As in the case of ordinary civil servants, research, educational, cultural, humanitarian and sports activities are excluded from the scope of this restriction, and public officials can perform these activities without explicit permission. However, in the case where a public official is earning an income from these activities he/she is obliged to report it to the Anti-Corruption Agency.

An important novelty for enhancing the legal framework on the prevention of corruption in the state administration is a general prohibition of *pantouflage*, i.e. a situation in which a public official, after termination of his/her term in office, moves to a private company with activities that are closely related to those of the office that the public official had previously held. In line with GRECO recommendations, article 38 of the Law on the Anti-Corruption Agency prescribes that "during the period of two years after termination of the public office, an official whose term in office has been terminated may not take employment or establish business cooperation with a legal entity, entrepreneur or international organisation engaged in activity related to the office the official held, except under the approval of the Anti-Corruption Agency." This prohibition applies to all public officials, with the exception of MPs, as in the opinion of the drafters of the law the scope of MPs' activities is so wide that it would not be possible to prohibit MPs from moving to the private sector after termination of their public office.

The Law on the Anti-Corruption Agency of December 2008 was amended in July 2010⁵⁷. These amendments have strengthened the legal basis for the protection of whistle-blowers in the public

⁵⁶ The Law on the Anti-Corruption Agency, adopted on 23 October 2008 (*Official Gazette of the Republic of Serbia*, no. 97/2008), replaced the Law on Prevention of Conflict of Interest in the Discharge of Public Office, which was applicable until 1 January 2010. The law provides new rules on the conflict of interest of public officials.

⁵⁷ Amendments to the Law on the Anti-Corruption Agency, adopted on 28 July 2010, *Official Gazette of the Republic of Serbia*, no. 53/10.

administration. They prescribe that a civil servant or any other employee of a central government body (including public enterprises and public services) or of a local authority who files a corruption complaint to the Agency cannot suffer adverse consequences. The Agency is obliged to provide protection to a whistle-blower and to guarantee his/her anonymity. The amendments require the Director of the Anti-Corruption Agency to issue guidelines regulating whistle-blowers' protection in more detail. The Director is currently working on the development of such guidelines.

The 2009 amendments to the CSA also introduced the obligation of civil servants to report corruption to their immediate superiors and, consequently, guaranteed whistleblowers' protection. This seems to be a positive development, even if it raises doubts about the impartiality of superiors in cases where they themselves may be involved in corruption-related activities. Whatever the case may be, these provisions still have to be tested in practice.

In February 2011 central government bodies started to develop their integrity plans, in line with the guidelines provided by the Anti-Corruption Agency. It is expected that these integrity plans will identify special corruption risks for each institution, which should reduce corruption practices throughout the administration. Some institutions, such as the Customs Administration, already have an integrity plan, but for the majority of public administration bodies the development of an integrity plan is an important novelty. In order to build the capacities of institutions to develop these plans, the Anti-Corruption Agency organised training for human resources managers in ministries and other agencies in early February 2011.

The Anti-Corruption Agency is in charge of ensuring compliance with the rules on conflict of interest of public officials. Prior to the establishment of the Anti-Corruption Agency, enforcement of the rules on conflict of interest of public officials was within the competence of the Republican Board for Resolution of Conflict of Interest.

The Republican Board for Resolution of Conflict of Interest was established in early 2005. Its main task was to maintain the Register of Property and Assets of Public Officials and to decide whether an action or failure to act of a public official constituted a conflict of interest, as regulated by the now-abrogated Law on Prevention of Conflict of Interest. The Board could pronounce three types of measures: (a) confidential warning that is not disclosed to the public; b) public notice of violation of the law, in the case of elected officials; or (c) for appointed officials, public recommendation of dismissal. Although the initial results of the Board were encouraging, the lack of stronger sanctioning power to some extent limited its potential in general. At the beginning of its operation, the Board was faced with a number of cases of plurality of functions, which were resolved by officials' resignations following the Board's public recommendations. The problem, however, was that officials usually resigned only three to six months after the Board's recommendation, which allowed them to continue to acquire substantial benefits during this period.

Instead of strengthening the authority of the Board, the government decided to create a new institution, the Anti-Corruption Agency. The legal basis for the establishment of the Agency is provided by the Law on the Anti-Corruption Agency⁵⁸, which was adopted by parliament in December 2008. In accordance with the transitory provision of the Law on the Anti-Corruption Agency, the Republican Board for Resolution of Conflict of Interest continued to perform its functions until 1 January 2010, when the new Anti-Corruption Agency took over its responsibilities, caseload, databases and staff.

The Anti-Corruption Agency has a wide variety of competences in combating corruption, which include enforcement of the rules concerning the prevention of conflict of interest in the discharge of public office and property disclosure reports of persons holding public office. It also deals with auditing the finances of political parties and anti-corruption prevention activities⁵⁹.

It is doubtful that the Agency will be able to carry out all of its assigned tasks, especially until it develops its operational capacities, which will require time. Concerns have also been expressed as to whether it is a

⁵⁸ Law on the Anti-Corruption Agency, op.cit.

⁵⁹ For further analysis of the Anti-Corruption Agency, see SIGMA's 2011 assessment report on the Public Integrity Framework in Serbia.

good idea to have such a large body and such a large number of responsibilities concentrated in a single institution rather than in a number of different, smaller-scale institutions.⁶⁰ Furthermore, as the Agency has taken over responsibility for the prevention of conflict of interest from the Republican Board for Resolution of Conflict of Interest, the latter body was abolished immediately following the establishment of the Agency. This transfer of competence has raised serious public concern with regard to the effectiveness of frequent changes of anti-corruption institutional structures, especially as it takes a significant amount of time and effort for these institutions to establish themselves as credible authorities. However, since the Agency has already been established, it should be given an opportunity to prove that the institutional approach chosen was the right one. Furthermore, it should be stressed that the Anti-Corruption Agency has engaged staff who were previously working with the Board⁶¹. Two of the members of the Governing Board of the Agency used to be members of the Republican Board for Resolution of Conflict of Interest, which provides a certain degree of continuity of work between these two institutions and is therefore a positive development. In addition, the Agency is in the process of strengthening its public credibility, as it has questioned the behaviour and decisions of high officials, including ministers and the government as a whole.

Only senior civil servants and political appointees are required to disclose their assets and interests. Under the new legal framework, public officials, including senior civil servants and political appointees, are obliged to submit to the Anti-Corruption Agency, within 30 days of the date of election or appointment to public office, a disclosure report on their property and income, on their entitlement to use an apartment for official purposes, and on the property and income of their spouse or common-law partner as well as of their under-age children, in accordance with their status on the date of appointment. The Law on the Anti-Corruption Agency also obliges public officials to submit a disclosure report within 30 days following the end of their term in office, in accordance with their status on the date of termination of office. All officials are also required to inform the Anti-Corruption Agency of any change with respect to the information recorded in the Property Register that results in an increase of property exceeding the average net income in the Republic of Serbia for the month in which the change occurred, in accordance with the latest data published by the Office of Statistics. If an official fails to submit the report within the set deadline, the Agency is obliged to duly notify the body in which the official holds public office.

The rules on the disciplinary liability of civil servants are set out in considerable detail in the CSA. There are two types of disciplinary offences that can give rise to disciplinary proceedings: minor and serious violations of duty. The disciplinary proceedings for minor breaches of duty can be initiated for several different reasons: 1. when a civil servant often arrives late at work, or has unjustified absences during working hours, or leaves the work premises before the end of the working hours; 2. negligence in maintaining official documents and data; 3. unjustified absence from work up to one working day; 4. failure to inform the superior of the reasons for an absence from work within 24 hours of the occurrence, or absence without justified reason; and 5. violation of the professional code of ethics that is not covered by the rules on employment offences prescribed by the CSA or other special laws. The disciplinary measure for a minor disciplinary offence is a fine for an amount of up to 20% of the salary for full-time work for the month in which the disciplinary measure was determined.

The list of serious breaches of duty is rather long and covers various types of misbehaviour of civil servants: 1. failure to perform duties or performance of duties and execution of orders of superiors in a manner that is unconscientious, untimely or negligent; 2. performance of duties that are contrary to the law or failure to take action which the civil servant is authorised to take in order to prevent the occurrence of an unlawful situation or of damages; 3. abuse of employment rights; 4. violation of the principle of impartiality or political neutrality or expression of political beliefs at work; 5. disclosure of a professional secret or other confidential information; 6.) misuse of the duty to report corruption; 7. acceptance of gifts for the

⁶⁰ Trivunovic, M., V. Devine and H. Mathisen (May 2007), "Corruption in Serbia 2007: Overview of Problems and Status of Reforms" [CMI draft report].

⁶¹ Since 1 January 2010, the Anti-Corruption Agency has engaged 13 employees of the former Republican Board for Resolution of Conflict of Interest.

performance of duties contrary to the rules of the CSA, acceptance of services or benefits or usage of the position in a state authority in order to realise personal interests or the interests of another person; 8. additional work contrary to the conditions prescribed by the CSA; 9. violation of the prohibition to hold a managing, supervisory or representative position in a commercial entity, institution or other legal entity; 10. violation of the prohibition to establish a commercial entity or public service or to be engaged in any type of entrepreneurship; 11. violation of the duty to transfer the managing rights in a legal entity to another person; 12. violation of the duty to report any personal benefit that a civil servant or a person related to him/her may gain as a consequence of a decision of the administrative authority when that civil servant participates in the decision-making process; 13. unlawful management of public assets; 14. violation of the rights of other civil servants or state employees; 15. improper, violent or offensive behaviour towards other civil servants and clients; 16. performance of duties under the influence of alcohol or drugs; 17. acting in a way which impedes clients to exercise their rights and interests before the state authority; 18. unjustified absence from work for up to two consecutive working days; and 19. repetition of a minor disciplinary offence established by a final decision in disciplinary proceedings.

The sanctions foreseen for a serious breach of duty range from the temporary or permanent decrease of salary to the temporary suspension of the right to a promotion, transfer to a lower-ranked position or, as a final measure, dismissal. While the above rules apply to the entire class of civil servants, the content of the procedural rules depends on whether the disciplinary offences were committed by ordinary civil servants or senior civil servants.

Disciplinary proceedings against a civil servant who does not have managerial responsibilities are initiated by the head of the ministry or agency on his/her own initiative or on the proposal of the immediate superior of the civil servant or of any other civil servant who has learned that the violation of duty took place. The head of the ministry or agency can conduct the disciplinary proceedings on his/her own and decide on the disciplinary liability of the civil servant. However, it is much more often the case for disciplinary proceedings to be conducted by a disciplinary committee. The CSA provides the possibility for the minister or the director of the agency to set up a disciplinary committee to conduct disciplinary proceedings and decide on disciplinary liability. In that case, the disciplinary committee is to have three members with at least a university degree and a minimum of five years of professional experience. In addition, one member of the committee should have a university degree in law.

If a senior civil servant is held liable, his/her case of breach of duty is processed by the High Civil Service Council (HCSC). The disciplinary proceedings before the HCSC are initiated on the proposal of the minister or on the government's proposal if the senior officer concerned is himself/herself the head of the administrative organ (as is the case of the directors of central agencies).

One difference compared to disciplinary rulings against ordinary civil servants, which can be appealed before the government's Appeals Commission, is that for disciplinary rulings against senior civil servants the only recourse is to initiate an administrative dispute before the court.

There are no statistical data that could illustrate the attitude of civil service managers towards the use of disciplinary procedures. However, the impression is that they are widely under-utilised, especially in the case of minor disciplinary offences. Practice has shown that managers resort to disciplinary proceedings in order to put pressure on a civil servant whom they would otherwise dismiss. However, disciplinary proceedings against civil servants rarely lead to the termination of employment.

The exception to this rule concerns disciplinary proceedings against employees of the Ministry of Interior. A significant number of disciplinary proceedings were recently conducted against policemen who were allegedly receiving bribes. As a consequence, a large number of these policemen were dismissed. According to the available information, these proceedings led directly to an increase in the number of appeals lodged with the newly established Administrative Court.

The Code of Conduct for Civil Servants was adopted by the High Civil Service Council in February 2008 and came into effect a month later, in March 2008, following its publication in the *Official Gazette of the Republic of Serbia*. Since the CSA regulates the civil service in a very comprehensive manner, the Code of

Conduct contains a selection of behavioural guidelines that are directly related to the main principles established by the CSA.

The Code stresses the principle of integrity by requiring civil servants, even in their private lives, to behave in a way that would not make them susceptible to the influence of other individuals and that would impair the impartial performance of their duties in accordance with the law. Civil servants are also expected to behave in a manner that would not damage their professional reputation and the reputation of the public administration but would strengthen the confidence of citizens in the civil service.

The principle of political neutrality is further elaborated in the Code by the prohibition to wear or exhibit while at work any symbols or propaganda materials of political parties. Civil servants are also not allowed to exhibit any behaviour that could influence the political orientation of their colleagues.

The Code also contains a certain number of rules on conflict of interest. It repeats the provision of the CSA that civil servants are forbidden to accept gifts or any kind of service or other advantage for themselves or others. In addition, it sets out in detail the procedure that a civil servant should follow if he/she is offered a gift (of minor value) in the performance of public duties.

The Code complements the provisions of the CSA by placing emphasis on the relationship between civil servants and users of public administration services. It obliges civil servants to act with professionalism and patience and in a polite manner when dealing with citizens, as their basic duty is to respect the personality and dignity of clients. Proper clothing standards have also been set by the Code of Conduct by means of examples of what is considered to be indecent apparel: shorts, an excessively short skirt, an excessively low neckline on a woman's dress or blouse, etc.

If a civil servant breaches the rules of the Code of Conduct, disciplinary proceedings can be initiated. As a general rule, violation of the Code of Conduct can be subject to the disciplinary sanctions prescribed for minor disciplinary offences, except if the violation is determined by the law to be a serious breach of duty.

In general, provisions aimed at protecting integrity in the public service are well established, although perhaps the obligation of all public officials to submit asset declarations is unnecessary, as the law should focus on officials holding high office or on officials in positions that are particularly vulnerable to corruption in order to make the system more manageable. The promotion of integrity is still far from being considered as a managerial responsibility that should be embedded in the obligations of managers. The weak managerial capabilities of the civil service may lead to the defective design and implementation of the foreseen institutional integrity plans, which otherwise hold the promise of serving as an interesting managerial instrument for promoting integrity in public office.

4.7 Remuneration

The pay system in the Serbian civil service is regulated by the Civil Servants' and Employees' Salaries Act (CSESA), which started to be implemented on 1 January 2007. This law provides the rules for the calculation of salaries of civil servants, excluding government members (cabinet members). The net salary is calculated by means of the following formula: base x coefficient = basic net pay.

The base needed for the calculation of salaries is determined annually by the Budget Law. Prior to the passage of the new CSESA, the base pay used to be determined by a "governmental conclusion". This "conclusion" enabled the government to introduce a system with multiple bases for different classes of employees, which provided room for unequal treatment of civil servants performing the same or similar tasks and made their financial position unnecessarily dependent on the state organ in which they were working. The current Law on Salaries is based instead on the principles of equality and transparency. A civil servant is entitled to receive the base pay for working full-time or for a period considered as full-time (article 7-2). A civil servant who is not working full-time is entitled to receive the base pay in proportion to his/her working hours.

The coefficients are determined by the CSESA. Prior to the adoption of the CSESA, coefficients were determined by governmental decree and were therefore subject to more frequent changes. The

coefficients for senior officials' posts (appointments) and for "ordinary" civil servants' posts are set by classifying each post into one of 13 pay-levels. The pay-levels are aligned with the categories of jobs, i.e. the number of pay-levels corresponds to the number of categories of senior officials' posts and the number of ranks of other civil service posts.

Senior officials' posts ("appointments") in ministries, special organisations, government services, courts, public prosecutor's offices, the Republic Attorney General's Office, and the appointment post of the head of an administrative district are classified into five groups, in accordance with the Decree on Classification of Jobs and with the criteria for job descriptions of civil servants. The CSESA stipulates that each appointment in those state organs is to be classified according to the pay-level corresponding to the group in which the appointment is placed, in accordance with the Decree on Classification of Jobs and with the criteria for job descriptions of civil servants. Therefore, an appointment classified in accordance with the decree in the first group of appointments will be classified on the first pay-level, and so on. The CSA gives discretion to the services of parliament, President of the Republic, Constitutional Court, and state organs with members appointed by parliament to adopt their own acts specifying appointments in the service.

"Ordinary" civil service posts are classified on one of the pay-levels from VI to XIII in accordance with the ranks assigned to them. Each pay-level corresponds to a rank that is specified in the CSA. However, in contrast to senior appointments, for which the pay-levels are fixed, each pay-level in which civil service posts are classified comprises eight pay-steps. A civil servant taking up duty in a new position is assigned the coefficient for the first pay-step in the pay-level in which the job is classified.

As indicated above, pay progression through horizontal pay-steps is based on performance. As also mentioned above, a civil servant whose performance has been assessed as "exceptional" for two consecutive years is promoted by two pay-steps. A civil servant whose performance has been assessed as "excellent" for two consecutive years, or as "exceptional" and "excellent", irrespective of the sequence of the assessments, is promoted by one pay-step. A civil servant whose performance has been assessed as "good", or as "excellent" and "good", irrespective of the sequence of the assessments, for three consecutive years is promoted by one pay-step.

In the case of promotion, a civil servant promoted to an immediately higher executive post is assigned the coefficient for the first pay-step in the pay-level in which his/her new job is classified, and if this coefficient is lower than the coefficient that the civil servant had before the promotion, the civil servant is assigned the coefficient that is immediately higher than the coefficient he/she had before the promotion.

A special rule has been envisaged for entry into managerial executive positions. An internal organisational unit manager is entitled to a coefficient increase of two pay-steps based on his/her entry into the managerial position. This provision indirectly introduces a managerial allowance, which is reflected in the pay-steps within a pay-level. After the duty of a civil servant to manage an internal organisational unit is terminated, the civil servant's coefficient is reduced by two pay-steps. The civil servant loses the coefficient he/she was awarded for managing, whereby his/her potential promotion by pay-steps while he/she was working in the managerial position was accepted.

The current salary scheme applies to the core civil service, including the customs and tax administrations, and covers about 35,000 staff, while it does not include the police and information services (as indicated above, their remuneration is considered to be a state secret). The system provides for a compression ratio of 1:9. In 2007 salaries were increased on average by 41.2%, except for the lowest grades.

The civil service salary system has undergone important changes due to amendments to the CSESA adopted in December 2010. The coefficients of the lowest two levels of civil servants (junior clerk and clerk) have been increased by 40%, and the coefficients of the second lowest levels (junior associate and associate) have been increased by 30%. In this way, the decompression ratio for salaries of civil servants of 1:9 (which was introduced by the CSESA in 2006) has been reduced to 1:6.4.

These amendments came into effect on 1 January 2011. The new salary system should make it easier for the government to attract and retain qualified staff in the administration. Salaries of the four lowest levels of employees have been increased by around 30-40%. The coefficient of the lowest level employees was

increased by 35%, from 0.75 to 1. This means that the overall decompression ratio in the overall public employment system has decreased from 1:12 to 1:9. The increase in salaries for lower-level civil servants/employees can be attributed to the efforts of the Trade Union of Civil Servants and Local Government Employees⁶², which has managed to establish a good social dialogue with the Ministry of Public Administration and Local Self-Government, which is the body in charge of policy-making in the area of civil service legislation.

Nevertheless, there is a sharp contrast between the significant salary increases for 2011 and the downsizing of staff carried out in 2010, which could reflect a degree of inconsistency in the government's personnel expenditure policies. The government has not sufficiently explained this inconsistency publicly.

The system set up by the 2006 Law on Salaries of Civil Servants (CSESA) applies to the holders of both "appointed" and "executorial" positions and is coherent with the classification of the civil service insofar as it uses as its foundation the base pay established by the Budget Law, to which a coefficient applies (assigned to every rank in the standard classification of jobs).

The CSESA, inspired by the World Bank, is very restrictive concerning bonuses, overtime and other types of remuneration beyond the standard salaries. Therefore, the only way in which managers may reward the best performing civil servants with a salary raise is through vertical promotion to vacant positions classified in higher ranks. The new salary system for the civil service has benefited for the most part the holders of middle-rank positions. For some groups, such as staff working in tax and customs, but also drivers in general services, the salary reform has in fact resulted in a considerable decrease in salaries by freezing them, which was explained as the result of the non-transparency of the real take-home pay in these services. In the tax and customs administrations, the previous system allowed for considerable bonuses. These bonuses have been discontinued under the new salary scheme. As the bonuses were often seen as part of the basic salary, the real decrease in take-home pay led to a considerable number of complaints (some 6,100) to the Appeals Board. Currently, there are no discretionary, end-of-the-year bonuses paid by ministries. Exceptions are the Tax Administration and the Customs Administration, which were allowed to reintroduce special bonuses and prizes from their own sources. In 2008 parliament passed a new special law on tax administration, which enables the Tax Administration to arrange its pay and grading system and allows them to re-introduce a separate pay system with significant bonuses.

Some allowances that were paid previously have already been incorporated into the salaries. The main remaining allowances are: 1) *Transport allowance*: This allowance is paid as a fixed amount of 2,500 RSD per month for all ranks. The allowance is not subject to tax and is not pensionable. 2) *Length-of-service allowance*: The length-of-service allowance is currently 0.4% per year of service, up to a maximum in practice of 16% for men and 14% for women. When the new CSESA was drafted, there was strong pressure from the World Bank to eliminate the length-of-service allowance. However, its elimination was not possible, one of the reasons being that this allowance has been granted for all public sector employees in accordance with a collective agreement. 3) *Management allowance*: Under the previous salary system, there was a special management allowance ranging from 10% to 30% of the basic salary, which was paid as recognition of the additional responsibility of management posts. This management allowance has been integrated into the wage grid, as mentioned above, and now amounts to around 10% of the base pay (horizontal progression by two pay-steps). 4) *Other allowances*: Payments for specific conditions of work, such as overtime, shift allowance, and allowance for hazardous working conditions, have been kept, but are separate from the basic pay, so that the basic pay of a job reflects the true relative value of the job itself as performed under normal conditions. There are no special allowances for working in particular institutions, or for language skills or educational achievements. There are also no family foundation allowances, holiday allowances, study allowances, housing allowances, tax allowances or tax breaks. Civil servants are not entitled to a 13th or 14th month of salary.

⁶² The Trade Union of Civil Servants and Local Government Employees, which is the only representative trade union of civil servants, has about 32,000 members at central and local government levels.

Overall, the ratio between base pay and variable pay (including allowances) is on average 75:25, which is close to the European standard of 80:20.

Pay in the civil service now follows a unified system, which is transparent and does not allow for arbitrary supplements and uncoordinated changes in job classifications. Distortions in the salary scheme, due to different classifications of similar jobs, have basically been eliminated due to the new classification system, the implementation of which was closely controlled. Salaries remain determined by a coefficient system, whereby the multiplier is fixed annually and the coefficients are set by the classification. A performance-related pay component will be introduced in 2011, based on performance appraisals. For the time being, these appraisals do not have an impact on remuneration, as the system needs to be thoroughly tested first, and managers need to be given sufficient training in carrying out performance appraisal.

Seniority no longer exists as a salary component, as it has been absorbed and factored into the basic salary. There is still a bonus for seniority (0.4% a year), but it is scheduled to be abolished in 2011.

Components of the salary structure in Serbia are quite transparent, as the base pay is determined by the Budget Law, while the coefficients and amount of allowances (seniority allowance and management allowance) are clearly determined by the CSESA. However, the government has been reluctant to publish the salaries of civil servants, and one of the reasons for this reluctance is probably the fact that salaries in the civil service, since the reform of the salary system in 2006/2007, have in general become higher than salaries in the private sector.

At the end of 2009, there was pressure on the government to publish data on the number of civil servants and their salary levels. When the Law on Determining the Maximum Number of Employees in the Republican Administration was discussed in parliament (to enable staff cuts in the civil service under IMF pressure), the Commissioner for Information on Public Importance and Protection of Personnel Data, Mr. Rodoljub Sabic, managed to obtain the passage of an important amendment, which required that the data on the number of employees in the Republican administration and on the level of their salaries was to be made accessible to the public. The law requires civil service institutions to present the data on the number of personnel and their salaries on their websites. There is a further requirement concerning the introduction of a register on the number of employees and the level of their salaries, which will be maintained by the Ministry of Finance and available on the ministry's website. However, so far ministries and agencies have not yet complied with this requirement, and the register of civil servants has not yet been completed and presented on the website of the Ministry of Finance.

Despite significant improvements in reforming the civil service pay system and the enhanced capability of the Serbian civil service to attract and retain personnel, the effects of the economic crisis have to some extent undermined the reform results achieved, as the level of salaries for higher paid positions was reduced by 10-15% in the course of 2009.

During the 1990s the unemployment rate in Serbia rose from 19.7% in 1990 to 26.8% in 1998. As from 2000, unemployment in Serbia steadily increased, quickly reaching 32% by 2004.⁶³ Afterwards there was a modest economic recovery, due in part to the short-term influx of cash from the sale of enterprises through privatisation. Unemployment dropped to 16% by April 2009 and then increased to 19.2% by April 2010. However, this overall improvement may have to do in large part with the recent adoption of the American model for calculating unemployment. According to this method, workers who are not regularly and actively seeking jobs are counted as "discouraged," and "outside of the job market," and therefore do not belong to the ranks of the unemployed.⁶⁴ The high unemployment rate is one of the reasons for the attractiveness of public employment.

Salaries are fixed by law or other legal instruments, and the management has almost no discretionary leeway for determining the individual salaries of civil servants. This situation could deteriorate, however,

⁶³ "Unemployment in Serbia and Montenegro," www.worldwide-tax.com.

⁶⁴ Statistical Office, Republic of Serbia (April 2009), "Labor Force Survey".

once a performance-related pay scheme is introduced. The discretion of managers in determining individual salaries is much greater for public employees than for civil servants.

4.8 Planning and Control of Personnel Expenditure

There is a specific process of planning staff numbers and budgets in ministries and other central government institutions. Each ministry and other central government agency has to specify its organisation and staffing requirements in a Systematisation Act (Act on Internal Organisation and Systematisation), which is prepared each time the ministry/other government agency decides to make changes in its organisation or staffing numbers.

Each ministry or agency prepares its draft Systematisation Act, which is submitted for comments to three bodies: the Ministry of Public Administration and Local Self-Government, the Ministry of Finance, and the Human Resources Management Service. If approved by each of those bodies, the Act is then submitted to the government for final approval.

Before the reform, if not all of the authorised positions were filled, payroll financing was provided in accordance with the number of actual employees and not with the number of authorised posts specified in the systematisation. In most state organs there was a large difference between the number of authorised positions and the number of actual staff. In the event that not all of the posts envisaged in the systematisation for the ministry were filled, the minister could recruit new staff without the special prior consent of the Ministry of Finance. Additional payroll expenditures for which no funds had been provided in the budget could be provided for in the course of the year from the current budgetary reserve funds. The ministry that had recruited new staff would address the Ministry of Finance with a proposal to cover the gap in financing from the current budgetary reserve funds. Unrealistic systematisation acts thus allowed ministries to recruit employees for whom no funding was provided and to then exert pressure on the Ministry of Finance to provide additional funding, mainly from the budgetary reserve funds.

In order to address deficiencies in the staff budgeting process, the CSA (2006) introduced an annual staffing plan as a new instrument for planning and controlling staff numbers in central government institutions. These bodies are not allowed to recruit any new staff who have not been envisaged in the annual staffing plan. This instrument has proved to be very helpful for the budget process and for controlling the overall number of civil servants in the government. An annual staffing plan typically indicates: the number of civil servants with the status of permanent employee in the current year, broken down by appointed post and by rank, and the number of civil servants with the status of permanent employee required by the state body for the following year, broken down by appointed post and by rank; the estimated number of civil servants to be hired by the state organ as temporary employees in the following year due to the increased scope of activities; and the estimated number of first-time employees to be hired by the state organ in the following year.

Each state organ submits its draft Annual Staffing Plan to the Ministry of Finance simultaneously with the submission of its financial plan proposal. Ministries, special organisations and other government bodies submit their draft Annual Staffing Plan to the Human Resources Management Service (HRMS), and the courts and public prosecutor's offices submit their draft Annual Staffing Plan to the Ministry of Justice (MoJ). The HRMS and MoJ control the compliance of the draft Annual Staffing Plans with existing regulations, and in the event that any irregularities are identified, they provide guidelines for their correction. If the Ministry of Finance approves the budget request for the implementation of the Annual Staffing Plan, the draft Annual Staffing Plan is finalised and it is considered to be in compliance with the draft Republic Budget Law.

Once the draft Annual Staffing Plans have been finalised, the unified Annual Staffing Plan Proposal is prepared following the adoption of the Republic Budget Law. While each state organ prepares its own draft Annual Staffing Plan, the joint Annual Staffing Plan Proposal for all central government bodies is prepared by the HRMS. The MoJ prepares the Annual Staffing Plan Proposal for all courts and public prosecutor's offices. The Annual Staffing Plan Proposals prepared by the HRMS and the MoJ are then sent to the

Ministry of Finance for approval. The Ministry of Finance controls whether the Annual Staffing Plan Proposals prepared by the HRMS and the MoJ fully comply with the Republic Budget Law. For all other state organs, the Annual Staffing Plan is adopted for each state organ separately (for the parliamentary services, Prime Minister's services, Constitutional Court services, General Attorney's Office, etc.), following approval by the Ministry of Finance.

The Annual Staffing Plan provides the Ministry of Finance with a good basis for planning the budget for civil servants, as it has precise data on the number of existing staff and their positions and on the number of staff to be employed in the course of the next budget year. As the base pay of civil servants is set by the Budget Law, and the pay levels determined by the coefficients in the wage grid, the Ministry of Finance has all of the necessary data for carrying out an effective budget planning process. When positions are vacant, they can be filled in the course of the year for which the Annual Staffing Plan was approved. If a position is not filled, the ministry/agency will not be able to use the funds that had been approved for the vacant position.

As a result of the clear rules that are applied for the calculation of the salaries of civil servants and the precise information available on the number of civil servants, the Budget Department of the Ministry of Finance finds the budgeting process concerning civil servants easy and effective. The Ministry of Finance faces, however, much greater challenges in budget planning for other public sector employees, such as for employees in the education and health sectors or in the Ministry of the Interior.

As indicated above, the Ministry of the Interior system of human resources planning is not linked to the general arrangements for staff planning that apply to most of the Serbian public administration. Due to methodological weaknesses, *inter alia*, within the Ministry of the Interior, human resources planning does not adequately capture the real personnel needs and personnel movements for the coming fiscal year and beyond. Based on rough estimates, there are approximately 33,000 "real" police officers employed by the Ministry of the Interior, or 440 policemen per 100,000 inhabitants. However, despite this state of affairs, many officials in the Ministry of the Interior argue that the ministry and the police force are constantly suffering from a manpower shortage⁶⁵.

There is a well established procedure and mechanism for personnel expenditure planning and management in the hands of the Ministry of Finance, which allow for generally sound control. However, the Ministry of the Interior is beyond such control, even if it is one of the largest employers in the state administration.

4.9 Termination of Civil Service Employment

The rules for the dismissal of civil servants are laid down in the CSA, and they provide for a significant level of protection against political and managerial discretion in this regard. The right to stability of employment limits the possibilities of dismissal of Serbian civil servants to exceptional circumstances.

A civil servant without managerial responsibilities can be dismissed on the employer's notice: a) in the event of the unjustified rejection of a reassignment to another position in the same or in a different administrative organisation when the transfer does not require the incumbent's consent; b) if a civil servant does not perform satisfactorily while on probation; c) if a civil servant does not commence work within 15 days after the termination of the justification for staying out of work; and d) if a civil servant fails the professional state examination. The employment is terminated when the decision on dismissal becomes final, in accordance with the general principles of administrative law.

The employment can also be terminated as a result of disciplinary proceedings for a serious breach of duty. The list of violations that can lead to the termination of employment rights is long and includes situations such as the following: negligence in the performance of duties, violation of the principle of impartiality and political neutrality, unlawful management of public funds, and unjustified absence from work for up to two working days. Although the termination of a civil servant's employment as a result of disciplinary

⁶⁵ See Draft report by the OSCE and Kingdom of Norway on Human Resources Gap Analysis in the Ministry of the Interior.

proceedings could in principle involve a high level of managerial discretion, in reality this instrument is not easy to apply. Practice has shown that disciplinary proceedings rarely result in the termination of employment.

Another way of dismissing a civil servant is to cancel his/her position, which can occur in the context of massive workforce cuts, termination of an agency or reorganisation of an institution. When the government intends to reduce the number of staff in the administration, it requires all ministries and agencies to adopt new rulebooks on internal organisation and systematisation containing a fewer number of positions. A civil servant whose position has been cancelled in this way would no longer have a legally defined working post, which would provide the basis for the process of termination of his/her employment. The employment of a redundant civil servant ends if within two months he/she is not transferred to another position or to another administrative organisation as a result of an internal or public competition.

Lastly, the termination of employment of a civil servant without managerial responsibilities can also be the consequence of negative performance appraisal results. Article 30 of the CSA requires the quarterly performance appraisal of civil servants (every three months). If a civil servant is given an "unsatisfactory" rating, he/she will undergo an extraordinary assessment, and if in the extraordinary assessment the civil servant once again is given a negative rating, his/her employment is terminated. Amendments to the CSA adopted in December 2009 have linked performance appraisal results even more closely to dismissal by shortening the extraordinary assessment period from 90 to 30 days. It is debatable, however, whether these performance appraisal provisions will have the envisioned effect, since unsatisfactory ratings are very rarely allotted in the civil service.

A civil servant without managerial responsibilities is entitled to severance pay only in the case whereby his/her contract ends as a consequence of massive workforce cuts. The severance payment is equal to one-third of the civil servant's average salary (calculated for the period of the last three months) multiplied by the number of years of service.

As a general rule, a civil servant has the right to appeal against a decision that concerns his/her rights and duties, including a notice of dismissal. The appeal must be submitted within eight days of receipt of the notice of dismissal and delays its execution. The government's Appeals Commission decides, within 30 days of receipt of the appeal, whether the termination of a civil servant's employment is in accordance with the law. If, after the expiration of the 30-day period, the Appeals Commission does not make a ruling, there is a presumption that the appeal has been rejected and the way is expedited to the Administrative Court. The proceedings before the Appeals Commission are conducted in accordance with the Law on General Administrative Procedures. These rules apply to dismissal on any grounds, except for the termination of employment of a redundant civil servant, in which case the appeal is not permitted but an administrative dispute may be initiated. A further legal remedy available in the case of dismissal, an appeal against the decision of the Appeals Commission, is decided by the Administrative Court, which was established in January 2010. A number of civil servants have appealed against dismissal, especially after the staff cuts that occurred in 2006 and in the course of 2010. Some cases have also been taken to the court. The court has, however, rejected most of the appeals, as the staff cuts were conducted in accordance with the existing rules on redundancy.

The causes and procedures for the termination of civil service employment are well regulated and offer sufficient guarantees against arbitrary dismissal, but in practice such terminations may sometimes be open to abuse.

4.10 Training

Since 2007 the HRMS has been developing an annual professional development training programme (PGPT) for civil servants. The PGPT has been created to respond to horizontal needs for the professional development of civil servants. It is designed to help create/reinforce a set of general, common skills and competences required of all civil servants, regardless of the institution in which they work. This programme

also reflects the common needs of all state authorities regarding shared tasks and concerns, such as administrative tasks, human resources, financial management and law-drafting⁶⁶.

On 21 January 2010, the government adopted the fourth General Programme of Professional Development for Civil Servants,⁶⁷ prepared by the Human Resources Management Service (HRMS). The 2010 programme was prepared in co-operation with other relevant state administration bodies, in line with their competences for specific areas included in the programme. It is quite a comprehensive document, encompassing 93 different topics classified in 11 thematic areas. The thematic areas of the 2010 programme were reform-oriented, encompassing a wide variety of topics, including senior management development and EU integration. The thematic training areas were as follows: 1) Constitutional order and state administration; 2) Civil service system; 3) Modern management and leadership in state administration; 4) EU integration; 5) Project management in state administration; 6) Public finance system; 7) Fight against corruption; 8) Public relations and communication; 9) Computer literacy; 10) Foreign language; and 11) Training of trainers, which encompasses the management and implementation of IPA projects.

Over the past year, the HRMS has continued to inform civil servants of professional development activities in a timely manner. The PGPT has been posted on the HRMS website, which gives to a large number of civil servants the opportunity to become acquainted with the programmes implemented by the Service. The HRMS has also continued to post on the website the dates of certain training events, and to submit on a regular basis the training plans for the following month to all contact persons for training activities in state administration bodies.

The HRMS adopted the fifth General Programme of Professional Development for Civil Servants, which was subsequently adopted by the government in January 2011⁶⁸. The programme was prepared in co-operation with other relevant state administration bodies, in line with their competences for specific areas included in the programme. It is quite a comprehensive document, encompassing 105 different topics classified in 15 thematic areas. The thematic areas of the programme are reform-oriented, encompassing a wide variety of topics, including senior management development and EU integration. The thematic training areas are as follows: 1) Constitutional order and state administration; 2) Legal drafting; 3) Civil service system; 4) Public policy process; 5) EU integration; 6) Public finance system; 7) Decentralised management of EU funds; 8) Programming of international assistance and projects; 9) Fight against corruption; 10) Protection of human rights and data protection; 11) Management in state administration; 12) Business correspondence; 13) Training of trainers; 14) Computer literacy; and 15) Foreign language.

One problem with the PGPT is that, due to inadequate training needs' assessment, some training activities are not of great interest to civil servants, while others are quite popular but there are insufficient places for all of the civil servants who wish to, and would need to, attend the training. One of the continuing key problems with the implementation of training programmes is that senior civil servants very rarely attend them. It seems that high-level managers are not aware of the need to attend training and to gain a broader knowledge of reform processes.

The resources for the implementation of a majority of training events have been earmarked from the budget of the HRMS, while a certain number of training courses will be implemented with the support of various donors, such as the Konrad Adenauer Foundation, the Hanns Seidel Foundation, the Norwegian Ministry of Foreign Affairs and the GTZ, as well as through IPA funds and instruments, including SIGMA.

There is no specialised public administration school or training centre. In the absence of a civil service school or training centre, the HRMS is striving to co-ordinate and strengthen existing training programmes

⁶⁶ RESPA (December 2008), *Civil Service Training Systems in the Western Balkans Region*.

⁶⁷ "General Programme of Professional Development for Civil Servants in the state administration authorities and services of the government for 2010", available at www.suk.gov.rs.

⁶⁸ "General Programme of Professional Development for Civil Servants in the state administration authorities and services of the government for 2011", available at www.suk.gov.rs.

and resources and serves as a key institution for civil service training. The HRMS intends to establish a civil service training centre in the near future. In the new Rulebook on Internal Organisation and Systematisation adopted in the course of 2010, a centre for training has been included as a separate unit of the HRMS, but it is doubtful whether this plan will materialise.

Another important institution offering training to civil servants is the Serbian European Integration Office (SEIO). The SEIO has a much more specialised mandate, as it provides only EU-related training (e.g. introduction to the European Union, EU policies, EU law, and harmonisation of national legislation with the *acquis communautaire*). The SEIO has the status of a central government service, the director of which is directly subordinated to the government and to the Prime Minister⁶⁹.

Finally, every ministry or agency is authorised to adopt its own programme of specialised professional training in order to ensure that all civil servants' needs have been taken into account. Some state authorities (Tax Administration, Ministry of Interior, etc.) are already implementing standing or ad hoc training programmes and are managing their own training facilities.

In the Serbian training market there are private organisations that develop their own commercial training programmes. Many of these programmes are relevant to the public administration, but they are not used very often by civil service institutions. The programmes target individual civil servants as well as other groups: diplomats, businessmen, international organisations, etc.

Article 10 of the CSA specifies that a civil servant has both the *right* and the *obligation* to receive training in matters that correspond to the needs of the state authority. The CSA distinguishes between professional (vocational) training, which was discussed above, and "additional education". Articles 96-97 of the CSA grant a civil servant the right to additional training in fields that are relevant to the state authority's performance. The selection of a civil servant for additional training is conducted by an internal announcement within the state authority, and the priority in the selection procedure is given to a civil servant with a higher average appraisal rating for the previous three years. The additional training expenses are to be covered by the state authority.

There is no special induction training provided for new recruits. Instead, relevant topics are included in the annual general training programme. There are also no pre-entry training programmes, although a majority of training activities is also open to apprentices who are being trained to become civil servants prior to passing the state professional examination. Civil servants express their own interest in attending training courses. Their wish to attend a training course has to be approved by their superior. The HRMS has a contact person in each institution, who informs the HRMS of civil servants' interests in particular training courses.

There is no appropriate system of training needs' assessment. Training needs are assessed by the HRMS and the SEIO through a combination of various methodological approaches. The first data taken into account are participants' responses to the evaluation questionnaires filled out at the end of each training event. The responses are analysed and categorised annually, and plans for future training activities are made on this basis. In addition, both the HRMS and the SEIO conduct interviews on training needs with senior officials in various public administration institutions, but this is not sufficient to determine real training needs. The SEIO also conducts an analysis of the annual progress reports of the European Commission and other relevant documents of the EU in order to identify training needs⁷⁰.

It is also difficult to carry out training needs' analysis as (senior) civil servants do not sufficiently understand the human resources development function. Although the identification of training needs should be a part of the performance appraisal process, managers very rarely point out the training needs of their subordinates in the performance appraisal forms. Another problem is that no analysis of training results has been carried out at either the general or individual institutional level.

⁶⁹ In practice, SEIO's Director is responsible to the Deputy Prime Minister in charge of European Integration Affairs (the Prime Minister delegated this responsibility to him).

⁷⁰ RESPA, op. cit.

Another problem is that there is no appropriate feedback from managers on how the training in which a civil servant has participated has affected his/her work. There is also no central database on the attendance in training by civil servants.

There is some link between performance appraisal and training. If a civil servant's performance is considered to be unsatisfactory, he/she may be sent to additional professional training in order to increase the chances of receiving a better rating in the "extraordinary appraisal". The performance appraisal form also contains data on individual training needs, but managers rarely complete this part of the form. Civil servants do not receive bonus payments, salary allowances or preferential promotion for their participation in training activities.

In the period between 1 January 2010 and 31 July 2010 a total of 1845 civil servants attended 94 training courses organised by the HRMS. This means that on average a civil servant attends per year two days of training organised by the HRMS.

A specific programme for the development of senior civil service competencies, which is part of an annual general training programme, was developed through a technical assistance project funded by the Norwegian Government. The inspiration for this programme came from the UK, Ireland, Portugal and other European countries. The competency and knowledge provided was adjusted to the needs of the Serbian Government. Although considerable effort has been invested in developing the competency framework, it has still not been introduced as a formal tool in HRM practices.

In line with the Action Plan for implementation of the PAR Strategy, which was adopted by the government in July 2009, the Ministry of Public Administration has started to develop an overall civil servants' training strategy, which is expected to be finalised by mid-2011 and implemented by the end of 2012. The training strategy is expected to address the current deficiencies of the training process.

Although reform-linked training is being delivered, mainly due to the good efforts of the HRMS, it would be advisable to establish more accurate training needs' analyses and to provide the HRMS with the necessary resources and premises that would enable it to play a much needed role as a facility for human resources development in Serbia. In the medium term, the transformation of the HRMS into a proper Institute of Public Administration under the Ministry of Public Administration and Local Self-Government should be envisaged. Public managers and senior civil servants badly need to attend training in order to improve their managerial capabilities. Training for managers should be considered as part of their working obligations.

4.11 Civil Service Management System

4.11.1 Human Resources Management Service

The key institution responsible for the cross-governmental management of human resources is the Human Resources Management Service (HRMS). The HRMS was formally established by the Civil Service Act of 2005 and started to be operational in early 2006. The HRMS has the status of a government service and is a central government structure reporting to the Secretary General of the Government.

The institutional affiliation and position of the HRMS was subject to discussion within and outside the government. In the course of drafting civil service legislation, the management of the Legislative Secretariat made an extensive research of civil service management structures in other countries. They concluded that the creation of a separate, central government service that would be able to co-ordinate HRM activities from the government centre would definitely be a better option than placing the HRM in a line ministry, such as the Ministry of Public Administration and Local Self-Government (MPALSG), as it would enable this service to have a higher hierarchical position in relation to other ministries and agencies. The main sources of inspiration for the central management of the civil service came from experience with other European countries. The MPALSG, which initially performed HRM functions, however, was opposed to this stance, as it preferred to preserve HRM authorities within its competencies.

Eventually, the political decision was made to establish a separate HRM service that would operate at the centre of government. To this end, some of the staff of the MPALSG, together with HRM equipment, were transferred to the Human Resources Management Service (HRMS) in April 2006. However, ever since the establishment of the HRMS, there have been tensions between the HRMS and the MPALSG, which has to some extent reduced the effectiveness of human resource management practices. The central management capacity of the HRMS has therefore been undermined by the fragmentation of authority across several institutions. This fragmentation will be discussed in greater depth below.

The competencies of the HRMS are set out in article 2 of the Decree on Establishment of the HRMS. Although the HRMS did initially have a policy-making role and was able to initiate civil service legislation, the amendments to the CSA of December 2009 deprived the HRMS of this important authority. This policy-making role has instead been fully transferred to the Ministry of Public Administration and Local Self Government (MPALSG). The amendments to the CSA of December 2009, which reduced the scope of the HRMS' powers, were prepared by the working group that had been set up by the MPALSG, whereas the staff of the HRMS did not take part in their preparation. The HRMS staff was only invited to take part in drafting the amendments of secondary legislation that followed the adoption of the CSA. Finally, the CSA amendments brought an important change in the accountability lines between the HRMS and its reporting authority, requiring the HRMS to report to the Secretary-General of the Government, instead of to the Prime Minister, as was originally prescribed by the CSA. This change of reporting authority also demonstrates the lowering of the status of the HRMS and poses a danger to its existence as an individual institution in the future.

The HRMS also lacks the power to control the implementation of the CSA, which is a prerogative traditionally performed by the Administrative Inspection placed within the MPALSG. The HRMS instead has merely an advisory role in the interpretation and enforcement of civil service legislation.

The governance structure of the HRMS comprises three key sectors: sector for recruitment and professional development, sector for analytical affairs, and sector for general and legal affairs. The sector for recruitment and professional development contains a centre for training and professional development, which is currently a core civil service training structure. Within this sector there is also a section for recruitment, and its staff are involved in the management of vacancies, preparation and management of examinations, and participation in selection committees. There is also a separate section for career development and performance appraisal. The sector for analytical affairs is in charge of maintaining the civil service's register and IT affairs, while the sector for general and legal affairs deals with financial and personnel issues concerning the functioning of the HRMS. It should be noted that the number of HRMS sectors was recently reduced from five to three sectors in order to comply with the government's requirement to reduce the number of staff in the civil service.

According to the Civil Servants Act (articles 159-163), a central personnel registry is to be created in the HRMS in order to serve as an important tool for planning HR policies. However, so far no such registry is in place. Data regarding civil servants and general service staff in the state administration is therefore based on the annual reports provided by the various administrative bodies. This registry should be set up, as it would provide permanent, updated quantitative and qualitative information on human resources in the state administration.

The number of staff currently employed in the HRMS is not sufficient to carry out its core functions. According to the Rulebook on Internal Organisation and Systematisation adopted in 2008, the HRMS was to have 50 positions, which would be an appropriate number of staff for this institution. However, due to the recent layoffs of staff that took place under the IMF's pressure, the HRMS was obliged to reduce the number of staff in the Rulebook and the number of actually filled positions from 40 to 34. Such a reduction in staff and the inability to hire additional personnel in the near future pose concerns for the future development of this institution.

As for other senior officials' posts, the selection of the HRMS Director is carried out by the government's Selection Commission, whose members are appointed by the High Civil Service Council. A candidate for

selection to the appointed position of director has to meet specific conditions, including a university degree and nine years of experience in human resources management.

The reasons for termination of employment of the head of the HRMS are the same as for other senior officials' positions: 1) expiry of his/her term of office; 2) resignation; 3) appointment as an office-holder in the Republican administration or in a provincial or local self-management body; 4) suppression of the position; 5) legally forced retirement based on age; and 6) written notice of termination of employment or dismissal. The reasons for dismissal may be the following: 1) conviction to a prison term in excess of six months; 2) the decision on a disciplinary measure for the termination of his/her employment has become effective; 3) assessment of his/her work as "unsatisfactory" in an extraordinary assessment procedure and the respective decision has become effective; 4) a measure recommending his/her dismissal taken against him/her by the Anti-Corruption Agency; or 5) any other reasons provided for by general labour regulations regulating the termination of employment, irrespective of the employee's and employer's will.

Budgetary resources are in general sufficient to allow the HRMS to carry out its basic responsibilities, but they are not sufficient for the development of its competences to their full potential. In order to overcome budgetary constraints, the HRMS has managed to attract donors' assistance in order to perform its core duties, and it has received significant donor support, especially with regard to civil service training.

4.11.2 High Civil Service Council

The High Civil Service Council (HCSC) has an important role to play in setting human resources management standards. It was established in 2006, on the legal basis provided by the CSA. The HCSC is in charge of designing criteria for the assessment of qualifications, knowledge and skills in the recruitment procedure, establishing requirements for selection of candidates for certain posts, and adopting the Code of Ethics of Civil Servants. The HCSC also has an important role to play in the process of recruitment of senior officials, as one of its members is always a head of commission for the recruitment of senior personnel. The Council comprises 11 members, who are appointed by the government for a period of six years. Five members are appointed, on the proposal of the Prime Minister, from among the experts working in the areas that are of importance for the work of the public administration. The other six members are civil servants appointed by the government, selected on the proposal of the Director of the HRMS. The head of the HCSC is chosen by an agreement of its members. As mentioned above, the HRMS staff provide technical support for the operation of the Council.

4.11.3 Appeals Commission

The Appeals Commission was also established in mid-2006 to ensure the review of administrative decisions concerning disputes arising in the area of personnel management within the civil service, including the police. The Commission is independent in its work and reports directly to the Prime Minister. It has eight members (plus the President of the Commission), who work in panels of three members each. At the beginning of the Commission's operation, the majority of appeals concerned the implementation of the Law on the Salaries of Civil Servants and the coefficients accorded to individual posts. The majority of appeals have been rejected and only 2% have been accepted. Civil servants have the right to bring an action against the decision of the Appeals Commission to the Administrative Court. However, it is expected that only around 10% of the cases will be taken to the Court, as most of the appeals do not appear to be legally sustainable.

4.11.4 Ministry of Public Administration and Local Self-Government (MPALSG)

The most important institution in charge of civil service policy development is the Ministry of Public Administration and Local Self-Government (MPALSG), which has the authority for the preparation of civil service reform programmes and for the drafting and implementation of civil service legislation⁷¹. The MPALSG has a special sector for labour relations in state organs, which is in charge of drafting civil service

⁷¹ Ministries of the Republic of Serbia Act, adopted on 1 August 2008, article 12.

legislation and the legislation concerning local government employees. Administrative inspection is also within the competence of the MPALSG, which is traditionally responsible for monitoring the implementation of public administration legislation. Therefore, the MPALSG also has a separate section on administrative inspection, which is in charge of controlling the implementation of the Civil Service Act (CSA) and other legislation pertaining to the organisation and structure of the public administration. The inspection process is performed in the following manner: if an administrative inspector identifies an illegality or irregularity in the implementation of laws, other provisions and general acts, he/she prepares an inspection report requiring a civil servant to comply with the findings of the report. In case of non-compliance with the report, an inspector may file misdemeanour charges against the official who did not comply with the report's requirements.

Prior to the 2005 reforms, the civil service was highly decentralised. Individual institutions were fully in charge of the recruitment process, which suited the tradition of strong ministerial autonomy and weak centre of government institutions and had an adverse effect on the creation of a comprehensive civil service system.

The reform process brought about the gradual centralisation of the recruitment process, exemplified in the centralised announcement of all civil service vacancies by the HRMS and its involvement in carrying out and monitoring the recruitment process. As will be discussed in more depth below, it is important to emphasise that individual ministries/agencies still had an important role to play in the recruitment and selection process, and the final decision on employment remained with the minister or head of institution.

Nevertheless, a high degree of centralisation of the recruitment process took away the discretion that ministries and other public bodies had enjoyed previously and resulted in resentment towards the HRMS. The general feeling was that recruitment procedures had become overly time-consuming and rigidly formalistic. In contrast to the previous, fairly rapid recruitment practices, the new recruitment procedures took quite a long time (sometimes up to five or six months), which was a source of frustration for both ministries and candidates. At times, recruitment provisions were interpreted in a fairly rigid way, which added to the already existing dissatisfaction. By way of example, the HRMS requested all candidates to provide written recommendations from their previous employers, which could be difficult or impossible to obtain, especially for civil servants who had worked in the former federal Yugoslav administration that no longer existed.

As a result, there was a natural tendency to resist the implementation of recruitment requirements and to develop a negative attitude towards the institutions that were responsible for their implementation, such as the Human Resources Management Service. At the same time, individual institutions were trying to find ways of circumventing the existing legal requirements. The way that was used the most often to avoid applying the civil service law provisions was to hire temporary personnel, who had the same rights and responsibilities as permanent personnel, but an employment contract of limited duration.⁷²

The amendments to the CSA adopted in December 2010 have reversed the centralisation trend and gradually returned to decentralisation of the recruitment process. Recruitment of executive positions has been decentralised, as individual institutions have been given the right to advertise vacancies. This change represents a return to the traditional, decentralised human resources management system, demonstrating that Serbian ministries still have quite strong autonomy, while the centre of government institutions are rather weak and often unable to impose themselves as viable co-ordinating bodies.

There is also a need to strengthen the capacities of HRM units in ministries and other agencies. Very often the number of civil servants in these units is quite small, which limits their potential and restricts the time at their disposal to deal with human resources development functions.

⁷² As an example, the Serbian Minister of Economy and Regional Development, Mladjan Dinkic, recently admitted that his ministry had the same number of permanent and temporary employees, around 150 in each category(!). He further argued that both categories of employees should have the same status during the planned reduction in the number of civil servants. This practice was later criticised in the first Regular Annual Report of the newly established State Audit Institution.

The legislation for reducing staff (Law on Determining the Maximum Number of Employees) was prepared by the Ministry of Economy instead of the Ministry of Public Administration and Local Self-Government (MPALSG). In a certain way this fact illustrates the unclear and scattered roles regarding the overall responsibility for civil service management. In this sphere, the policy-making, co-ordination and monitoring system include the MPALSG, the Ministry of Finance, the High Civil Service Council, the Secretary-General of the Government and the Human Resources Management Service (HRMS). Consideration is also being given to the creation of a directorate for administrative inspection to supervise the implementation of legislation related to the civil service – an administrative inspectorate is already foreseen in the Civil Servants Act, article 173. The risk of increasing confusion in this area is high and should be previously assessed. Furthermore, the functions regarding civil service policy design and policy implementation are currently completely separate and sometimes run in parallel. This separation creates problems related to the quality and coherence of both functions in an environment like the one in Serbia, where policy-making and policy implementation have traditionally remained together.

4.11.5 Role of Civil Service Trade Unions and Social Dialogue

The role of civil service trade unions in Serbia is fairly limited, both in the process of preparation of civil service legislation and in civil service management. The CSA and other legislation do not provide a specific basis for trade unions' participation in management. The role of the unions has not evolved over the last two decades, either in terms of their size and influence or in their participation in the reform and management of the civil service. Their current role therefore demonstrates continuity with the late communist period, when civil service unions did not have an important role to play in governance processes.

The role of civil service unions is the most visible in the context of setting wage levels, especially for employees of lower educational qualifications whose salaries are rather low. On several occasions trade unions have organised strikes in order to put pressure on the government to increase the level of their salaries. However, unlike large public sector unions (such as those for education and health workers), which have played quite an important role in recent years and have often succeeded in obtaining significantly larger salary increases, the civil service unions have not managed to have a great deal of success in raising the salary levels of civil servants.

Civil servants have the right to create and to be members of trade unions, which are recognised as social partners. Currently social dialogue is difficult at the national level, while at local level some agreements have been reached. The Ministry of Finance has the right to block the implementation of agreements, thereby creating frustration. At local level some agreements have also often been blocked for political reasons. Collective bargaining is regulated by the Law on the Social-Economic Council, but its implementation is poor. A commission to monitor the implementation of the law was never set up. The trade unions were involved in the 2010 downsizing of staff, and they are still contributing to a better implementation of this policy.

In order to gain political influence, some trade unions (e.g. Confederation of Independent Trade Unions of Serbia) are considering participation in political life and are looking for seats in parliament. This plan may create problems and simply reinforce attempts to manipulate trade unions for political purposes. A clear separation between political organisations and trade unions should therefore be preserved.

PUBLIC INTEGRITY

Main Developments since Last Assessment (May 2010)

1. Prohibition of plurality of offices (cumul des fonctions) and its reversal. The Law on the Anti-Corruption Agency, which entered into force on 1 January 2010, prohibits MPs from holding concurrently two or more public offices. The law set a transitional deadline of 1 April 2010 for all public officials, including MPs, affected by this prohibition to choose to keep only one of the positions held, the other(s) to thereafter be considered as incompatible. However, the Parliament adopted controversial amendments to the Law on the Anti-Corruption Agency according to which an official who had been elected to his/her position directly by citizens could perform several public functions without the consent of the Anti-Corruption Agency, except in cases of incompatibility of functions as defined by the Constitution. Currently, there is an estimated 5,000-6,000 persons holding at least two offices.

These amendments stirred a significant public and institutional debate. The Director of the Anti-Corruption Agency questioned the constitutionality of the amendments. In September 2010, the Anti-Corruption Agency lodged a legal action with the Constitutional Court requesting an evaluation of the constitutionality and legality of the amendments. In December 2010, the Constitutional Court held its session regarding this matter and decided to postpone its decision on this issue.

2. The issue of blank resignations is still unsolved. Another important matter regarding the integrity of MPs is the issue of blank resignations. This issue was also one of the key criticisms of Serbia by the European Commission in its 2010 Progress Report. In early 2011, the Speaker of Parliament announced that she intended to call an extraordinary parliamentary session at which blank resignations were to be abolished. It is unclear though what the impact of such an abolition could be. She also announced amendments to electoral laws and the regulation of co-operation with independent bodies and of all issues concerning the work of MPs. The Speaker also indicated that the adoption of a new law on political party financing would be one of parliament's priorities in 2011.

3. The issue of political party financing is not solved yet. Financial oversight responsibilities were transferred from the Electoral Commission and the parliamentary Finance Committee to the Anti-Corruption Agency. The Law on the State Audit Institution also gives authority to the SAI to audit political party financing. The Agency still does not have sufficient capacities and powers to oversee and monitor political party financing. Likewise, the SAI lacks staff and capacity to audit political party financing. The government has formed a working group to draft the new Law on Financing Political Activities. The draft law was finalised in December 2010 and is expected to be adopted by the government by February or March 2011 and passed by parliament in April 2011. According to OSCE and the Venice Commission the draft Law on Financing Political Activities is a step forward in creating a modern and comprehensive political financing system in Serbia, as the proposed model reflected the recommendations of the Council of Europe and the OSCE, although certain areas for concern still remain. These recommendations have been taken into consideration and incorporated into the latest version of the draft law, which was sent for consultations within the government at the end of 2010.

The key novelty of the draft law is that political parties are allowed to raise funds for their day-to-day work and for electoral campaigns without limitations, but sets limits to private donations. Private funding of political organisations, including membership fees, inheritances, legacies, property income and donations, is nevertheless subject to certain restrictions.

4. The practice of government accountability before parliament is improving, but the use of independent reports remains controversial. During the year 2010, parliament continued to hold special

sessions during which MPs had the opportunity to pose questions to ministers (on each last Thursday of the month). In the period from the beginning of January 2010 to the beginning of December 2010, MPs posed 82 questions to ministers and received 55 responses. The majority of the questions, however, concerned quite specific local problems rather than issues of general interest. Nevertheless, these sessions should be considered as a useful practice in parliamentary life.

In July 2010 new Parliamentary Rules of Procedure were adopted. These Rules of Procedure consolidate the existing instruments of control over the executive and further clarify legislative procedures. One of the most controversial provisions of the new Rules of Procedure gives parliament the authority to reject the reports of the Ombudsman and the Commissioner for Free Access to Public Information and Data Protection. This provision was severely criticised by the Ombudsman and by the Commissioner for Free Access to Public Information and Data Protection as an attempt to interfere with the functioning of their work as independent bodies. Of course the concern arises that the authority to reject the reports of independent institutions may unduly influence the work of these bodies. This provision has also been criticised by the European Commission and the Council of Europe as being in contradiction with European standards. As a result of the pressure of public opinion and of the European Commission, the Serbian Parliament is considering the repeal of the controversial provision in the Rules of Procedure. In this regard, the Speaker of Parliament made a statement to the effect that she would call for the provision to be repealed at the first session of parliament scheduled in February 2011.

5. The judicial reform conundrum is not sorted out yet. The independence of judges and prosecutors has been one of the key burning issues in the past year, due to the process of re-appointment of all judges and prosecutors, which was finalised in December 2009. The overall number of judges and prosecutors was reduced by 20-25%. More than 800 judges were not reappointed, out of a total of 3,000 judges and misdemeanour judges. Major aspects of the judicial reform have been a matter of serious concern. The reappointment procedure for judges and prosecutors was carried out in a non-transparent way, putting at risk the principle of the independence of the judiciary.

The right to appeal for non-appointed judges was limited to recourse to the Constitutional Court. Almost all judges whose tenure in office was terminated have filed constitutional appeals to the Constitutional Court. Altogether, more than 1,500 appeals were filed. To date only two of these appeals have been dealt with and the decisions of the High Judicial Council were revoked.

Following the critical remarks of the EC's Progress Report on judicial reform in Serbia, the Ministry of Justice decided to prepare a number of amendments to the judicial law package. These amendments were adopted by the government and sent through the fast-track procedure to parliament on 21 December 2010. The amendments were quickly adopted by parliament on 29 December, without consultation.

The amendments concern the appointment of the permanent composition of the High Judicial Council and the State Prosecutorial Council. According to the amendments, the process of appointment of a permanent composition of the Councils is to be completed in a very short period of time. Furthermore, the Councils are to take over from the Constitutional Court the review of appeals filed by non-appointed judges. Instead of a constitutional appeal, the amendments introduce a new legal remedy – "an administrative complaint to the High Judicial Council or to the State Prosecutorial Council" – which will be available to non-appointed judges or prosecutors. If the Council(s) rejects a complaint, the decision on the judge's/prosecutor's status will become irrevocable. The Ministry of Justice has claimed that these amendments have been approved by the Council of Europe and the European Commission.

The Associations of Judges and Prosecutors have criticised the amendments while they have stirred a wider public debate regarding their constitutionality and legality. More than 30 prominent law experts in Serbia (mostly university professors of constitutional law and legal theory) have signed and published an open manifesto to the public and to the highest authorities in which they have emphasised that the 2010 amendments to the judicial law package put in jeopardy the very concept of the rule of law and the legal system in Serbia.

6. Other actions having an impact on anti-corruption. In its 2010 Progress Report, the European Commission concluded that Serbia had made some progress in the fight against corruption. The

implementation of the GRECO recommendations of June 2006 has continued. Amendments to the Law on Civil Servants and the Law on Free Access to Information have introduced the obligation for civil servants to report corruption and have provided a certain protection from retaliatory measures. Also, the access to information has improved. With regard to the processing of corruption cases, quite good co-operation has been established between the police and the state prosecution. The implementation of the Action Plan for implementing the Anti-Corruption Strategy adopted in late 2006 has been slow. There has been little progress in the investigation and prosecution of corruption cases, with the number of final convictions remaining low, in particular in high-level cases.

On 6 December 2010 the Council of Europe's Group of States against Corruption (GRECO) published its Third Round Evaluation Report on Serbia, in which it acknowledged the authorities' efforts to comply with Council of Europe standards, but pointed out the need to fight corruption more actively and to strengthen the supervision of party funding, some defective criminalization of corrupt behaviours and the need to improve transparency in political finances. It is therefore essential to strengthen the capacities of the Anti-Corruption Agency. In addition, the current rules on transparency must be further developed, including through the better regulation of donations in cash and in kind, in particular for the use of public facilities. Moreover, it must be ensured that all political parties report on their financial situation and that these reports are made available to the public in a timely manner.

The fact that corruption is still one of the key problems in Serbia is demonstrated by the results of corruption perception surveys. A report on perceptions of corruption prepared by the TNS Media Gallup in March 2010 and released in May 2010 shows that the level of corruption perception has not decreased. The majority of respondents also believed that anti-corruption legislation was inefficient.

7. Anti-corruption Agency. The Anti-Corruption Agency has become operational and has started to perform most of its wide variety of functions. The Agency has received asset declarations from approximately 16,000 of the 18,000 officials who were required to submit such declarations. The Agency maintains an asset register on its website. However, it is not yet fully staffed and still lacks permanent premises and technical equipment. The Agency remains dependent on the co-operation of other state bodies and on the effectiveness of law enforcement authorities. Nevertheless, over the past year it has managed to ensure good collaboration with the Prosecutor's Office and the Ministry of Interior.

8. Whistle blowers and witness protection programme is starting. The amendments to the Law on the Anti-Corruption Agency adopted in July 2010 also concern the protection of whistle-blowers. According to article 56 of the law, a civil servant or other employee of a public body or local government unit who files a complaint to the Agency regarding a corruption-related case enjoys special protection by the Agency. The Agency is obliged to protect the anonymity of the complainant. The Director of the Agency is obliged to prepare specific guidelines on how this process is to be regulated.

9. Powers of the Commissioner for Access to Information of Public Importance and Personal Data Protection have been strengthened. The Commissioner for Information of Public Importance has managed to enlarge its legal competences regarding the enforcement of its authority, which is an important improvement. On 29 December 2010 the Parliament adopted amendments to the Law of Free Access to Information of Public Importance, whereby the Commissioner's decisions are to be binding, final and enforceable by coercive means (coercive action or fines, as appropriate), in accordance with the law pertaining to general administrative proceedings. The government is to assist in the administrative enforcement of such decisions by taking actions to ensure compliance with the Commissioner's decisions.

10. Ombudsman. In May 2010, the Ombudsman published its report for 2009⁷³. The general assessment of the Ombudsman was that the respect of citizens' rights by the state administration and its relations towards citizens and their rights in general could not be considered to be satisfactory. Some of the key problems, in the Ombudsman's view, are the very weak capacities of individual civil servants and the lack of accountability for the performance of their duties. Looking at the structure of the complaints filed, it

⁷³ 2009 Report of the Ombudsman (Protector of Citizens), available at http://www.ombudsman.rs/index.php/lang-sr_YU/izvestaji/godisnji-izvestaji/884-annual-report-2009.

may be concluded that some civil servants are not familiar with the basic elements of the legal system and with the general regulations governing the operation of administrative authorities. An even greater problem is the fact that such employees are hardly ever sanctioned or removed from the civil service.

11. Anti-corruption Council. The Council has continued to contribute to the fight against corruption by awareness-raising. In this regard, on 11 January 11 2011, the Anti-Corruption Council sent a letter to the Serbian President specifying cases of corruption faced by foreign investors in Serbia and cites the examples of certain privatizations which are, in the Council's view, only the tips of some of the outstanding problems faced by foreign investors in Serbia.

Main Characteristics

1. Generally failed anti-corruption efforts since the political transition in 2000. A National Anti-Corruption Strategy was adopted in late 2005 by the Serbian National Assembly. The Strategy was complemented by an Action Plan, adopted in late 2006. The Strategy and Action Plan have remained on paper only. The government's anti-corruption activities have for the most part been geared towards passing laws – generally of poor quality and consequently difficult to implement – which have led to ineffective practical work by government bodies.

Political corruption as a policy issue remained unaddressed until 2008, when the current government was established, as previously no official in power had been truly interested in anti-corruption policies. The economic crimes committed during the Yugoslav wars of the 1990s and the massive and forced changes in property ownership have never been investigated or prosecuted, however. A major hope in the fight against corruption is currently embodied by the Anti-Corruption Agency, which started its operations in January 2010.

In December 2010 the government adopted an action plan for the fulfilment of priorities to meet the criticisms of the EC's November 2010 Progress Report, "with the aim of accelerating the achievement of candidate country status". This action plan contains some measures related to the fight against corruption. The plan seems to have been hastily prepared and the result is a rather mechanical list of "quick-fix" solutions.

Explanations for the failed anti-corruption efforts since the fall of the previous regime on 5 October 2000 cite several reasons. In particular, two key political dynamics lingering from the past should be considered as the backdrop for the current corruption as well as the anti-corruption discourse and policies. The first dynamic is the overwhelming dominance of political parties, which has led to the common use of the term *partitocracy* (or *oligocracy*) to describe the Serbian public life. The second important dynamic is the incomplete break with the Milošević era on a number of fronts, including the area that is relevant here, the financial elites that have somehow captured the state. The above two lingering political dynamics also represent key limitations to the political will to fight corruption in Serbia.

Surveys consistently demonstrate that perceptions of corruption are significantly higher than citizens' experience of it, and that, while the experience of administrative corruption in the daily lives of citizens may not be particularly high, it does play a more significant role in business. Political influence in particular is perceived as being present. The domains in which the situation is most critical are political corruption, corruption in public procurement procedures (which represents a large black hole for political party financing), operations of local governments (especially in the area of urbanism, construction licensing, and bribes that businesses have to pay for various types of inspections), the functioning of the judiciary (exemplified in political influence that results in the selective application of the law to individuals), as well as the health and education sectors, which have been exposed to widely publicised corruption scandals in recent years.

2. Corruption Prevention and its institutionalisation are improving. The Anti-Corruption Agency (ACA), an independent body governed by a Board and a Director and reporting to Parliament, is currently engaged in several meaningful anti-corruption prevention endeavours, such as the elaboration of integrity plans, whistle-blower protection, controls on political party financing and the prevention of conflicts of

interest (including the elected politicians). The ACA has also initiated some policy proposals to amend fundamental legal instruments, such as the penal and criminal procedure codes. It furthermore plans to engage in extensive analyses of specific sectors or processes that have a high risk of corruption, as identified through complaints and reports received by the Agency itself and by other state institutions. Other topics under consideration include the analysis of the level of discretionary rights in the public administration, as discretion in public decision-making is considered to be too high.

This line of work of the ACA could constitute an important contribution by the institution to the national anti-corruption effort, as diagnostic systems analyses related to corruption are overall quite limited, while the range of possible topics is nearly endless. More emphasis on policy recommendations would also be welcome, as the current dominant practice is to draft laws rather than to define desired policy outcomes before selecting the precise instruments and systems needed to implement and achieve them. The Agency also plans to undertake some quantitative research, such as the perceptions of corruption among state employees. Current capacities appear to permit no more than two annual in-house research efforts, but the scope of research could be considerably extended through external co-operation.

The Anti-Corruption Agency appears to have set off to a good start. There are many positive signs, including a gradual and strategic commitment, while it develops its capacities. It is questionable, however, whether the Agency will be able to carry out all of its assigned tasks, especially before it has developed its operational capacities, which will require time. There were, and still are, concerns about whether it is a good idea to have such a large body – and such a large number of responsibilities concentrated in a single institution – rather than several smaller-scale institutions.

For the time being, the ACA has done a number of things right. One achievement that should not be underestimated is the establishment of good relationships with other institutions, particularly law enforcement bodies, and with the Ombudsman, which is the institution responsible for identifying problematic sectors by means of an analysis of complaints received and for forwarding this information to the Agency. There are still more opportunities for co-operation, however. For instance, the Ombudsman has developed a draft code of good administrative behaviour, which has been forwarded to parliament. This is an example of an initiative that might have been strengthened through co-operation, or at least co-ordination with the Agency. Such codes should function in tandem with, and reinforce, other efforts, such as integrity plans. The hope is that in time, as the Agency builds its profile and reputation, it will be seen as a partner for such joint initiatives, and that the fight against corruption will be considered as an integral part of good governance and, more broadly, of good public management.

Similar opportunities for advancing a joint agenda may exist with a number of other bodies, particularly oversight bodies, such as the various inspections taking place under the auspices of the Ministry of Public Administration and Local Self-Government (MPALSG), the Tax Administration, the Commissioner for Access to Information of Public Importance (in promoting transparency in the public administration, for example), and others.

One issue for concern is the insufficient appreciation of the importance of public support for an institution such as the Anti-Corruption Agency and the difficulty in garnering such support in Serbia. While it is acknowledged that communicating the importance of preventive functions in the fight against corruption is difficult and that the general popular feeling in Serbia is that fighting corruption means arresting people, a strategy to counter this perception needs to be worked out more resolutely. Coupled with the apparent decision to begin the fight against corruption by using the tactic of constructive commitment and co-operation, there does appear to be a risk that the Agency will not be perceived as important or genuine and that it may fail to obtain the public support that would be needed if it were to come under attack.

The progress in developing the national integrity system over the past months has been mixed. There has been a deterioration regarding the regulation of the conflict-of-interest provisions for MPs. On the other hand, important progress has been made with respect to drafting a new law on financing political parties, which still has to be passed.

The institutional framework for fighting corruption is in place with the Anti-Corruption Agency becoming operational and other anti-corruption institutions continuing their work without any major difficulties. However, corruption remains a serious problem. It is still considered by many national and foreign observers as the third most pressing problem in Serbia, after unemployment and poverty. Public procurement continues to be one of the major sources of illegal funding of political parties and of the illegitimate personal enrichment of public officials.

There is an obvious need to strengthen the capacities of independent institutions, such as the Ombudsman and the Commissioner for Access to Information, and to provide an adequate framework for establishing and ensuring the independence of judges and prosecutors, after having strengthened the capacity of the police and other bodies to investigate corrupt activities and organised crime.

Reform Capacities

1. The capacity of the government to undertake effective measures for the protection of the public integrity system appears to be limited by the entanglement between politicians, political parties, business interest and unclear media ownership. However, the current government has shown its commitment to putting in place mechanisms that could, if appropriately implemented, underpin a better public integrity system.
2. The Anti-corruption Agency, which is it hoped will be one of the main engines of reform, has been entrusted with numerous and heavy responsibilities on many different fronts, with a number of prevention instruments geared to promoting integrity in the state and local government institutions, where managerial capabilities are weak. On the suppression side, the ACA may face difficulties, due to the scarcity of resources for carrying out investigations and verifications of assets declarations. The ACA will also need to strengthen its policy analysis and policy proposal capabilities.
3. The suppression side of anti-corruption is weak. In particular, the judiciary and the prosecutorial services remain weak in terms of resources, and lack social prestige. The Ministry of Justice, which was supposed to be the main engine for the reform in this field, has failed, and it will now be very difficult to reorient the reform of the judiciary and prosecution.
4. The political incentives for reform are unclear, as social tolerance to corruption is, for the time being, still significant. However, this situation is evolving in a positive way. Furthermore, a national consensus on NATO and EU membership has not yet been built. In other countries, such a consensus has proved to be one of the main drivers for reform and has set the direction for the reforms. Better understanding of the issues at stake and more work is needed to ensure that Serbia follows resolutely the path of reforms required for membership of Euro-Atlantic institutions.

Recommendations

1. The Constitution needs to be made more democratic to ensure that the division of powers is better protected and that constitutional control mechanisms – for political and administrative control as well as control exercised by citizens – are more effective.
2. The capacities of the National Assembly in particular need to be developed so that it is able to effectively control the government.
3. While priority should be given to actions with a multiplier effect, any policy or action that could directly or indirectly contribute to unravelling the current entanglement of politics, business interests, media ownership, and political party financing should be resolutely undertaken.
4. The system of administrative checks and balances should be strengthened by reinforcing the legal competences and means of independent bodies, particularly those whose main purpose is the

promotion of transparency in public life, namely the Commissioner for Access to Information and the Ombudsman.

5. The capacity of the Anti-Corruption Agency needs to be increased in terms of staffing, financial resources, and premises, to enable it to handle the numerous competences and tasks that it has been assigned. Ensuring the success of the Anti-Corruption Agency should be considered as being in the national interest. The legal standing of the ACA should be reinforced by giving it constitutional standing and making it less dependent on changing political majorities.
6. The institutional capacity in ministries and parliament needs to be strengthened in order to produce policies and regulations, including laws, of better quality, to facilitate implementation and to ensure respect for the rule of law and the principle of legality.
7. Any policy or action geared towards promoting the confidence of citizens should be undertaken; and this should be seen as a central public policy of the state. Public trust in the role of the law and in public governance institutions needs to be given greater importance. It is indispensable to lawfully treat and respect individual rights.
8. Likewise, any policy or action aimed at recovering the trust of citizens in the judiciary, prosecution services and the police should be undertaken. The effective design and management of these bodies require merit-based management, accountability and transparency.
9. The public management system in state and local governments needs to be professionalised by introducing merit-based management mechanisms, so that integrity plans and ethical and democratic values are integrated into the everyday life of public institutions. Professionalisation of these institutions and of their management cannot be dissociated from strengthened accountability mechanisms concerning all public officials, including politicians, as well as all public servants.

1. Anti-corruption Policy

1.1 Anti-Corruption Policies and Strategies

A National Anti-Corruption Strategy was adopted in late 2005 by the National Assembly. The Strategy comprised three key elements: a) efficient enforcement of anti-corruption legislation, b) prevention of corruption by reducing or eliminating opportunities for corruption, and c) awareness-raising and education of the general public aimed at ensuring public support for the implementation of the Anti-Corruption Strategy.

The main reform areas that were identified in the Strategy included the political system, the judiciary and police systems, the public administration, the public finance system, the economic system, the media, and the participation of civil society in the fight against corruption. The objectives of the Strategy were to reduce corruption to levels comparable to those in neighbouring countries and to improve the overall efficiency of the public administration in order to facilitate economic development and foster foreign direct investment. The Strategy was complemented by an Action Plan adopted in late 2006.

The implementation of the Strategy and Action Plan remained on paper only, mainly due to a lack of clear political commitment of successive governments to pursue an anti-corruption agenda. In fact, in its 2009 Progress Report on Serbia, the European Commission concluded that the Action Plan for implementation of the Anti-Corruption Strategy had not been implemented⁷⁴. In 2007 the Centre for Liberal Democratic Studies in Belgrade had also concluded that, five years after the changeover from the previous regime in 2000, "corruption [was] still a widespread and dangerous phenomenon in Serbia. The study has also shown that the government anti-corruption activities were mostly normative, i.e. legislative, with weaker practical work of the government bodies"⁷⁵.

In the same vein, on 13 March 2009, on the occasion of the presentation of its 2008 report, the Ombudsman made a devastating statement concerning Serbian anti-corruption strategies and action plans: "All the councils, strategies, action plans or agencies deployed in the fight against corruption have not made the slightest impression on the Serbian population thus far. Mal-governance, the breeding ground of corruption, is experienced as still being widespread." This statement was reminiscent of the one already made in 2002 by former European Commissioner Chris Patten: "You can't have a process where Balkan countries pretend to reform and we pretend to believe them."⁷⁶

In December 2008 the Law on the Anti-Corruption Agency (ACA) was passed; the Anti-Corruption Agency was established in mid-2009 and started its operations in January 2010. Since that date the anti-corruption effort seems to have taken on a better pace, although much remains to be done, as will be described in this report. The ACA is trying to activate some sectoral plans contained in the 2006 Action Plan (e.g. concerning the police or construction and urban planning), which ideally will lead to the development and application of sectoral or process-specific remedies or to certain instruments (e.g. integrity plans). Nevertheless, most of the measures contained in that Action Plan need to be reviewed.

This 2005 Anti-Corruption Strategy was an offspring of a specific political discourse. Since the fall of the previous regime on 5 October 2000, the anti-corruption political discourse helped to promote a sense of identity for the newly established democratic ruling coalition and to push forward democratic reforms. It was in this context that an advisory Anti-Corruption Council to the government was created in 2001. The Council contributed to raising awareness of the problems associated with corruption and to encouraging the enactment of several pieces of legislation related to the fight against corruption (public procurement in 2002, with major amendments in 2004; financing of political parties in 2003; prevention of conflict of

⁷⁴ European Commission (2009), *Serbia 2009 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges 2009-2010*, Brussels, 14.10.2009, SEC (2009) 1339.

⁷⁵ Begovic, Boris and Bosko Mijatovic, eds. (2007), *"Corruption in Serbia Five Years Later"*, Centre for Liberal Democratic Studies, Belgrade.

⁷⁶ <http://news.bbc.co.uk/2/hi/europe/2509811.stm>

interest in 2004; new Penal Code in 2005 and new Criminal Procedural Code in 2006). Several of these pieces of legislation were of poor quality and displayed significant loopholes, which led to ineffective implementation.

The political discourse had a prescriptive thrust and focused on administrative corruption much more than on the privatisation process, which was at the origin of most cases of political corruption. Between 2004 and 2008 political attention was turned to disputes on nationalistic politics and to the questioning of EU membership aspirations. This political climate led to two general elections during that period and to a referendum on the 2006 Constitution, which was tainted with irregularities and carried out in the midst of fiery nationalistic discourses.

This political climate notwithstanding, a number of measures were taken between 2000 and 2010 aimed at improving the performance of the police and of judicial authorities in charge of corruption cases, including the strengthening of judicial and police institutional frameworks and the training of their staff.

With regard to the strengthening of institutional frameworks, improvements were also made within the Ministry of Interior. It strengthened the capacities of a Special Police Unit for Combating Organised Crime (SBPOK, established in 2001), which has an Anti-Corruption Department. Furthermore, the Office of the Inspector-General of the Ministry of Interior (established in June 2003), which has the power to conduct investigations into alleged corruption and other misconduct of staff, was strengthened and transformed into the Internal Control Sector in 2007. In the same year, the Special Investigative Techniques Service was provided with additional technical and human resources.

In 2008 the prosecutorial services were strengthened by the establishment of the Special Department for Combating Corruption within the Public Prosecutor's Office to deal with corruption offences, including economic crimes linked to corruption. The work plan of the Special Department includes the implementation of specific measures to articulate co-operation between the police and prosecutors. The Department is also authorised to monitor the application of corruption-related provisions at local level in order to ensure uniformity and consistency in implementation, as well as to provide specialised assistance and expertise in the fight against corruption. Regional anti-corruption departments have also been formed in the District Public Prosecution Offices in Belgrade, Novi Sad, Niš and Kragujevac.

A number of training courses on anti-corruption measures have been conducted by the Judicial Training Centre (transformed into the National Judicial Academy by a law of December 2009), with special seminars for judges and prosecutors on topics such as special investigative actions and the use of evidence and measures in combating corruption, challenges and good-practice examples in combating corruption, organised crime and money laundering. Following the adoption of the Criminal Procedure Code in 2006, the Judicial Training Centre organised a number of seminars and training courses aimed at building the capacity of judges, prosecutors and the police in the various phases of corruption cases. Since 2007 the Judicial Training Centre (now the National Judicial Academy) has included the topic of combating corruption in its regular training programme for judges, prosecutors and police officers.

Nevertheless, as corruption had been used as a political weapon among political competitors, the government considered it necessary to relay a public signal on this issue. That gesture was the Anti-Corruption Strategy of 2005 and its Action Plan of December 2006, which emphasised national economic development and insisted on comparison on this issue with neighbouring countries rather than with EU Member States. This standpoint was consistent with the fervent nationalistic mood that prevailed when the Strategy was elaborated. Amidst this climate of profuse usage of corruption scandals as a political weapon, the 2006 Constitution gave constitutional status to the prohibition of conflict of interest (article 6).

Political corruption as a policy issue was not really addressed until 2008, when the current government took office, as previously no official in power was interested in anti-corruption policies. The economic crimes committed during the Yugoslav wars of the 1990s and the massive and forced change in property ownership have never been investigated or prosecuted. The responsibility of individuals who financed that conflict and benefited from it has been addressed neither in Serbia nor in any other former Yugoslav country. Consequently, corruption and post-war profiteering through privatisation and the international

criminalisation of the Serbian State did not rank as negative on the scale of morality as did the accusations of betrayal of the motherland or human rights violations⁷⁷.

In December 2010 the government adopted an action plan for the fulfilment of priorities to meet the criticisms of the EC's November 2010 Progress Report, "with the aim of accelerating the achievement of candidate country status". This action plan contains some measures related to the fight against corruption. The plan seems to have been hastily prepared, and the result is a rather mechanical list of "quick-fix" solutions. However, it has the advantage of being announced in the media and presented as a genuine commitment of the government to undertake reforms. A different matter is whether this kind of approach contributes to convincing the public of the authenticity of the government's commitment. Perhaps in the end these approaches are also detrimental to the public's appreciation of the prospect of Serbia's EU membership, which in fact has diminished in recent opinion polls.

A major hope in the fight against corruption is currently embodied by the Anti-Corruption Agency, which started its operations in January 2010. The Agency's efforts on this front signify that for the first time state institutions are reminded of their obligations under the National Anti-Corruption Strategy of 2005 and its 2006 Action Plan. The Agency has renewed, or perhaps established for the first time, the significance of these instruments by requiring quarterly reports on the status of implementation of the Action Plan. Until the past year, only a few institutions appeared to have been aware of, or taken seriously, their obligations under the Strategy and its Action Plan. The one institution that appears to have been a positive exception to this general trend is the Ministry of Interior. The Agency intends to issue an annual report on the implementation of the National Anti-Corruption Strategy by the end of March 2011, which will further raise the profile of these obligations. It remains to be seen whether there will be any consequences for poor performers, however, as the Agency has no particular sanctions at its disposal on this matter. It is hoped by Agency staff that the public "naming and blaming" of non-compliant institutions will suffice for the time being.

The Agency's annual report will also assess the possible need to update the Action Plan. While the need for updating is obvious in some respects (e.g. in view of the fact that most deadlines for measures have long expired), updating the actual measures is a far more serious endeavour and one that deserves serious consideration in view of the Agency's other ongoing activities and still-limited capacities. It may be worth noting that there is no publicly available information on sectoral anti-corruption action plans, even from institutions that are otherwise making a significant effort to proactively publish information on their performance (e.g. the police). It is unclear whether this is a deliberate choice or simply an oversight, but it does give the impression that institutions are reluctant to publicise their anti-corruption efforts – other than arrests for corrupt conduct – which perhaps reflects a broader lack of appreciation in Serbian society of the importance of preventive measures.

The domains in which the situation is still most critical are political corruption, corruption in public procurement procedures, operations of local governments (especially in the areas of urbanism, construction licenses, and bribes that businesses have to pay for various types of inspections), the functioning of the judiciary (exemplified in the political influence that results in the selective application of the law to individuals), and perhaps to a lesser extent, the health and education sectors, which have been exposed to widely publicised corruption scandals in recent years.

1.2 Lingering Political Dynamics Influencing Corruption and the Perception of Corruption in Serbia

Most public allegations of corruption do not result in legal proceedings or other sanctions. There are a number of possible reasons for this situation: in some cases, allegations are essentially unfounded and are motivated by opposing political interests; allegations may be unfounded because they are based on incomplete information, a poor understanding of an intricate regulatory system, or insufficient evidence

⁷⁷ Zurnic, Marija (January 2011), "Corruption in Serbia", Nottingham University [paper prepared in the context of the SIGMA project on "Civil Service Professionalisation in the Western Balkans"].

available concerning the actual action that took place; sometimes the behaviour or action, which may be morally reprehensible, is not illegal as such; the extensive criminalisation of corrupt behaviour, coupled with often vague legal descriptions, requires strong evidence for criminal courts to issue guilty verdicts, whereas actions are difficult or even impossible to detect and prove in a court of law, and therefore potential investigations lead nowhere; finally, law enforcement bodies are often under pressure to not pursue sensitive cases.

There is evidence that of all of these factors are at play in Serbia, which suggests that while perceptions of corruption may be somewhat exaggerated (see below), they are not unfounded. In particular, there are two key political dynamics that should be considered as the backdrop for the current corruption and for the anti-corruption discourse and policies in Serbia: the dominance of political parties and the capture of the state by financial elites.

1.2.1 Dominance of Political Parties

One key political dynamic in Serbia is the dominance of political parties and political party leadership in the political life of the country, which gives rise to the term that is now common, *partitocracy* or *oligocracy*⁷⁸. This dominance is made possible by the existing electoral system and informal restrictions on parliamentary mandates. Serbia has a fully proportional system, with closed electoral lists in a single electoral district. This system allows political party leaders complete discretion in selecting any candidate from the electoral list to take the seat won in parliament, thereby exercising enormous influence on these candidates. This practice was declared unconstitutional by the Constitutional Court in 2003, which provided a more democratic interpretation of article 102 of the Constitution. The practice continued, however, especially with regard to small parties. The political future of party activists is in the hands of the party leaders, who reward them with executive or legislative positions mainly on the grounds of influence or loyalty. In such a system, electoral candidates do not have a particular connection to voters and hence they have little or no incentive to carry out electoral campaigns. This disconnection from the voters does not provide much opportunity for individual candidates to gain popularity (hence influence and legitimacy) directly from the voters so as to counterbalance the influence of party leaders.

The problem has been further compounded by the well-known practice of political parties requiring their parliamentary candidates to submit blank resignation letters, which could be activated by party leaders at any moment as punishment for disobedience, a practice that was declared unconstitutional in 2010. This system has created a situation whereby MPs (and municipal assembly representatives) are completely dependent on their party leaders, which undermines the possibility of acting independently and exercising oversight over the executive. Parliament functions principally as a legislative factory, where debate is largely meaningless as votes will be cast according to the directives of political party leaderships. As a result, there is a strong dominance of the executive and a concentration of power in party leaderships. The effects of this situation are felt in a number of sectors and regulatory regimes considered in this report, particularly in parliament and in the judiciary.

1.2.2 State Captured by Financial Elites

The second important political dynamic to consider is Serbia's incomplete break with the Milošević era on a number of fronts, including that of financial elites, which is relevant to this assessment of the public integrity framework. Beyond any speculations, there is extensive evidence of the unsavoury origins of the initial capital ("the first million") acquired by many of Serbia's tycoons. Most of these individuals acquired their initial capital during the Milošević era, when they represented or served the system in various business transactions or were allowed to conduct business under extremely favourable conditions, presumably in exchange for support of the Milošević party or of the Milošević family and associates. There are also compelling suspicions that these key businessmen quietly began in the late 1990s to finance the opposition in parallel, thereby ultimately finding themselves on the "right side" after 2000. No definitive evidence exists, but off-the-record conversations and occasional public statements by "disobedient"

⁷⁸ Petrovic, Marko (2005), "2006 Constitution of the Republic of Serbia as a Legal Framework for Party Oligocracy" in: *Facta Universitatis*, Series Law and Politics, Vol. 3, No. 1, pages 17-24.

politicians strongly suggest that the practice of providing funds to both sides – the ruling parties and the opposition – has continued to this day.

In the meantime, the businessmen in question had the opportunity to invest the questionable “first million” in numerous opportunities that opened up as from 2000, including in some of the most important privatisations of state property. Privatisation beneficiaries in Serbia, as elsewhere in the region, also include individuals with even more unsavoury biographies, including links to organised crime and to war crimes. In summary, these few individuals are the main financiers of political parties and electoral campaigns, wielding tremendous influence on the political life in the country, both within the government and with the opposition. For this reason some activists claim that Serbia does not really have an opposition. The situation is further compounded by their influence on the media, as either owners or advertisers.

The above two lingering political dynamics also represent key limitations to the political will to fight corruption in Serbia, where it is difficult to imagine any politician who would promote proceedings against his/her main financial benefactor⁷⁹. In addition, these dynamics give rise to a number of secondary phenomena that impact on corruption. For instance, Transparency Serbia warns of a recent trend of establishing new regulatory bodies with an unclear constitutional status that would exempt them from having to meet the requirements of the public administration regulations, particularly in terms of staffing, financial control and external audit. These bodies are seen, at a minimum, as job-creation mechanisms for allies, but it is feared that their uncertain status – in particular the lack of oversight mechanisms – opens additional corruption risks⁸⁰.

More research into this phenomenon is needed, and some additional analysis is expected from Transparency Serbia’s forthcoming National Integrity System study, due in May 2011. The study will cover a wide range of institutions and regulatory processes – referred to as the “Pillars of Integrity.” It is also likely to provide additional insight into other trends influencing corruption on which no research is currently available: for instance, the unintentional negative consequences of decentralisation, which has resulted in the devolution to local authorities of a number of competencies for which they have no capacities, including public procurement and urban planning. Poor implementation capacities represent one of the key corruption risks concerning those processes.

According to van Duyne, it is a well established assumption that *“when democratic control procedures are weak, multi-party states tend to slide back to the feudal rewards system in which the role of the lord is replaced by that of the party: if in power it rewards its retainers by dispensing them positions with income (or power) as if they were ‘fiefs’. However, the parties themselves are dependent on funds from trade and industry or, rather, leading businessmen. This mutually beneficial dependency is strengthened by changeovers of the actors: businessmen entering parliament (immunity included) and politicians finding well-paid jobs in corporations. This is the ‘feudal’ socio-political situation in Serbia, as described by Pesić”*⁸¹. Foreign investors face difficulties in this “feudal” political climate, as the Serbian Anti-Corruption Council indicated in a letter to President Tadić dated 30 December 2010, in which the Council presented to Tadić information on cases reported to it by foreign investors, who had pointed to typical mechanisms of system-based corruption that foreign companies were facing when trying to invest in Serbia⁸².

1.3 Perception of Corruption

Citizens have the perception that corruption in Serbia is at a high level. According to the findings of the 2010 Transparency International Global Corruption Barometer (released in December 2010), nearly half of

⁷⁹ For a documented discussion on state capture in Serbia, see: Pesić, Vesna (April 2007), “State Capture as the Cause for Widespread Corruption in Serbia”, Central European University-Centre for Policy Studies and Open Society Institute, Budapest. In this document the situation of Serbia is described as a “feudal socio-political situation”.

⁸⁰ For a discussion on Serbia’s state organisational policy, see SIGMA’s 2011 assessment report on Public Service and the Administrative Legal Framework.

⁸¹ Van Duyne, Petrus C. (2010), “Searching for Corruption in Serbia”, *Journal for Financial Crime*, Vol. 17, No. 1, pages 22-46.

⁸² See B92: http://www.b92.net/eng/news/politics-article.php?yyyy=2011&mm=01&dd=12&nav_id=72065

the population believes that the level of corruption has increased over the past three years, with 25% of respondents indicating that it has increased “a lot” and 23% “a little.” An interesting part of the analysis compares these perceptions to citizens’ reported experience of corruption. In the same survey, 17% of citizens reported that a member of their household had given a bribe over the last 12 months in dealings with the institutions surveyed (education, judiciary, medical services, police, registry and permit services, utilities, tax revenue and customs). This figure is (insignificantly) lower than that of the previous year (18%) and, as is typical around the world, significantly lower than (less than half) the perceptions of corruption overall reported in the same survey.

There have been no major changes from the previous two years in citizens’ perceptions of the institutions that are the most corrupt, with only slight improvements registered with regard to civil servants, the judiciary, the media and the private sector. Parliament also registers a very small improvement, while political parties are the only institution to register a small decline.

These findings are broadly consistent with a TNS Media Gallup survey conducted in March-July 2010, which records 16% of the respondents admitting to have given a bribe and 33% acknowledging a cousin or friend who had given a bribe. Nearly 90% of respondents perceived corruption as a common practice. The majority of respondents also considered that anti-corruption legislation was inefficient and that the government and the police were the institutions that had the means to eradicate corruption. In addition, more than half of the respondents agreed that bribery was sometimes the only way to bypass the bureaucracy or unfair regulations.

A November 2010 survey among representatives of small and medium-sized enterprises and entrepreneurs carried out for the Serbian Chamber of Commerce by CeSID, a local NGO, provided a slightly different perspective. While a total of 48% of the respondents were dissatisfied or very dissatisfied with the work of the government in the area of economy and business (with an additional 31% neither satisfied nor dissatisfied), only 2.6% cited the government’s promotion of or failure to reduce corruption as the main reason for their dissatisfaction. Incongruently with these findings, “widespread corruption and bribery” were identified as the third most important obstacle to the development of the economy in general (rated 61.3 on a scale of 1 to 100) and were seen as the most important obstacle personally by 18.5% of respondents (the second most popular response, just behind “excessive taxes and levies for private business”, identified by 20.4% of respondents). More than three-fourths of the respondents acknowledged an influence of politics on the economy, with 29% of respondents stating political influence as decisive, 45% identifying it as existing “to a significant degree”, and another 10% viewing it as being present “to a small degree.”

On specific, corruption-related issues, more than half of the respondents acknowledged that corruption hampered their business (19.4% “a great deal” and 32.8% “somewhat”). When asked about experience with “lower-level” corruption, defined by the survey as “personal contacts which facilitate doing business more easily,” and “higher-level” corruption, defined as “giving and taking of bribes,” nearly 40% acknowledged having engaged in “lower-level” corruption (10% “regularly” and 29% “seldom”), while less than 30% reported having engaged in “higher-level” corruption, with the following distinctions: 5% had given bribes and 22% had provided offerings of low value (coffee, sweets, drinks). When asked whether they would engage in corruption in the future, 3% of respondents admitted that they would “always” because getting the job done was of paramount importance and 24% stated that they would if it saved them time and effort; 51% claimed that they would refuse, under any circumstances, while interestingly, 22% refused to respond or even consider the issue.

These three surveys consistently demonstrate that citizens’ perceptions of corruption are significantly higher than citizens’ experience of it, and that, while the experience of administrative corruption in the daily lives of citizens may not be particularly high, it does play a more significant role in business. Political influence is perceived as being particularly present. Research on the topic suggests that the discrepancy may be attributed to frequent media reports alleging corruption, including more in-depth investigative reports on high-level or political corruption in large privatisation /sales /concessions /construction deals, including reports issued by the Anti-Corruption Council and independent media.

The imbalance between perceived and “real” corruption is a way of presenting corruption as relentless despite constant anti-corruption activities. On a national scale the *under-reform trap*⁸³ and the crisis of legitimacy create more opportunities for corruption. In Serbia the ruling coalition parties have allocated among themselves the control over the various sectors of the economy. They can influence the perception of corruption and benefit from mutually accorded corruption scandals. This situation is favourable to the financial elite and further strengthens the capture of the state. It also produces more corruption and worsens citizens’ perception of it. The “under-reform trap” results in a unreformed and unprofessional public sector, which is at the origin of the absence of hard data on “real” corruption. It also ensures the flow of foreign financial aid to support reforms⁸⁴.

2. Prevention of Corruption

2.1 Anti-Corruption Agency (ACA)

The Anti-Corruption Agency (ACA), established by the December 2008 Law on the Anti-Corruption Agency⁸⁵, started its operations in January 2010, and most of the year was spent in recruiting staff and setting up operations. The ACA was initially envisaged to have up to 150 staff, but this number was subsequently reduced to 97; in February 2011 the Agency has 57 staff. It has developed its internal structure and defined staffing needs in an internal systematisation table, which was updated in July 2010. The main constraint in reaching the full staffing level is the lack of office space, with the Agency still operating in temporary premises due to delays in the renovation of its designated permanent home.

The ACA is an independent state agency, reporting to parliament, which is responsible for a wide range of preventive anti-corruption competences, including those of the former Committee for Resolution of Conflict of Interest, to which responsibilities on auditing political party financing have been added. The ACA is entitled to make policy proposals for introducing or amending legislation on preventing and combating corruption. The ACA has strong sanctioning powers with respect to cases of conflict of interest⁸⁶. It is questionable, however, whether the Agency will be able to carry out all of its assigned tasks, especially before it has developed its operational capacities, which will require time. There were, and still are, concerns about whether it is a good idea to have such a large body and such a high number of responsibilities concentrated in a single institution rather than distributed among a number of different smaller-scale institutions⁸⁷. The management of the ACA is comprised of the ACA Board and the Director, who is appointed by the Board. On 18 March 2009 parliament appointed the members of the Board⁸⁸.

The Agency is organised in four departments, as follows: 1) Prevention: education, integrity plans, strategy implementation, research and relations with the media and civil society, and conflict of interest; 2) Control: asset declarations and financing of political parties; 3) Operations: maintenance of registers and receipt of complaints; 4) Administration: human resources management, finances, information technologies, registry

⁸³ “Full democracies have usually undertaken advanced market reform, while semi-democratic states have usually pursued limited reform, and real dictatorships have done little reform [...]” in: Asland, Anders, Peter Boone, and Simon Johnson (2001), “Escaping the Under-Reform Trap”, IMF Staff Papers, Vol. 48, Special Issue, p. 93.

⁸⁴ Zurnic, op. cit.

⁸⁵ Law on the Anti-Corruption Agency, adopted on 23 October 2008, *Official Gazette of the Republic of Serbia*, no. 97/2008.

⁸⁶ The Agency will also be able to require officials to return all of the funds that they had obtained during the period of the plurality of offices, which is not possible under the current legal framework. It is also interesting to note that the Law on the Anti-Corruption Agency designates as a criminal offence the failure of a public official to provide data on his/her property or the provision of false data with the intention of concealing the facts concerning his/her property, which entails a prison penalty for a duration of between six months and five years (see article 72 of the Law on the Anti-Corruption Agency).

⁸⁷ Trivunovic, M., V. Devine and H. Mathisen (May 2007), “Corruption in Serbia 2007: Overview of Problems and Status of Reforms”, CMI draft report.

⁸⁸ Nine members of the ACA Board are elected by parliament following the nomination by the Administrative Committee of Parliament; the President of the Republic; the government; the Supreme Court of Cassation; the State Audit Institution; the Protector of Citizens and the Commissioner for Information of Public Importance, following a joint agreement; the Social and Economic Council; the Bar Association of Serbia; and the Associations of Journalists of the Republic of Serbia, in mutual agreement.

and archives. The Agency also has a service for international co-operation. Public expectations were high and unrealistic when the ACA was launched. It was presented as a sort of panacea for eliminating corruption in the country. Now the ACA management needs to build public understanding of the institution and of the legal constraints within which the institution has to operate.

The ACA is currently engaged in several meaningful anti-corruption prevention measures, such as the elaboration of integrity plans, whistle-blower protection, control of political party financing and prevention of conflicts of interest (including the plurality of offices of elected politicians), as well as the elaboration of policy proposals on amending fundamental legal instruments, such as the penal and criminal procedural codes. Furthermore, it plans to engage in extensive analyses of specific sectors or processes that have a high risk of corruption, as identified by means of complaints and reports received by the Agency itself and by other state institutions (e.g. the Ombudsman). One such sector is construction and urban planning, where the Agency has undertaken analyses and made recommendations on a new draft law. Other topics under consideration include the analysis of the level of discretionary rights of the public administration, as discretion in public decision-making is considered to be too high.

This line of work of the ACA could be an important contribution by the institution to the national anti-corruption effort, as diagnostic systems analyses related to corruption are overall quite limited, while the range of possible topics is nearly endless. There is also almost unlimited potential for co-operation with academic and research centres and with civil society organisations in this domain. More emphasis on policy recommendations would also be welcome, as the current dominant practice is to draft laws rather than to define desired policy outcomes before selecting the precise instruments and systems needed to achieve them. The Agency also plans to undertake some quantitative research, for instance on the perceptions of corruption among state employees. Current capacities appear to permit no more than two annual in-house research efforts, but the scope of research could be considerably extended through external co-operation.

Integrity plans are essentially managerial instruments aimed at the risk-mapping and risk mitigation of corruption, which all state institutions are required to adopt under the Law on the Anti-Corruption Agency. Such instruments appear to be the anti-corruption policy instruments of choice in Serbia, and the Agency is investing significant efforts in this work. If carried out properly, such an approach could serve to decentralise responsibility for the fight against corruption to each state institution. This decentralisation of responsibility is important in view of the low awareness of the National Anti-Corruption Strategy and the general impression that fighting corruption is the job of the law enforcement institutions and the Anti-Corruption Agency rather than the responsibility of every institution and every state employee. However, the "if carried out properly" eventuality posed above constitutes an important factor. In view of the low managerial capabilities of the Serbian State administration, it is by no means assured that the integrity plans will be elaborated effectively and in good faith, and it is equally questionable whether the Agency will have the capacity to exercise the necessary quality control and to oversee their implementation.

With the backing of the Prime Minister, the Agency requested in June 2010 the appointment of responsible persons in institutions for the first round of elaboration of integrity plans, and it issued guidelines for their elaboration in October 2010. Ultimately, the obligation extended to an estimated 5,000 institutions (direct budget-users), but the actual number may be even higher. In summary, an enormous amount of work lies ahead. Progress on the implementation of integrity plans, and the Agency's capability of shaping this process, will require continued monitoring before any conclusions can be made concerning the value of these efforts.

2.2 Whistle-blower and Witness Protection

An obligation to report corruption was explicitly introduced for the first time through amendments to the Civil Service Law⁸⁹ and to the Law on Free Access to Information of Public Importance, both of which were

⁸⁹ Amendments to the Civil Service Law, *Official Gazette of the Republic of Serbia*, no. 104/09.

adopted on 11 December 2009.⁹⁰ In line with a GRECO recommendation, article 23-a of the Civil Service Law has introduced the obligation to report corruption and to ensure the subsequent protection of whistle-blowers in the following way: "Civil servants or employees are obliged to notify in writing their immediate superiors or managers if they learn, in the course of discharging the duties that a corruption activates was undertaken by an official, civil servant or an employee in the state authority they are employed with. The civil servant or the employee who report corruption shall enjoy protection, starting from the day of submitting a written notification thereof, in compliance with the law." Whereas the amendments to the Civil Service Law have clearly established civil servants' obligation to report corruption, the protection of whistle-blowers has remained vaguely regulated. As a result, the effectiveness of whistle-blowing concerning corruption has been somewhat diminished.

Amendments to the Law on Free Access to Information of Public Importance have taken an additional step forward in whistle-blower protection as they provide detailed provisions in this regard. According to these amendments, each government body is required to designate one or more officials, referred to as "authorised persons", to act upon requests for free access to information of public importance. An authorised person who provides access to information of public importance cannot be held liable or suffer any harmful consequences if the disclosed information indicates the existence of corruption, misuse of authority, uneconomical use of public funds, or unlawful conduct of the government body (article 38). This provision provides a more solid ground for protecting the persons authorised to react upon requests of information, including information on corruption or some other unlawful action. However, its implementation in practice remains to be seen.

Nevertheless, the ACA is taking steps to elaborate a mechanism that would implement an effective whistle-blower protection regime so that Serbia could fulfil its international obligations (and follow GRECO recommendations). Clarity on whistle-blower protection, and the role of the Agency in the process, is one of the advances achieved in the July 2010 amendments to the Law on the Anti-Corruption Agency (article 56)⁹¹. It is now specified that if a civil servant or other employee of a public body or local government unit files a complaint to the Agency regarding a case of suspected corruption, he/she enjoys special protection by the Agency, including the preservation of anonymity. As the general legal framework for whistle-blower protection exists, the remaining task of the Agency is to define the exact procedures and mechanisms, keeping in mind the extensive and intensive co-ordination needed among various state bodies that have a role in protecting the rights of state employees who might suffer from the negative consequences of reporting corruption or other criminal acts. The target is to have a sound whistle-blower protection system up and running in 2011.

2.3 Conflict of Interest and Asset Declarations

With regard to asset declaration, there have been no major changes except for the fact that the competent body to which asset declarations of MPs and members of the government (and other public officials) should be filed is the Anti-Corruption Agency and no longer the Republic Board for Resolution of Conflict of Interest. According to article 43 of the Law on the Anti-Corruption Agency, a public official is required to submit to the ACA within 30 days of appointment a disclosure report concerning his/her property and income, or entitlement to occupy an apartment for official purposes, as well as the property and income of his/her spouse or common-law partner and of under-age children if they live in the same household.

If an official fails to submit the report within the set deadline, the Agency is obliged to notify accordingly the body in which the official holds public office. A public official is also obliged to file another report within 30 days of the day of termination of office with the status of the situation on the day of termination of office so as to enable a comparison of the changes in the level of income before and after holding public office. This obligation is a positive development.

⁹⁰ Amendments to the Law on Free Access to Information, *Official Gazette of the Republic of Serbia*, no. 104/09.

⁹¹ Whistle-blower protection has also been facilitated by an amendment to the Law on Classification of Data, whereby the revelation of confidential material that serves as evidence of criminal activity is no longer classified as a criminal act.

Members of parliament were already subject to the regulations on asset declaration and registration prescribed by the Law on Prevention of Conflict of Interest in Discharge of Public Office⁹², which were monitored by the Republic Board for Resolution of Conflict of Interest, which was established in 2005. As indicated above, this competence was transferred on 1 January 2010 to the Anti-Corruption Agency.

Article 13 on the “Content of the Disclosure Report” sets out in detail the requirements for the declaration, which are as follows: 1) ownership rights on real property and leasing rights on real property exceeding one year, at home and abroad; 2) movables under mandatory registration with government authorities (motor vehicles, vessels, aircraft, weapons, etc.); 3) deposits in banks and other financial organisations, at home and abroad; 4) stocks and shares in legal entities; 5) cash and securities; 6) rights derived from copyrights, patents and similar intellectual property rights; 7) debts (principle, interest and repayment period) and claims; 8) source and amount of income from the discharge of public office and engagements in scientific, educational and cultural institutions; 9) the public official's membership in management and supervisory boards in public enterprises, institutions, companies or other legal entities with a state capital share, and in scientific and humanitarian associations; 10) all other information deemed relevant by the public official to the application of this law.

The only difference in requirements on asset declaration between MPs and other office-holders is that the disclosure report submitted by MPs, in addition to the above-mentioned information, must also contain information on business entities where they have retained managerial rights or where they are directors, deputy or assistant directors, or members of management or supervisory boards. This requirement is the consequence of the fact that MPs, unlike other office-holders, are allowed to hold and maintain simultaneously positions in a public enterprise, institution and company or other legal entity with a majority state capital share.

More specific rules on conflict of interest for certain public employees are provided in the Civil Service Law, Law on Health Insurance, Law on Public Agencies, Law on Higher Education, etc. The Civil Service Law allows civil servants, with the written consent of their superior, to work outside their normal working hours for another employer, provided that such additional labour is not prohibited by a law or other regulation and that it does not create the possibility of a conflict of interest or affect the impartiality of the work of the civil servant. Civil servants are not allowed, however, to establish economic companies or public services or to engage in entrepreneurship.

An important improvement in the area of the prevention of conflicts of interest of MPs was the entry into force of the Law on the Anti-Corruption Agency in January 2010⁹³. This law prohibits MPs to concurrently hold two or more public offices. Under the previous legal framework, i.e. the Law on Prevention of Conflict of Interest in Discharge of Public Office⁹⁴, which ceased to have effect on 1 January 2010, MPs were allowed to concurrently hold a position of director, deputy, assistant director and member of the management or supervisory board of a public enterprise, and any other institution, enterprise or other legal entity with a major state capital share. This provision was a controversial exception to the rule, and in fact this was a privilege that MPs had granted to themselves by amending the proposal of the government at the time of the Law on Prevention of Conflict of Interest in 2004. In line with GRECO recommendations, the Law on the Anti-Corruption Agency has resolved this controversy by setting a deadline of 1 April 2010 for all public officials, including MPs, who are in a position of conflict of interest to decide as to which position they will maintain. This incompatibility regarding the right of an MP to hold concurrently other responsibilities in the public or private sector was contested by MPs and other public officials.

As a consequence, the ACA in 2010 led a major struggle to ensure that politicians respected the new regime on conflict of interest. Under pressure from some political parties, the National Assembly adopted in July 2010 a controversial amendment to the Law on the Anti-Corruption Agency, according to which an official

⁹² Law on Prevention of Conflict of Interest in Discharge of Public Office, adopted on 20 April 2004, *Official Gazette of the Republic of Serbia*, no. 43/04.

⁹³ Law on the Anti-Corruption Agency, adopted on 23 October 2008, *Official Gazette of the Republic of Serbia*, no. 97/2008.

⁹⁴ Law on Prevention of Conflict of Interest in Discharge of Public Office, adopted on 20 April 2004, *Official Gazette of the Republic of Serbia*, no. 43/04.

elected to his/her position directly by citizens could perform several public functions without the consent of the Agency, except in cases of the incompatibility of functions as determined by the Constitution⁹⁵.

These amendments stirred a significant public and institutional debate. The Director of the Anti-Corruption Agency questioned the constitutionality of the amendments, which were also criticised by Transparency International and other NGOs. In September 2010, the Anti-Corruption Agency appealed to the Constitutional Court, requesting an evaluation of the constitutionality and legality of the amendments. In December 2010, the Constitutional Court considered the matter. The judge rapporteur was of the opinion that the amendments were unconstitutional. Some other Constitutional Court judges, however, did not share that opinion. Finally, the Constitutional Court decided to postpone its decision on this issue.

ACA officials expect that the amended law will prolong a great number of conflict-of-interest situations. The amendments will allow MPs, deputies of the autonomous province or of local councils to keep any other office they may have had – for instance, a position as a city mayor – until the term of office one of the positions expires. Currently, there are some 5500 politicians holding at least two offices at the same time. Nevertheless, the Agency reports that the vast majority of public officials have complied with the initial ban on multiple functions, as some 80% of officials resigned second functions voluntarily and within the prescribed period. Most others have applied to the Agency to issue a ruling on whether the additional positions constitute a conflict of interest, which is fully in compliance with the law.

The registration and verification of asset declarations of public officials are two of the Agency's most important competences. The regime has improved considerably since entry into force of the Law on the Anti-Corruption Agency, and has strengthened many relevant provisions, including instituting the Agency's authority to verify the declarations, providing the Agency with the power to invite a public official for an interview upon the discovery of an irregularity, and the designation as a misdemeanour the failure to disclose information about assets.

The Agency maintains an electronic register of officials' declarations, some of which are publicly accessible (e.g. those related to salaries and other sources of income, property, vehicles, stocks, savings accounts — yes/no only, and benefits of office, such as housing), and it has instituted an annual plan of verifications. In 2010 Agency staff succeeded in verifying the declarations of 250-300 top-ranking officials. The plan for 2011 includes the same group plus the managing positions in state-owned enterprises, bringing the total number to about 500. This number of verifications is viewed as a realistic workload, but it raises questions concerning the veracity of declarations of the several thousand remaining officials who are obliged to file them, as the ACA would need to have its capacities strengthened to enable higher quality and more in-depth verifications. Such strengthening might lead to the emergence of a macro-institution in terms of size and power.

The ACA has reported no institutional difficulties with declaration verifications to date. There has been satisfactory co-operation from domestic banks, although the issue is inevitably quite different with regard to foreign banks. Inquiries addressed to foreign financial institutions have to be sought through official channels of international co-operation on criminal matters and through the anti-money laundering unit, which require evidence extending beyond the evidence required solely for verification purposes.

To date, the Agency has initiated only a few (3-4) misdemeanour proceedings for officials' failure to provide information within the prescribed deadlines or to submit evidence of transfer of managerial rights. There have been no serious, in particular no criminal, offences to date. Furthermore, there is a lack of clarity on the precise scope of the Agency's authority to make inquiries as opposed to investigations, for which it is not authorised. As a result, the Agency has adopted a policy of communicating openly and regularly (on a daily basis) with law enforcement agencies in order to avoid any potential conflicts about exceeding its authority. This policy applies not only for asset verifications but also for inquiries based on received complaints and reports of corruption. In fact, the Agency is trying to establish a permanent co-operation

⁹⁵ Article 11 of the Amendments to the Law on the Anti-Corruption Agency, adopted on 28 July 2010, *Official Gazette of the Republic of Serbia*, no. 53/10.

mechanism whereby a prosecutor and a police investigator would be permanently seconded to the ACA for this purpose.

As indicated above, with regard to the issue of regulation of conflicts of interest of judges and prosecutors, positive developments have occurred in this respect, due to a broad definition of the concept of “public official” in the Law on the Anti-Corruption Agency. Since 1 January 2009, judges and prosecutors have also been considered as public officials (as are MPs, members of the government and other officials, as will be explained later in the report) and therefore: 1) they are not allowed to hold concurrently other public offices, and 2) they are obliged to file asset declarations with the Anti-Corruption Agency.

2.4 Protection of Integrity in Parliament and in the Government

There have been no major changes regarding the regulation of the immunity of MPs and members of the government due to the fact that the immunity rules concerning them are enshrined in the Constitution. The rules on parliamentary immunity have nevertheless been specified to some extent by the new Law on the National Assembly, which was adopted on 26 February 2010⁹⁶. Article 38 of this law repeated the constitutional provisions whereby MPs are granted dual protection: *non-liability*, i.e. non-accountability for votes cast and opinions expressed in the performance of their duties; and *inviolability*, i.e. immunity for acts that are not carried out in the performance of their duties. With regard to the principle of inviolability, the law repeated the constitutional provision set out in article 130, which grants immunity to members of parliament against the institution of criminal proceedings or any other proceedings where the penalty of imprisonment may be pronounced if the MP has invoked his/her immunity.

The law further specifies that in the event that an MP has not invoked his/her immunity he/she can be the target of criminal proceedings or any other proceedings. The law also confirms the constitutional provision whereby parliament may decide to uphold the immunity of an MP, but such a decision requires a majority vote of MPs. Some MPs (including the Speaker of Parliament) and NGOs (such as Transparency International) have proposed the lifting of parliamentary immunity in corruption cases through provisions of the Law on the National Assembly, but these proposals have been rejected on the grounds that they were not in compliance with the Constitution, which provides a firm basis for regulating MPs’ immunities.

Although the current immunity rules for MPs are indeed quite wide and should be restricted, the fact that they are enshrined in the Constitution means that it is unlikely that they will be subject to change in the near future. The scope of inviolability is only restricted in the case of *flagrante delicto* in committing an offence, carrying a minimum penalty of no less than five years, in which case an MP may be detained without the approval of parliament.

During the current parliamentary term that started in June 2008, there has been no case of discussing the lifting of immunity of any MP or member of the government, which may be considered as a positive development. In comparison, during the previous parliamentary term and in the short period between February 2007 and March 2008, nine MPs invoked their immunity against prosecution charges, which altogether concerned 14 criminal offences.

An important novelty in enhancing the legal framework on the prevention of corruption of members of the government is the general prohibition of *pantouflage*, i.e. the situation where members of the government (and other public officials), after completing their term of office, move to private companies having activities that are closely related to the office held by the member of government concerned. In line with GRECO recommendations, article 38 of the Law on the Anti-Corruption Agency prescribes that “during the period of two years after termination of the public office, an official whose term in office has been terminated may not take employment or establish business cooperation with a legal entity, entrepreneur or international organization engaged in activity related to the office the official held, except under the approval of the Anti-Corruption Agency.” This prohibition also applies to other public officials, with the exception of MPs, as the opinion of the law-drafters of the Law on the Anti-Corruption Agency was that

⁹⁶ Law on the National Assembly, adopted on 26 February 2010, *Official Gazette of the Republic of Serbia*, no, 9/2010.

MPs (primarily involved in passing legislation) included all forms of economic and social life and that therefore it was not possible to prohibit MPs from moving into the private sector after termination of their public office.

Another much debated matter regarding the integrity of MPs is the issue of “blank resignations”. This issue also constituted one of the key criticisms of the European Commission in its 2010 Progress Report on Serbia. In early 2011, the Speaker of Parliament announced that adequate models for abolishing “blank resignations” were being sought. As this issue is also related to the provisions of the Serbian Constitution (article 102), it is important that adequate measures be taken in order to abolish this practice without violating constitutional provisions.

2.5 Accountability of Government to Parliament

The government’s and ministers’ responsibility before parliament is enshrined in the Constitution. In accordance with article 105, parliament appoints the members of the government and decides on the termination of mandates of the government and of individual ministers, i.e. it holds the government accountable for its operations. Furthermore, article 7 of the Law on Government prescribes that the government is responsible to parliament for the formulation and implementation of policies of the Republic of Serbia, for the implementation of laws and other general acts of parliament, for the state of affairs in all of the areas within its competences, and for the work of state administration bodies.

In reality, however, parliament exercises little scrutiny over the government. This situation is primarily due to the high degree of dependence of MPs on political parties, but also due to the tradition of Serbian parliamentarism whereby MPs are interested mainly in the legislative process and are not accustomed to carrying out a substantive supervisory and scrutiny role with regard to the work of the executive. Nevertheless, there are several ways in which parliament can hold the government accountable for its actions: a no-confidence vote, interpellation, questions posed to ministers, creation of special committees of inquiry, and discussion of reports prepared by the government and other bodies.

According to the Constitution, a minimum of 60 MPs may initiate a motion of no-confidence in the government or in a minister. A no-confidence motion against the government is successful if it obtains the majority of votes of all of the members of parliament⁹⁷. A minister may also be subject to a no-confidence vote and dismissed by a majority vote of all MPs⁹⁸. A motion of no-confidence in the government was initiated by opposition parties in November 2008 as a result of the disagreement over the establishment of the EULEX mission on Kosovo, but it was not successful as the government had sufficient political support in parliament.

The 2006 Constitution established interpellation as a constitutional instrument for the first time. In accordance with article 129, a minimum number of 50 MPs may submit a request for interpellation on a specific issue concerning the work of the government or of an individual minister. The government/minister is obliged to respond to the interpellation within 30 days. Parliament debates and votes on the reply submitted by the government or the member of government to whom the interpellation was directed. By voting for acceptance of the reply, parliament continues to work according to the adopted agenda. If in its vote parliament does not accept the reply given by the government or government member, parliament will pronounce a vote of no confidence in the government or government member. Although it was hoped that the constitutional establishment of interpellation would contribute to a more dynamic work of the National Assembly and to a more transparent and accountable exercise of executive power, interpellation has not fulfilled these expectations and has almost never been used in parliamentary practice.

Another instrument for holding the government accountable is the individual MP’s questioning of ministers. This questioning can be carried out in two ways, namely 1) by sending questions in writing to the government, and 2) by posing questions orally at special parliamentary sessions. The number of written

⁹⁷ Article 18 of the Law on Government, adopted on 22 June 2005, *Official Gazette of the Republic of Serbia*, nos. 55/05, 71/05, 101/07.

⁹⁸ *Ibid.*, article 21.

questions and subsequent government responses has been rather low. In principle, MPs from the ranks of ruling parties do not question ministries due to strong party control and under the pretext that parliament needs to work quickly. Interestingly enough, the opposition also fails to ask questions, probably because it is used to receiving unsatisfactory replies or no replies at all. The Law on the National Assembly states the obligation of ministries to report quarterly to parliament. Although the results of these control sessions are unsatisfactory, the establishment of this practice is a positive novelty in parliamentary life in Serbia.

Parliament has a practice of setting up committees for special inquiries, but these committees are rarely created. These committees are formed on an *ad hoc* basis to examine specific cases and have the right to summon the civil servants involved in the case. In general, parliamentary support services are weak. Therefore, there has been unanimous consent by all political actors that parliamentary committees need to have expert, specialised research assistance to fulfil their mandates as prescribed⁹⁹.

In the course of 2010, parliament continued to organise special parliamentary sessions during which MPs had the opportunity to pose questions to ministers (on the last Thursday of the month). From the beginning of January 2010 to the beginning of December 2010, MPs posed 82 questions to ministers and received 55 replies. The majority of questions dealt with quite specific local problems rather than with issues of a more general interest. On a positive note, the establishment of these special parliamentary sessions and the number of questions are to be considered as a practice that has advanced. However, although the mechanisms for such monthly special sessions of questions to ministers have become routine, much of the debate in parliament has remained primarily at the level of political posturing.

In July 2010 new Parliamentary Rules of Procedure were adopted. These Rules of Procedure consolidate the existing instruments of control over the executive and further clarify legislative procedures. Among other improvements, they have unblocked the work of parliament (which had formerly been possible, for instance, by the lack of a quorum in committees). Obstruction of this type has been common and exceedingly problematic. For instance, the Judiciary and Administration Committee had been unable to reach a quorum in order to vote on judicial appointments for the previous two years. Of course other types of obstruction are still possible and are employed: for instance, extended discussions of pointless amendments. Nevertheless, a more constructive relationship between the ruling parties and the opposition has been reported, and this situation is believed to enhance the potential for parliamentary oversight.

One of the most controversial provisions of the new Rules of Procedures enables parliament to reject the reports of the Ombudsman and of the Commissioner for Free Access to Information and Data Protection. This provision has been harshly criticised by both institutions as an attempt to interfere with the functioning of their work as independent regulatory bodies. There is a concern that the authority to reject the reports of independent institutions may unduly influence the work of these bodies¹⁰⁰.

This provision has also been criticised by the European Commission and the Council of Europe as being contrary to European standards¹⁰¹. Faced with the pressure of public opinion and of the European Commission, parliament is considering the repeal of the controversial provision in the Rules of Procedure. In this regard, the Speaker of Parliament has made a statement to the effect that the provision would be repealed as soon as possible.

In summary, parliamentary oversight in Serbia must be considered as being extremely limited in view of the constraints on MPs to act independently, which are imposed by mechanism of blank resignations referred to above. The party leadership can activate this mechanism at any time as punishment for “disobedient” MPs, and its constraints are further compounded by the electoral system that confers power on political parties and party leaderships rather than on voters. That being said, there are some indications that these

⁹⁹ Southeast Europe Parliamentary Program (SEPP), Parliamentary Centre (November 2003), *Joint Baseline Report on the Internal and Human Resources Management in the Parliament of the Republic of Serbia*.

¹⁰⁰ Council of Europe (2010), “Report of the Committee on the Honoring of Obligations and Commitments by Member States of the Council of Europe” (monitoring committee) [information note by the rapporteurs on their fact-finding mission to Belgrade and Novi Pazar, 28 November- 2 December 2010].

¹⁰¹ European Commission (2010), *2010 Progress Report on Serbia* [COM(2010)660].

constraints may be relaxed in the course of 2011 if the threat of blank resignations is finally eliminated as has been announced and if changes to the electoral law are introduced as foreseen. In that event, the existing mechanisms and capacities within parliament will become far more meaningful.

2.6 Political and Electoral Campaign Financing

Political party financing is regulated by the Law on Financing of Political Parties, adopted in 2003 and amended in 2008. The 2008 amendments transferred oversight responsibilities from the Electoral Commission and the parliamentary Finance Committee to the Anti-Corruption Agency (ACA). The Law on the State Audit Institution (SAI) also authorises the SAI to audit political party financing.

As could have been expected, the ACA and the SAI have not had much success in controlling political party financing in practice. Apart from the fact that the current law is of poor quality and regulates political party financing in a rather vague way, the ACA does not yet have sufficient capacities and powers to oversee and monitor political party financing. In addition, The SAI remains severely understaffed and does not have the capacity to audit political party financing.

To address the current oversight problems, the Serbian Government has formed a working group on drafting a new law on the financing of political activities. Representatives of the Anti-Corruption Agency, CESID and Transparency Serbia (two NGOs) have participated in the working group sessions. The draft law was finalised in December 2010, and it was expected to be adopted by the government by mid-February 2011, but at the time of writing it has not yet been adopted.

In November 2010 the Ministry of Justice requested (through the OSCE Mission in Serbia) the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR) and the Venice Commission to review the draft Law on Financing Political Activities. In response to this request, the OSCE/ODIHR and the Venice Commission undertook the assessment jointly¹⁰². In their joint assessment report, delivered in December 2010, they concluded that the draft Law on Financing Political Activities constituted a step forward in creating a modern and comprehensive political financing system in Serbia. The proposed model largely reflected the recommendations of the Council of Europe and the OSCE. Nevertheless, certain shortcomings that were identified in the report should be addressed prior to the adoption of the law. These recommendations have been taken into consideration and incorporated into the latest version of the draft law, which was forwarded for consideration by the Serbian Government at the end of 2010.

GRECO's 3rd Evaluation Round Report (1 October 2010) on the transparency of political party funding highlighted many shortcomings in the current political party funding in Serbia and recommended the clarification of the mandate and powers of the ACA with regard to the supervision of funding of political parties and electoral campaigns, while entrusting the ACA, in an unequivocal manner, with the leading role in this respect. GRECO urges an increase in the financial and personnel resources of the ACA so that it will be better equipped to ensure substantial, proactive and swift monitoring of political financing.

The key novelty of the draft Law on Financing Political Activities is that political parties would be able to raise funds for their day-to-day work and electoral campaigns without limitations. The private funding of political organisations – including membership fees, inheritances, legacies, property income and donations – is nevertheless subject to certain restrictions. Special attention is paid to donations, which are defined as amounts of money voluntarily donated to a political actor or as a service rendered without compensation or under conditions deviating from market conditions¹⁰³. The draft law sets a ceiling of 20 monthly salaries of a natural person as the maximum amount of a donation and a ceiling of 100 monthly salaries if the donor is a legal person. The ceilings set are based on a form of indexation, thereby diminishing the effects of inflation. The draft attempts to strike a balance between the recognition that all individuals should have the right to freely express their support of the political party of their choice through

¹⁰² OSCE/ODIHR – Venice Commission (2010), "Joint Opinion on the Draft Law on Financing Political Activities of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR", adopted by the Venice Commission at its 85th Plenary Session in Venice, 17-18 December 2010.

¹⁰³ Draft Law on Financing of Political Activities, article 7.

financial and in-kind contributions and the need to set reasonable ceilings on the total amount of contributions so as to avoid distortions of the political process in favour of wealthy interest groups. Contributions by foreign states and by foreign natural and legal persons, except for international political associations, are prohibited¹⁰⁴. This provision is consistent with international standards and is practised in many OSCE and Council of Europe member countries.

If the new draft law is passed in its current form, it would constitute an improvement to the existing situation but would still not sufficiently address one of Serbia's key corruption-drivers, as noted above: the influence of tycoons on politics. The draft law does not provide for raising adequate financial resources to carry out electoral campaigns without private sources. As long as private financing is needed, it will be provided by the same handful of individuals, who will in turn continue to exert inappropriate political influence, as described above. Since these individuals finance all political sides, there is no reason to believe that this pattern would change with the coming to power of a particular political option.

As it is a question of relatively few individuals who act as the main financiers of political parties and campaigns, it is likely that the amount of funding in question exceeds the proposed limits on individual donations. An important concern, therefore, is whether the Anti-Corruption Agency will have the capacity to detect such breaches, even if it has obtained the support of external auditors. Financial investigations of this type constitute a challenge for even the most highly-skilled professionals, and this situation will be even more the case if transactions continue to take place in cash or through in-kind or other indirect mechanisms (e.g. portions of firms' pre-paid advertising blocks "donated" to electoral candidates), as was done in the past.

Ideally, the mere threat of investigations, or one or two "demonstration" investigations and sanctions, could serve as a deterrent for some of the current abuses, such as the widely-suspected misuse of funds of state-owned enterprises for electoral purposes. Unfortunately, if the experiences of other countries (Western Europe and especially the USA) serve as a guide, it is fairly certain that even in the event of the early success of the new regulatory regime, new ways will still be found to subvert the restrictions and undertake illicit financing activities.

With regard to the tycoons, the decline of their influence will depend, in the long-term, on the continued development and democratisation of political parties in Serbia, as they may start to identify alternative sources of funding, for instance through more massive membership. Another avenue is a change in Serbia's electoral system.

This report has described, as one major driver of corruption in Serbia, the concentration of power within political party leaderships, which is enabled by the current electoral system and results in, among other negative consequences, the dependence and obedience of party activists to their party leaders. After years of discussion, a working group on changes in the electoral system was finally convened following a Constitutional Court ruling in mid-2010 against the current practice of closed electoral lists.

The changes in the electoral system now being contemplated include the introduction of multiple electoral districts, although this proposal is bound to be controversial as it will raise the question of how to treat Kosovo. Another possible change would be the introduction of voting for candidates and not parties, with the corollary that the seats in parliament would be taken by the candidates who had won the most votes. A draft law based on this concept has been elaborated for local elections, but the same principles are now advocated at a national level. Reform in this direction should be strongly supported as it would fundamentally change the electoral dynamics in Serbia. It would not only encourage electoral candidates to campaign, but would also compel them to demonstrate to voters what they have accomplished during their mandates. In such a situation, standing up publicly against suspected corrupt deals, or against the party boss, might actually prove to be politically profitable. To be sure, the alternate system would open up avenues for the influence of other, local centres of power but, at the least, such a change would disperse the existing concentration of power and increase the competition for influence.

¹⁰⁴ Ibid, article 9.

With regard to the financing of the regular operations of political parties, the new draft law provides some slight changes in terms of the distribution of funds. The funds available for this purpose would not be changed – 0.15% of the state budget, 0.1% of the budget of the autonomous province and 0.1% of the budget of local government units. However, the distribution of these funds would be slightly different and would favour minority parties. Funds would be distributed on the basis of obtained votes, but if a party obtained less than 5% the funds would be multiplied by 1.5.

Under the new draft law, the financing of election campaign expenditures has been reduced from 0.1% of the budget (as under the current law) to 0.05% per cent. All of the participants would receive an equal amount of up to 5% of the overall budget. In the case of elections in the autonomous province and of local elections, funding is naturally to be provided through the autonomous province budget or the local self-government unit budget. If fewer than 20 electoral lists are registered, the remaining funds are to be allocated in equal amounts to all registered electoral lists¹⁰⁵.

The reporting requirements under the new draft law apply equally to the electoral campaign period and to day-to-day operations of parties. Article 24 requires political actors to keep detailed accounts concerning the origin of amounts received and the structure of funds. Reports should also clearly identify which funds were provided to the benefit of the party and which funds to an individual candidate. Article 25 of the draft law requires political actors to submit an annual financial report to the Anti-Corruption Agency.

The procedure in case of violation of the law would be initiated *ex officio* by the Anti-Corruption Agency. The procedure could also be initiated by any natural or legal person. The Agency would have the possibility of inviting the responsible political actor to provide information and necessary data to enable decision-making on the possible violation of the law. Proceedings before the Agency would be held behind closed doors. If the Agency found that errors should be corrected, it could issue a warning. If a political actor failed to comply with the warning measure within the set deadline, the Agency would be authorised to initiate a misdemeanour procedure. In the new draft law, the sanctions for violation of the law are quite strict and vary between 200,000 and two million RSD.

The ACA currently has four staff in the relevant department, although the staffing systematisation foresees a total of 10 persons. In March 2010, the ACA issued a new reporting template, but its application has not been seen as particularly active in terms of pursuing compliance with the existing law, including in the follow-up to the local elections that were held in 2010. For instance, no financial reports have been posted on the dedicated Agency website as at the end of February 2011. One explanation for this apparent lack of attention to the issue is the fact that the Agency, as noted above, is taking the leading role in drafting the new Law on Financing of Political Activities. It may well be a tactical decision on the part of the ACA to conserve its limited time and resources until the regulatory framework is improved by the forthcoming new law. Indeed, the Agency seems far more future-oriented in this matter, including plans to undertake the monitoring of electoral expenditure (and their justified use) as a way of estimating the required amount of campaign funding, which would then be compared to the declared amounts in order to assess the veracity of the financial statements submitted by political actors.

2.7 Prevention of Corruption in some Key Public Services

In this section we examine some of the institutions that contribute to the protection of the public integrity system in Serbia. We do not deal here with two institutions that have a major impact on the system, namely the Ombudsman and the Commissioner for Free Access to Information of Public Importance and Personal Data Protection. Neither do we discuss here the performance of the Public Procurement Directorate nor that of the State Audit Institution. The roles, achievements and positive popular perceptions of the performance of these institutions have been analysed elsewhere¹⁰⁶ by SIGMA.

¹⁰⁵ Ibid, article 18.

¹⁰⁶ See SIGMA's 2011 assessment report on the public service and administrative legal framework of Serbia as well as its assessment reports on External Audit and the Public Procurement System.

2.7.1 Judges and Prosecutors

The independence of judges and prosecutors has been one of the main burning issues in Serbia in recent years due to the process of re-election (or re-appointment) of all judges and prosecutors, which was finalised in December 2009¹⁰⁷, in application of the Law on the Implementation of the Constitution. The key issue in this controversial process was the non-establishment of objective criteria for re-election. The Law on Judges set the general criteria for the election of judges, such as professional skills, qualifications and “worthiness”. These criteria were further developed by the High Court Council, which passed the Decision on Criteria and Measurement of Fulfilment of Criteria of June 2009, which set the criteria for the election of judges and presidents of courts¹⁰⁸.

The High Court Council’s Decision on criteria for the election of judges and prosecutors was overall positively assessed by the Venice Commission, but with some important reservations. The Commission issued its Opinion No. 528/2009 regarding the draft of the criteria and standards for the election of judges, concluding that the draft criteria were in line with European standards (recommendations of the Council of Europe and good practices identified in EU Member States) and were forward-looking as they defined a precise framework for the skills required of the various categories of judges. However, reservations were raised with respect to the manner in which the various skills were to be evaluated and balanced against one another. The Venice Commission pointed out that the time frame in which the implementation of the re-appointment procedure was to take place was very short. The Commission further pointed out that, given the exceptional nature of the re-appointment procedure, every currently serving judge who held permanent tenure (whether or not they had applied for re-election) should only have his/her tenure terminated by a justified decision, which could be appealed to a court of law. An appeal before the Constitutional Court, however, should be made in accordance with article 82 of the Law on the Constitutional Court. In addition, it should be ensured that this appeal was an effective one, i.e. allowing the Constitutional Court to deal with the facts of each case.

The re-election process was carried out in a non-transparent manner. On 17 December 2009, the process of re-election of all judges and prosecutors was finalised, and the tenure of office of approximately 27% of judges and 30% of prosecutors was terminated, without adequate justification. The judges whose tenure was terminated did not receive an individual decision on termination of office, but only a collective list with the names of all of the judges who had not been re-elected. The justification of the decision was provided in the form of a standardised notice, signaling a lack of professional skills, qualifications and “worthiness” for election. In addition, no legal remedy against the decision was indicated.

Due to the opaqueness of the re-election procedure and inadequate justification for termination of office of non-elected judges, the way in which the prescribed criteria were implemented in each individual case remained unclear. This issue was also raised by representatives of the European Association of Judges and Prosecutors for Democracy and Freedom (MEDEL), who visited Belgrade in early February 2010. They expressed their deep concern about the process of re-election of judges and prosecutors, especially due to the fact that the decisions of the High Judicial Council and the High Prosecutorial Council did not contain individual justifications for the termination of office of the concerned judges and prosecutors. As a result of the pressure applied by MEDEL, the High Judicial Council agreed to provide judges and prosecutors with access to the data on which it had based its decisions.

Suspicion was further raised as to whether additional criteria, such as personal files kept by the security services, had been used in the re-election process. The Minister of Justice on one occasion stated to the media that the High Judicial Council had obtained and used the data provided by the Ministry of Internal Affairs and the Security Information Agency (BIA) during the (re)election process. The minister later denied this statement as an incorrect interpretation of her words, but this incident stirred a hot debate on the

¹⁰⁷ Prior to the process of re-election, there were 3149 judges in office, of whom 770 were misdemeanour judges. The High Court Council passed a Decision on the number of judges on 1 June 2009 (*Official Gazette of the Republic of Serbia*, nos. 43/09 and 91/09), and the overall number of judges was reduced to 2453, of whom 615 were misdemeanour judges.

¹⁰⁸ The High Court Council’s Decision on Criteria and Measurement of Fulfilment of Criteria, which set the criteria for the election of judges and presidents of courts, was adopted in June 2009 (*Official Gazette of the Republic of Serbia*, no. 49/09).

criteria used for judges' reelection. The Ombudsman and the Commissioner for Free Access to Information also reacted to this situation and carried out an investigation of the re-election process through an examination of the correspondence of the High Judicial Council, the minutes of its sessions, and its personnel files. They concluded that there was no proof to substantiate the claims that BIA had been involved in the re-election process, but suspicions nevertheless remained concerning the involvement of the security services in the re-election process.

Non-elected judges have at their disposal only one legal remedy – constitutional appeal guaranteed by article 170 of the Constitution and by article 82 of the Law on the Constitutional Court. A constitutional appeal is filed against an individual act or action of a state body or organisation entrusted with public powers that violates or denies human or minority rights and freedoms guaranteed by the Constitution if all other existing legal remedies have been exhausted or if no other remedies or the right to judicial protection are provided by the law. Almost all of the judges whose tenure was terminated filed constitutional appeals to the Constitutional Court. After receiving these appeals, the Constitutional Court requested the High Judicial Council and the High Prosecutors Council to submit individual explanations as to why the tenure of office had been terminated to each non-elected judge and prosecutor in order to be able to proceed with the appeals. On 12 March 2010, both Councils announced that they had submitted to the Constitutional Court an explanation of the reasons why a large number of judges and prosecutors had remained without work. The Constitutional Court's effectiveness in dealing with the appeals of the judges and prosecutors has been disappointing. By February 2011, the Constitutional Court had decided on only two judges' appeals¹⁰⁹. The Court upheld the appeals of two judges and instructed the High Judicial Council of its decisions in these two cases.

The European Commission's 2010 Progress Report indicated that Serbia had made little progress towards bringing its judicial system further into line with European standards, which constitutes a key point of the European Partnership. The Commission pointed out serious concerns about the way in which recent reforms had been implemented, in particular the reappointment of judges and prosecutors¹¹⁰. Following the critical remarks of the EC's Progress Report on judicial reform in Serbia, the Ministry of Justice decided to prepare amendments to the judicial law package. These amendments were adopted by the government and sent through the fast-track procedure to parliament on 21 December 2010. On 29 December 2010 the amendments were adopted by parliament.

These amendments concern the appointment of the High Judicial Council and the State Prosecutorial Council and introduce a new legal remedy to be made available to non-appointed judges/prosecutors. The amendments require urgent completion of the appointment of permanent membership of the two Councils in order to address concerns on the non-representativeness of the bodies that had conducted the re-appointment process. Furthermore, both Councils are to take over from the Constitutional Court the review of appeals filed by non-appointed judges. Instead of a constitutional appeal, the amendments introduced a new legal remedy (a complaint to the High Judicial Council/ State Prosecutorial Council) that will be available to non-appointed judges/prosecutors. The Councils are also given powers to initiate *ex officio* the procedure of re-examining judges'/prosecutors' appointments if they consider that irregularities occurred in the re-appointment process. The Councils' new decisions will be irrevocable. Judges/prosecutors who are not satisfied with the Councils' decision will still have the right to appeal to the Constitutional Court.

The Associations of Judges and Prosecutors have harshly criticised these amendments for several reasons. First of all, the amendments were adopted without any public debate and, as in previous years, during holidays just before the New Year. Secondly, the associations have challenged the constitutionality of the

¹⁰⁹ In the first case, on 28 May 2010 a constitutional appeal filed by Judge Zoran Saveljic from Nis was upheld. The High Judicial Council was requested to reconsider, within 30 days of receipt of this decision, the application of the complainant for the vacancy in the Court of Appeals in Nis and in the Higher Court in Nis. In the second case, on 21 December 2010 the complaint by Milena Tasic from Jagodina was upheld, and the initial decision of the High Judicial Council was quashed. The High Judicial Council was again ordered to reconsider, within 30 days of receipt of this decision, the application of the complainant.

¹¹⁰ European Commission (2010), *op. cit.*

amendments in terms of their interference with cases already lodged with the Constitutional Court, as a constitutionally guaranteed legal remedy filed with the Constitutional Court is transformed into a complaint to a judicial administrative body. Thirdly, the associations object that non-appointed judges, whose status has still not been decided upon (as their appeals are under consideration), will not be able to participate in the voting for the appointment of the permanent membership of the High Judicial Council and State Prosecutorial Council, which will adversely affect the representativeness of these bodies. In the view of the Associations of Judges and Prosecutors, these flaws should be rectified by revising the Law on Judges, the Law on the High Judicial Council, and secondary legislation issued by the High Judicial Council, in accordance with the decision of the Constitutional Court of 25 March 2010¹¹¹.

These legal amendments have stirred a wider public debate regarding their constitutionality and legality. More than 30 prominent Serbian law experts (mostly university professors in constitutional law and legal theory) signed and published an open appeal to the public in which they emphasised that the 2010 amendments to the judicial law package jeopardised the very concept of the rule of law and the legal system in Serbia and that they violated the provisions of the Serbian Constitution. On 19 January 2011 the appeal was forwarded to the highest Serbian officials. In January 2011 the process of appointment of the permanent composition of the High Judicial Council and of the State Prosecutorial Council was initiated. There are concerns, however, that this process will also be conducted under (political) pressure, especially due to the atmosphere of uncertainty instilled by the re-appointment process.

In summary, the reappointment process has been exceedingly complicated, with conflicting legal opinions on both substantive and procedural issues, and to which another layer of legislation, interpretation, and challenges was added at the end of 2010. The hasty and closed manner in which the new legal amendments were passed did not reverse the impression that the authorities were trying to conceal something that would not stand up to public scrutiny. Many (mostly national) observers see in the process a conspiracy to control the judiciary; others (mostly international) view it as a blunder – albeit a major one – based on a combination of high ambitions, low capacity and excessive arrogance.

A more favourable interpretation views the process as an attempt to deal with the Milošević legacy and in particular with Milošević-appointed judges. Another proposes that the objective was to improve the efficiency and update a 60-year old structure, with the problem originating with the Ministry of Justice's erroneous in-house calculation of the optimal number of courts and judges¹¹². The reappointment procedure fiasco itself has been attributed to an excessively short period of time, which was insufficient for the development of clear criteria and procedures or for an adequate review of candidates. As noted elsewhere, the actual decision-making process was also blemished by allegations of the illegal use of security service files on candidates as well as by favouritism and nepotism. At the end of the day, however, the truth about intentions is irrelevant. What is relevant is the way in which the problem will be resolved.

The Serbian authorities have proposed a review of the reappointment decisions, which would include the following elements: 1) complete transparency; 2) monitoring by the EC, OSCE and US Embassy in Belgrade; 3) new rules for the evaluation of candidates; and 4) publication of a comparison of candidates' qualifications. Such a review would be carried out according to a daily plan of activities, to be finalised in September 2011. However, the constitutionality of this proposal can also be questioned.

¹¹¹ In its Decision No. VIII U 102/2010, in which it upheld the appeal of the non-appointed judge Zoran Saveljic, the Constitutional Court held that "the judicial tenure of judges who were not appointed to permanent judicial office (following a Decision of the High Judicial Council on the election of judges to permanent judicial office in courts of general and special jurisdiction, *Official Gazette of the Republic of Serbia*, no. 106/09) shall be terminated on the date of assumption of office of the newly-elected judges (article 101, paragraph 1, of the Law on Judges), based on an individual, substantiated decision of the High Judicial Council which, *inter alia*, shall contain individualised reasons for not appointing a certain person, and which are founded on the requirements for the appointment of judges, prescribed by the provision of article 45 of the Law on Judges and more precisely defined by the Decision of the High Judicial Council on the criteria and standards for assessing general qualification, specific knowledge and fitness for appointment as a judge or president of a court." (*Official Gazette of the Republic of Serbia*, no. 49/09).

¹¹² It may be noted that the decision to integrate misdemeanour judges into the judiciary has also been greeted with disapproval by a considerable number of "customary" judges, who view misdemeanour judges as inferior and as obedient to the executive due to the manner in which they have traditionally been appointed.

The issue is so complicated and politically charged at this point that the proposed process – both the concept and actual implementation – would need to be carefully reviewed and sanctioned by highly respected, independent (i.e. international) legal experts in order to be accepted domestically. The involvement of the international community is highly recommended in order to help Serbia over this colossal hurdle, and it needs to exert all of its influence to put into effect a legally-sound resolution of the problem. Failure to resolve the problem would otherwise entail serious negative consequences for the judiciary in Serbia, which would impact not only on the fight against corruption but also on a broader range of democratic processes.

The conclusion is that the prestige and worthiness of the High Judicial Council and the State Prosecutorial Council, as well as the Ministry of Justice, have been severely diminished as a consequence of the questionable way in which the reforms of 2009-2010 were designed and executed. The process of dismissal of judges and prosecutors and their subsequent reappointment was far from any standard practice of democratic countries in the EU. In addition, the whole process has been highly detrimental to the capacity and credibility of those bodies in requiring professional standards, including accountability, from judges and prosecutors. As a consequence, the integrity and professionalism of the judiciary and prosecutorial services are likely to suffer for a long time, and in the short term this situation constitutes a major obstacle to Serbia's ambition to attain EU membership.

2.7.2 Police

The prevention of corruption in enforcement bodies, such as the police and customs and tax administrations, has focused on the strengthening of their internal control units. Law enforcement authorities have demonstrated a high level of commitment to fighting corruption within their ranks, which has led to the arrests of several suspects charged with corruption in office. A strengthening of co-operation between the sector of International Control in the Ministry of Interior and International Control in the Customs Administration has occurred, which resulted in December 2009 in the arrest of 13 police officers and 6 customs officers for having taken bribes. In 2009 alone, the Customs Administration filed 55 requests to initiate misdemeanour proceedings against 65 employees. As a result, the Customs Administration terminated the employment of nine employees and imposed 29 fine penalties. Less obvious results in fighting corruption were obtained in the Tax Administration.

The status of police officers is unsatisfactory. Salaries are generally low, and this situation is seen as one of the reasons for corruption. Increasing police salaries was one of the measures foreseen by the sectoral anti-corruption action plan, but no increases have been implemented. A salary increase for the newly-formed specialised units dealing with organised crime was considered back in 2002 – at the same time when such increases were instituted for the specialised judiciary units – but this increase did not take place. In fact, the police were on strike over this very issue during February 2011. It is not surprising that the turnover/attrition of staff is considerable, particularly of individuals with some level of expertise, which seriously undermines the efficacy of the service. Recruitment into the police is opaque and is carried out without open and fair competition. This lack of transparency also concerns the promotion of police officers.

A code of police ethics has been in existence since 2003, and Internal Control (in the Ministry of Interior – MoI) appears to be quite extensively developed. Internal control departments are situated at the central level in Belgrade and in four regional centres in Belgrade, Kragujevac, Niš and Novi Sad; these departments contain three units, for a total staff of 75, organised as follows: a) operational unit that conducts investigations, including the use of special investigative techniques (SIMS); b) unit for preventive measures and for receiving/handling complaints; and c) unit for logistical support and analysis. Internal control officers have the same status as "ordinary" police investigators, but they have additional authority: they can interview officers and request information, and all police officers are required to comply with their demands. They are authorised to file criminal charges and to propose the initiation of disciplinary proceedings, as well as to make broader policy proposals aimed at improving procedures and promoting professionalism. Disciplinary procedures are initiated by police supervisors, either *ex officio* or based on a report/complaint. In 2010 Internal Control proposed a total of 406 disciplinary measures (of the

45,000 total staff of the Ministry of Interior, approximately 30,000 are operative police officers). The proposed measures have for the most part concerned traffic police and Mol administrative staff.

2.7.3 Customs Administration

The Customs Administration has undergone a significant transformation since the introduction of new leadership in mid-2007, at a time when 2.5% of its employees were in prison. Initial measures included 60 staff changes over a period of four months, including six assistant directors and 13 directors of customs offices. Over the last four years, the Customs Administration has reported a total of 312 disciplinary procedures, 41 dismissals, and 210 fines imposed, along with 103 criminal proceedings initiated against its employees.

The Customs Administration has a number of preventive mechanisms in place and additional mechanisms are in the process of elaboration in co-operation with the World Customs Organisation and, more recently, the Anti-Corruption Agency. These measures include the following: 1) Code of conduct: Customs officers are subject to the 2008 Public Administration Code of Conduct that applies to all state employees. In addition, a specific code of conduct for customs officers has existed since 2003. A new code was elaborated recently in accordance with the standards of the World Customs Organisation, and it was submitted to the Ministry of Finance for approval, but it has been put on hold pending the adoption of a forthcoming revised Law on the Customs Administration. 2) Staff rotation: While no specific policy on staff rotation exists, it is nevertheless a common practice, which is undertaken not only to reduce the risk of corrupt relationships forming in the field, as well as other risks to security, but also to cope with seasonal changes in workloads, etc. 3) Complaints hotline: A hotline has been set up for citizens wishing to register complaints concerning the work of customs officers. 4) Communication with other state bodies: The Customs Administration has also reported productive co-operation with law enforcement bodies, particularly the police, and daily communication with the Anti-Corruption Agency and other institutions that provide information on suspected corruption. 5) Risk-mapping: The Customs Administration is already in the process of learning to identify corruption risks in its operations assisted by the World Customs Organisation. 6) Integrity plans: Together with the Anti-Corruption Agency, the Customs Administration will be one of the first state institutions to elaborate an integrity plan, ahead of the schedule set by the ACA. 7) Education of employees: A pilot project of continuing education courses is underway and is intended to improve performance and raise awareness of control mechanisms.

The Customs Administration also has an Internal Control unit that is responsible for investigations of suspected corruption or other violations. Supervisors are obliged to both monitor their subordinates and report to Internal Control any suspicions.

2.7.4 Tax Administration

Over the past several years, the majority of the reform efforts of the Tax Administration have focused on more effective collection of tax revenues through improved communication, simplified procedures, and other assistance to citizens in meeting their obligations.

One accomplishment in this area has been the establishment of a single unified registry of Serbia's 4.7 million taxpayers, which allows e-communication and therefore, along with other benefits, reduces opportunities for corruption that are inherent in person-to-person interaction between citizens and officials. A related major change is foreseen as from October 2011, as after that date the Tax Administration will only accept electronic tax returns. It is estimated that some 70% of the population has access to the Internet (and businesses nearly 100%), and free Internet access points will be set up in post offices and Ministry of Interior premises for individuals who otherwise do not have access. Nevertheless, according to the Serbian Chamber of Commerce, taxpayers find tax procedures and the tax system in general to be cumbersome and full of legal uncertainty, and this attitude constitutes a source of corrupt, tax-related deals.

A key challenge for the Tax Administration is the enforcement of the obligation of employers to register workers and pay social contributions. This phenomenon is a reflection of Serbia's considerable grey economy and, in addition to reducing state revenue, it has a further negative consequence of depriving

workers of pension and other social benefits. Difficulties in qualifying for these benefits due to poor records and to the avoidance by employers to pay social contributions are among the most common citizen complaints recorded by the Ombudsman. In response, the Tax Administration has instituted more in-depth control of enterprises through inspections. It has a special centre for large taxpayers (those with annual tax payments above 500,000 EUR, of whom there are 410 in total), but the real challenge is in the control by the 750 existing tax inspectors of the 117,000 enterprises obligated to pay VAT.

Investigations of suspected violations are conducted by the tax police, which have the same investigative mandate as the regular police, but without access to SIMs or the power of arrest. In these matters, the tax police maintain good co-operation with the regular police. The work of these bodies in 2010 resulted in 2,016 criminal charges for tax evasion, for a total value of 16 billion RSD. While precise statistics were not made available, the Tax Administration had the impression that the majority of these charges had been prosecuted, with perhaps only 5% rejected. A lack of expert witnesses to support tax-related indictments is seen as a key obstacle in the successful prosecution of tax evasion cases.

Tax inspectors and tax police constitute a category of state employees that is particularly exposed to corruption risks, and their relatively low salaries are seen as a potential risk factor. The Tax Administration also identifies major risks in the interaction with small taxpayers.

The Tax Administration has several instruments in place to prevent and confront corruption within its ranks. The Administration has an Internal Control unit. It has also launched a telephone hotline through which complaints are tracked, including those concerning the Administration's employees. Anonymous reports are also taken into consideration. An additional anticipated measure is the elaboration of an integrity plan, foreseen in 2011. Furthermore, all Tax Administration employees are subject to a code of conduct, and provisions on conflict of interest are defined in the Administration's internal rulebook. While not providing comprehensive data on all cases, the Tax Administration reported the dismissal of seven employees in 2010 and ten employees in 2009 for irregularities in carrying out their duties.

It may be noted that the advisory Anti-Corruption Council alleges that the Tax Administration had been complicit in perpetrating some high-level corruption schemes, for instance by deliberately failing to record full tax liabilities. This accusation seems to apply in particular to state-owned enterprises subject to privatisation deals, where the new owners were not to be made liable for the entire debt. More information and evidence would be required in order to substantiate this claim.

2.7.5 Health, Education and Local Self-Governments

In spite of the fact that the perception of corruption in public services, especially in the health sector, is very high, no specific measures have been taken to prevent corruption in the health and education sectors. It was encouraging, however, that the Minister of Health announced at the end of 2009 that the key objective of the ministry in 2010 would be the reduction of corruption and that citizens would therefore be called upon to actively co-operate in the suppression of corruption by reporting corruption and bribery cases to the ministry. However, the citizens' response has still not been satisfactory, as people fear that reporting might jeopardise their situation if/when they are in need of health services. So far, experience in the reporting of corruption in the health care sector has not been positive, as very rarely are bribery cases adequately processed by the police and the judiciary.

Nevertheless, one of the most important cases of corruption uncovered in 2010 was related to the health care sector. On 4 November 2010, five doctors and two representatives of a pharmaceutical company were arrested in Belgrade. The suspects were accused of having given and received bribes. Arrests were also carried out in the towns of Kragujevac, Nis and Sremska Kamenica. Doctors were detained on suspicion that they had demanded bribes worth more than 2 million RSD from the Merck pharmaceutical company in exchange for increasing the prescription of its *Erbitux* cancer medication in 2008 and 2009.

An important improvement has been made, however, in strengthening the general conflict-of-interest framework by broadening the term "public official" in line with a GRECO recommendation, as mentioned above. The concept of public official under the Law on the Anti-Corruption Agency covers "any person elected, appointed or nominated to the bodies of the Republic of Serbia, autonomous province, local

self-government unit, bodies of public enterprises, institutions and other organisations established by the RS, autonomous province, local self-government unit and other person elected by the National Assembly”¹¹³.

Therefore, for the first time local government officials, directors of hospitals and public centres, directors of schools, and deans of university faculties, etc. are considered to be public officials and will not be able to hold two public offices concurrently. All of these officials will be obliged to report their property status to the Anti-Corruption Agency. This change represents an important improvement in comparison with the preceding legal framework provided in the Law on the Prevention of Conflicts of Interest in the Discharge of Public Office, which excluded a number of public officials from its application, such as officials appointed to organs of institutions and other organisations established by the Republic of Serbia, the autonomous province, municipalities, towns and the City of Belgrade, as well as to public services such as health and education authorities.

It is still difficult to determine the exact number of “public officials” in Serbia according to the new definition of the Law on the Anti-Corruption Agency, but it has been estimated that this number is approximately 18 000. The ACA has indicated that the vast majority of public officials complied with their legal obligation related to asset declaration in 2010. As a way of comparison, the average number of asset declarations reported in previous years to the Republican Committee for Resolution of Conflict of Interest was approximately 6 000, which was also conditioned by the much narrower concept of “public official” that had been used.

3. Criminalisation of Corruption and Law Enforcement

3.1 Criminal Law

Regarding the criminalisation of corruption, the assessment concludes that the criminal law of Serbia complies, overall, with the standards of the [Council of Europe Criminal Law Convention on Corruption](#). Nevertheless, GRECO has called on Serbia to address a few limited deficiencies regarding, in particular, the legal framework applicable to the bribery of foreign jurors and arbitrators, as well as the possibilities of prosecuting corruption abroad¹¹⁴. GRECO has concluded that Serbia also needs to be more proactive in detecting, investigating and prosecuting corruption cases, especially high-level corruption cases in the public sector. The authorities also need to remain alert to related problems, other than traditional bribery, such as trading in influence and corruption in the private sector¹¹⁵.

As in many EU Member States, “corruption” as such does not exist in Serbian legislation as a criminal offence, but a number of corruption-related offences do exist, in line with international legal instruments. The most relevant corruption-related charges are provided for in the Criminal Code, such as: accepting a bribe (article 254), offering a bribe (article 255), illegal mediation/trading in influence (article 253) and misuse of official power (article 242). In 2008 the Council of Europe transmitted to the Ministry of Justice an expert opinion on the Criminal Code and the Criminal Procedure Code concerning the level of compliance of corruption-related offences with international standards in the fight against corruption. The experts were of the opinion that the Criminal Code was in line with the Council of Europe’s Criminal Law Convention against Corruption and with OECD’s Convention on Bribing Foreign Officials.

In 2009 amendments to the Criminal Procedure Code (CPC)¹¹⁶ were passed, whereby corruption-related offences were placed under a separate chapter, “Special Provisions on the Criminal Offences of Organised

¹¹³ Law on the Anti-Corruption Agency, article 2.

¹¹⁴ GRECO (2010), “Evaluation Report on the Republic of Serbia Incriminations” (ETS 173 and 191, GPC 2), adopted by GRECO, Strasbourg, 27 September – 1 October 2010, available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2010\)3_Serbia_One_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2010)3_Serbia_One_EN.pdf)

¹¹⁵ Ibid.

¹¹⁶ Amendments to the Criminal Procedure Code, adopted on 31 August 2009, *Official Gazette of the Republic of Serbia*, no. 72/09.

Crime". These special provisions require more urgent and confidential procedures to be undertaken for investigating such criminal offences, and they provide the competent authorities with the powers to use a number of special investigative techniques and measures, such as: a) surveillance and recording of telephone calls and other conversations or communication (article 504g-504h of the CPC); b) rendering simulated business services and simulated legal services (article 504j – 504l); c) automated computer search of personal and other data and related information (article 504n); d) undercover investigator (article 504o-504q); and e) co-operative repentant witness (article 504r – 504w).

These amendments were made, *inter alia*, in order to comply with the GRECO recommendation that requires the adoption of legislative and other measures to establish an efficient system of special investigative techniques and to provide the competent agencies with appropriate means and training in order to ensure that the system of special investigative techniques works efficiently in practice.

In addition to the legal measures mentioned above, in 2009 the Ministry of Interior conducted training of more than 100 police officers at all levels on the application of special investigative techniques. The capacities of the ministry's Special Investigative Techniques Service were further strengthened in the area of undercover surveillance by establishing, equipping and training regional teams for secret surveillance in regional centres.

3.2 Law Enforcement and Prosecution Bodies

3.2.1 Specialised Police Division

Serbia has specialised law enforcement capacities to investigate corruption (as does the Prosecution Service). Within the police, this capacity resides with the Organised Crime Department, which has a specialised division dealing with organised economic crime, including a unit for financial investigations. This division sees itself as being reasonably proficient in financial investigations, but it nevertheless acknowledged the need for specialists with an accounting/ bookkeeping/ auditing background due to an increase in more technically complex cases, such as procurement-related cases. There is a reluctance to engage external experts due to risks in terms of the confidentiality of investigations. The current resources are considered to be limited, particularly as the Department often provides assistance to investigators outside Belgrade, where capacities are far less developed. A doubling of the number of inspectors is anticipated with the new systematisation that is currently being elaborated.

The division reports very good co-operation with the tax police, especially with regard to money-laundering cases, but the situation could improve through technical means, such as networking of electronic databases with other relevant services. This networking is planned, but a project has yet to be drafted and financial and technical support obtained. Good co-operation with the Anti-Corruption Agency is also noted. Changes in the relationship between the police and the prosecutor are foreseen with the institution of prosecutor-led investigations in 2011.

Many observers are quite complimentary of the work of the police in recent years. The police publish annual performance statistics, but information on 2010 will not be available before April 2011. The available 2009 data, while not entirely presented systematically, reveals some interesting trends: a) In 2009 there were 3.5 times as many recorded criminal acts of offering or accepting bribes than in the previous year (268 in 2009 vs. 77 in 2008); and b) of the 3601 persons reported for corruption, there were 1,227 enterprise directors, 208 employees of public enterprises, 100 officials from the customs, education, health and judicial sectors, 87 police officers, 139 other public officials and 26 bank employees.

3.2.2 Specialised Prosecution

There is a Special Prosecutor for Organised Crime and High-level Corruption, who works with a 10-person team. High-level corruption refers to criminal acts resulting in a benefit of more than 200 million RSD and involving the misuse of office or crimes committed by high-level officials.

As from 2008, specialised departments for anti-corruption exist at the central level in Belgrade and in four regional centres: Belgrade, Kragujevac, Niš and Novi Sad. The Prosecution Service lacks a well developed

system of statistical analysis of its performance, but data is compiled on an annual basis and is usually finalised by the end of March for the previous year – a practice common to most state institutions. Current performance data is not made available on the Prosecution Service website, although apparently there were efforts to do so in the past, with some data provided for the years 2005-2007.

Prosecutors' workload varies depending on the location of the service, with a deputy prosecutor in Belgrade handling on average approximately 300 cases per year and in the busiest centres (Novi Sad) 400 cases per year. This situation is currently seen as still manageable, even with a 32% increase in cases noted for 2010 due to a restructuring and downsizing of the service (more details on this issue are provided below). Despite the increased workload, the previous year was also seen as successful, with the Prosecution Service being able to clear (close) a number of cases during 2010 that had been open but had not progressed for some 10 years. This particular outcome is seen to reflect an improved co-operation with the courts, although the precise number or the type of cases in question was not provided.

Prosecutors' salaries are viewed as quite respectable for Serbia. Remuneration is tied to the position and to the number of years of service, as defined in the Law on Judicial Salaries. While a uniformed police officer has a starting salary of the equivalent of approximately 300 EUR, the lowest prosecutorial position (deputy prosecutor) starts at 800 EUR – the same salary level as a police commander in Belgrade. The President of the State Prosecutors Council receives a salary equivalent to 1,800 EUR, which is higher than that of the Prime Minister, who receives 1,000 EUR. Special prosecutors' salaries are doubled, and they receive other benefits that ordinary prosecutors do not, such as subsidised housing. While the possible threat to special prosecutors is recognised, as is the need for some form of incentive/compensation for the high-risk circumstances in which they operate, nevertheless there is apparently some feeling among colleagues that the perks received by special prosecutors are perhaps a bit excessive.

Prosecutorial performance is monitored by the immediate Higher Prosecutorial Office. The mechanism for carrying out this performance appraisal is termed "instructive review" and typically consists of two-three days of on-site visits, reviews of data and files, and interviews. The instructive reviews are carried out according to an annual plan of control, and while they primarily aim to be instructive, the visits can, and have, uncovered problems. No additional details were made available concerning the types of problems encountered or the consequences/outcomes.

Individual performance assessment (Law on Prosecutors, chapter 7, articles 99-102) is carried out annually, as a kind of peer-review exercise, by a hierarchically superior prosecutor and the prosecutors' collegium at that higher level (a collegium is composed of the prosecutor and all deputies in a given prosecution office). The appraisal system is not viewed as particularly effective, with 99% of evaluations inevitably judged satisfactory. (It has been remarked that the Serbian Bar Association has stricter criteria, and many persons who succeed in becoming prosecutors would not be awarded the status of attorney.) The appraisal system is expected to change in accordance with criteria elaborated by the State Prosecutors' Council (more details are provided in the next section).

The process of advancement is similar to the process for first-time appointment, but with higher criteria applied. In other words, advancement is not automatic, apart from annual salary increases based on years of service.

Distribution of functions within the service is hierarchical, but prosecutors cannot be moved without their own consent. Mobility is low and constitutes a challenge when filling higher-level positions, with many qualified candidates simply forgoing advancement if it implies relocation.

A major transformation of the Prosecution Service is foreseen in 2011, with the shift to prosecutor-led investigations planned for the first half of the year. This practice is already in existence in the case of the two special prosecutors (for organised crime and war crimes), but experience in this regard is quite limited. Some training programmes are in place, but the planned transition time is considered to be too brief and insufficient to ensure the necessary level of expertise. Training has been agreed with the OSCE and with the US Department of Justice (DOJ), and there is considerable interest in assistance from various other

organisations. Nevertheless, the transition will be a challenge, and difficulties – together with lower effectiveness rates – should be anticipated.

Some observers are particularly concerned about the planned transformation in light of the institutional position of prosecutors, who are not seen as sufficiently independent. There is apprehension that the change will not lead to more effective law enforcement outcomes, but quite the opposite: that prosecutor-led investigations will be more easily compromised by political pressures. Unfortunately, this concern is not unfounded, judging from both past performance and in particular from the recent reappointment process of judges and prosecutors.

The Law on Public Prosecution requires prosecutors to act impartially (article 46) and to comply with the Code of Ethics (article 47); forbids them to be members of political parties or to be politically active in any other manner (article 49); provides them with functional immunity, unless they commit a crime in the execution of their duties (article 51); prohibits them from carrying out other functions or employment (article 65); requires them to give notification of potential conflicts of interest (article 66); and invokes disciplinary responsibility for the failure to withdraw from a case in which there are reasons to do so (article 104). Individual prosecutors are subject to specific instructions from a superior in cases where there is some doubt as to the efficacy of the prosecutor's handling of the case (article 18). The Republic Public Prosecutor may issue general instructions to all subordinates in an effort to improve the legality and effectiveness of the service (article 18).

While prosecutors are nominally independent of both executive and legislative powers according to the Constitution and the Law on Public Prosecution (article 45), a long-standing tradition of executive influence has been noted by many observers and should be more openly acknowledged. The Prosecution Service is also still not financially independent, but it is foreseen to become so as from 2012. Unresolved issues remain concerning the legal and managerial mechanisms whereby prosecutors may be held accountable for their decisions to investigate or to abstain from investigating a case, which is one of the key issues where prosecutors have to exercise professional discretion.

The process of judicial reform, intended to strengthen the integrity and independence of both judges and prosecutors, was launched in 2006. The first move in this direction was embedded in the new Constitution of 2006, which provided prosecutors with permanent tenure of office. Their position was to be further strengthened with the introduction of the State Prosecutors' Council (SPC), composed of a majority of prosecutors, which became the body responsible for the appointment and promotion of prosecutors and for any disciplinary action (including dismissal) concerning them. The SPC was given responsibility for defining its rules of procedure, criteria for evaluation, disciplinary procedures, code of conduct for prosecutors, and a host of other protocols, which have not been completed to date.

The SPC was also given the task of carrying out the process of prosecutors' reappointment. To say that this process has been deeply flawed (along with the process of reappointment of judges, addressed in detail in the following section) would be an understatement (see above). The process has compromised prosecutorial independence and integrity to such an extent that it has rendered insignificant all other existing or planned integrity-promotion mechanisms. It would not be an exaggeration to assert that the judicial and prosecutorial reappointment process is currently the most troubling development in Serbia.

One part of the problem relates to efforts to improve efficiency by reorganising and downsizing the court system. The prosecutorial structure followed the new organisational structure and staffing estimates. There was nearly a 50% cut in the number of courts and, by extension, prosecutors' offices – along with approximately 30% reduction in staff – resulting in a significant increase in the workload. (It has been noted that corrections in the number of staff began to be instituted within months of the initial cuts in order to cope with the workload.) The second and more significant part of the problem relates to the process of reappointment itself. The process was carried out by the first members of the State Prosecutors' Council (elected by parliament at the end of March 2009¹¹⁷), but this was done neither transparently nor on the

¹¹⁷ Members of the State Prosecutors' Council include the Republic Public Prosecutor, the Minister of Justice, and the President of the Parliamentary Committee on Justice and Administration *ex officio*; six permanently appointed prosecutors or deputy prosecutors elected by prosecutors through secret ballot; and two respected and prominent lawyers who have at

basis of clear criteria, with the result that the Council was unable to provide an explanation or justification for the way in which decisions were made. Additional allegations of favouritism and the illegal use of security service data have also been raised, but these assertions cannot be substantiated and even without them the process was deeply compromised.

The authorities have vowed to address the problem and remedies are being implemented. A package of judicial laws aimed at addressing the problem was hastily passed at the end of 2010, but these laws have created an even greater outcry. One of the measures being implemented is the review of all complaints on the non-reappointment decisions by a newly-elected State Prosecutors Council. Unfortunately, the review has been blemished even before it has begun for two main reasons: (a) the State Prosecutors' Council (SPC) is being elected by the current prosecutors; however, those prosecutors whose positions were not renewed, but whose appeals have not been concluded, have been disenfranchised; and (b) the SPC elections are widely seen to be taking place under pressure, if not directly then in an atmosphere of uncertainty and fear that has been created by the reappointment process.

Unless the entire reappointment process to date were made null and void and implemented anew, it would be difficult to imagine how a remedy could be found that would be broadly supported. Even in the extremely unlikely case that a new implementation of the process were to be undertaken, the confidence in the system and in the intentions of the authorities has been deeply shaken, and it will take a great effort and considerable time to recover. Developments on this front should be monitored very closely—concerning the prosecution perhaps even more so than the courts in view of the significant operational changes that are also to be implemented in 2011.

3.2.3 Judiciary

There are no specialised courts dealing with corruption-related matters in Serbia.

4. International Co-operation

4.1 OECD Anti-Bribery Convention

Serbian authorities consider that the Criminal Code provisions are aligned with the OECD Convention on Combating Bribery of Foreign Public Officials, even if Serbia is not a signatory to that Convention. Within the framework of a project dealing with combating economic crime in Serbia, the Ministry of Justice received an expert opinion on the Criminal Code and on the Criminal Procedure Code from the Council of Europe, which analysed the extent to which the content of these laws was aligned with international standards in the fight against corruption. The experts were of the opinion that the Criminal Code was in line with OECD's Anti-Bribery Convention.

4.2 Council of Europe Conventions

With regard to conventions of the Council of Europe, the Criminal Law Convention on Corruption¹¹⁸ was ratified by Serbia on 18 December 2002 and the Additional Protocol to the Criminal Law Convention on Corruption¹¹⁹ was ratified on 9 January 2008. Serbia also ratified the Civil Law Convention on Corruption¹²⁰ on 9 January 2008.

least 15 years of professional experience, one of whom is to be a practicing attorney nominated by the Bar Association of Serbia and the other a professor in the law faculty nominated in a joint session of the deans of all law faculties in Serbia. The term of office of the members of the State Prosecutors' Council should be for five years, except for the members appointed *ex officio*.

¹¹⁸ Law on Ratification of the Criminal Law Convention on Corruption, *Official Gazette of the Federal Republic of Yugoslavia (FRY)* – International contracts, no. 2/2002 and *Official Gazette of Serbia and Montenegro*– International contracts, no. 18/2005.

¹¹⁹ Law on Ratification of the Additional Protocol to the Criminal Law Convention on Corruption, *Official Gazette of the Republic of Serbia* –International contracts, no. 102/2007.

Serbia is also a member of GRECO (Group of States against Corruption of the Council of Europe).

4.3 United Nations Convention against Corruption (UNCAC)

The United Nations Convention against Corruption (UNCAC)¹²¹ was ratified by Serbia on 20 December 2005. In fact, the Anti-Corruption Strategy was formulated in accordance with article 5 of UNCAC and contains all of the elements envisaged by the UN's manual for the technical implementation of the Convention. Furthermore, it was article 6 of the UN Convention that was invoked as the legal mandate and conceptual basis for the creation of the Anti-Corruption Agency as an independent body tasked with preventive anti-corruption activities and responsibility for handling corruption issues in a comprehensive and systemic manner.

Progress has been made in implementing the provisions of international conventions in the area of anti-corruption to which Serbia is a signatory party, namely the UN Convention against Corruption (UNCAC) and the Council of Europe conventions. Some of the provisions of these conventions have been implemented by the adoption of the Law on the Liability of Legal Entities for Criminal Offences, the Anti-Corruption Agency Law, and the Law on Seizure and Confiscation of the Proceeds of Crime. The Ministry of Justice is also involved in the UN pilot project on the self-assessment of the enforcement of UNCAC.

4.4 EULEX

According to observers, and disregarding the issue concerning the status of Kosovo under UN Security Council Resolution 1244, the co-operation of Serbian authorities with EULEX leaves much to be desired, as many cross-border criminal activities escape prosecution, especially activities related to financial crime but also some types of organised criminality (e.g. money-laundering).

¹²⁰ Law on Ratification of the Civil Law Convention on Corruption, *Official Gazette of the Republic of Serbia* –International contracts, no. 102/2007.

¹²¹ Law on Ratification of the UN Convention against Corruption, *Official Gazette of Serbia and Montenegro*- International contracts, no. 12/2005.

PUBLIC EXPENDITURE MANAGEMENT AND CONTROL

Summary

Main Developments since Last Assessment (May 2010)

The past year has mainly been marked by legal changes that could have a significant effect on the **Public Expenditure Management (PEM)** system. The main changes have been amendments to the Budget System Law (BSL) in order to introduce fiscal rules, and the establishment of a new and independent Fiscal Council. The budget timetable now allows for the participation of the Fiscal Council in the budget process, and the National Assembly may now comment on the Government's Fiscal Strategy Report before the government finalises its budget proposals. However, these provisions have yet to be implemented in practice. Severe financial constraints also apply as the government tries to comply with the IMF Standby Agreement.

Only limited progress has been made in the area of **Public Internal Financial Control (PIFC)**. The 2010 amendments to the Budget System Law (BSL) introduced a clear definition of internal audit but those for financial management and control (FMC) remain confusing. The BSL amendments mean that secondary legislation also needs to be revised, which is currently being done. An examination commission has been established and the first internal audit certification examinations are scheduled for May 2011 (originally foreseen to be held in May 2010). The CHU is preparing its second annual report on PIFC.

In the preparations for **decentralised management of IPA funds (DIS)**, Serbia has moved from relatively passive preparations to more co-ordinated and active work. Active preparations are taking place at a very operational level for all IPA components. A few questions remain unanswered (such as staffing and the establishment of the Audit Authority) but Serbian authorities are committed to finalising these reforms by the end of 2011.

The main developments in the area of **external audit** since the last assessment relate to a significant increase in staff and, subsequently, an enhanced audit capacity, which have translated into better audit coverage with regard to the audit of the financial statement on the 2009 budget. The audit report for this audit was submitted to the National Assembly and discussed in the Committee for Budget and Finance in February 2011. The audit plan for the audit of 2010 financial statements has been adopted by the Supreme Audit Institution Council. A strategic plan, financial audit methodology and financial audit manual have not yet been formally adopted, but are currently under preparation.

Main Characteristics

PEM: Broadly speaking, the BSL provides all the essential components of a sound budget system, including in terms of formulation, execution, financial management and control, and audit. In line with the IMF Standby Agreement, Serbia has achieved its short-term fiscal targets in difficult circumstances in recent years by introducing recruitment restrictions, limited salary increases, and reforms to the pension system.

The recent adoption of fiscal rules in the BSL and the imminent establishment of the Fiscal Council are expected to impact positively on both the formulation and execution of the budget, and to enhance accountability. But existing deadlines are not sufficiently respected and the Assembly is not yet able to effectively hold the government to account.

The state budget does not include all donor funding, although EU funding is shown separately in the published budget documentation, as is the Serbian co-financing element. The budget documentation is of

insufficient quality and lacks transparency, and the structure of the budget is too detailed to be monitored effectively.

Since 2008, five ministries have undertaken steps for the development of programme budgeting, but insufficient capacity within the administration to develop this further and a lack of managerial capacity to execute a programme budget in accordance with a programme's objectives risk diverting attention from the more important short-term goal of improving policy-making within line ministries.

The budget execution phase has been strengthened with the introduction of new IT tools that allow Budget Beneficiaries to input data themselves into the system, which avoids manually checking of paper invoices by the Treasury. The fact that the Treasury still lacks information about commitments and that budget beneficiaries do not maintain this information either is a continuing weakness.

The Medium-Term Expenditure Framework introduced for the 2010 budget exists in name only, with the latter years representing only indicative allocations. The budget essentially remains a one-year bottom-up process, with budget-users ignoring top-down expenditure ceilings in their budget requests and no link between the budget allocations and strategic thinking.

The capital budget is not underpinned by any form of analysis and is drafted by the Ministry of Finance without any meaningful input from the Ministry for the National Investment Plan, as this Plan is drafted separately from the budget.

There is no strategic financial planning at budget beneficiary level either. The planning framework for EU funds provides a more analytical approach to multi-annual planning, but these activities are not linked to the budget process, and the Ministry of Finance has no significant role in the planning process for EU funds.

PIFC in Serbia is still at an early stage of development. The BSL 2010 provides a comprehensive legal framework for the development of PIFC, although some new definitions risk causing confusion about the actions required. FMC and IA rulebooks exist since 2007 but need to be revised.

The CHU has only limited staffing. It does not yet fulfill all of the functions of a CHU and CHU staff require a greater appreciation of managerial accountability as well as of efficiency and effectiveness

In the Ministry of Finance, although financial inspection is now organisationally separated from internal audit, the current tasks for financial inspection risk overlapping with those of internal audit. A clear focus for inspection on major financial irregularities, fraud and corruption would clarify its role compared to that of internal audit.

Financial management appears to be understood as only the control of expenditure against the budget and the cash profiles. Accounting systems designed to provide additional cost and management accounting information do not appear to exist in Direct Budget Beneficiaries, and the need for such systems is apparently not understood. The comprehension of the terms "efficiency" and "effectiveness" seems to be limited. Risk management appears to have more significance at this stage in the development of FMC than would normally be expected.

Internal audit units have been established in all internal audit rulebook-specified organisations (and in others as well), but these units are not sufficiently staffed to function effectively.

A characteristic of the Serbian public administration is the high number of subsidiary organisations – Indirect Budget Users and public enterprises. Whether large or small, there appears to be no effective Direct Budget Beneficiary managerial control over them. With public enterprises, this extends to how the chairman and external auditors are appointed and to who they report.

Overall, there is a lack of managerial accountability and of appreciation of the meaning of the term. The lack of separation of political and managerial responsibilities, with the head of the Direct Budget Beneficiaries making all effective decisions, prevents the emergence of managerial professionalism and accountability. There are no systematic arrangements for either the setting of objectives, the performance standards or indicators for budget beneficiaries, or the reporting or delegation of budgets and responsibilities linked to accompanying accountability arrangements. Therefore the basic premise

underpinning both FMC and internal audit is missing. This gap also has implications for Serbia's aspiration to apply for decentralised management of IPA funds by the end of 2011, as the general control environment would remain weak even if the formal procedures and structures for DIS were well prepared. There is some co-ordination between the activities of PIFC and DIS preparations, but it is still too fragmented to prevent the creation of two management systems within the same administration.

External audit is at a very early stage of development, as the State Audit Institution (SAI) only became operational in June 2007, following the adoption by the National Assembly of the SAI Law in 2005. The State Audit Institution (SAI) of Serbia has started fulfilling its role of auditing the financial statement of the budget for 2008 and of providing the National Assembly with an annual opinion and audit report on the government's public finance management for 2009. The Assembly has started discussing these reports, but its capacity to carry out its role with regard to budgetary oversight remains very weak.

The SAI law is broadly in line with international requirements for the independence of SAIs and the SAI has a sufficiently broad mandate to audit state and EU funds. The SAI has elaborated and adopted rules of procedure and a code of ethics, and is preparing an audit methodology and audit manual, a staff certification programme, and a strategic plan. Progress in these areas will need to continue together with a review of the legal framework to ensure that the framework is sufficiently robust, ensures the independence of the SAI in practice, and is effective in all respects.

Significant time has been spent by the SAI, in accordance with the law, on initiating offence procedures against officials. These procedures have utilised SAI resources that could otherwise have been used for additional audit work. The SAI remains considerably under-resourced, which has a detrimental effect on the level of audit achieved; it will need to address these shortcomings in order to become a modern and effective SAI.

Reform Capacities

There is recognition among staff at all levels of the Ministry of Finance that staffing is insufficient and analytical capacity inadequate to develop a strong **PEM** process. However, little is being done to address these two problems. Overall, the capacity for dealing with EU funds is relatively good but still depends on the capacity brought in by technical assistance projects.

The development of **PIFC** in Serbia requires a change in the approach to the delivery of public services which would introduce professional management to replace the traditional political/administrative control. At present, PIFC is simply regarded as a technical improvement in financial control currently carried out mainly by the Treasury. The aim of PIFC is to shift the responsibility for financial control away from the Treasury to the managers of line ministries, in order to improve the efficiency and effectiveness of public expenditure and to ensure that financial control is fully maintained.

This part of the PIFC reform is beyond the capacity of the CHU and requires a concerted public administration reform. Managers cannot be responsible for efficiency and effectiveness if they are not given that responsibility and the mechanisms to exercise that responsibility. Further technical assistance to the CHU that focuses only on technical issues will not be sufficient. Closely linked to this reform is the need to encourage the Ministry of Finance to establish a process linking budgets with achievements based on the budget resources made available. The Ministry of Finance should also be active in encouraging improvements in the efficiency and effectiveness with which public resources are used.

However, there is no apparent appreciation of the implications of PIFC reforms. For these to succeed, the drive has to come from the highest political levels. While there is recognition at the State Secretary level of the need for some degree of reform, there is no evidence of such recognition above that level. Without it, PIFC will remain a technical process rather than a managerial one.

External audit: Although the SAI has faced considerable difficulties in recruiting staff, finding suitable premises and providing adequate logistical resources, it has seen steady improvements in all of these areas during the past year. Furthermore, with the production of annual audit reports for 2008 and 2009, it has now proved to be capable of fulfilling its audit responsibilities.. The SAI has benefitted considerably from its

co-operation with the Office of the Auditor-General of Norway (OAGN), and has applied for support through a Twinning project. After operating for only three years, Serbia's SAI seems to be in a good position to build on its experience so far and to further develop into a mature and professional institution.

Recommendations

A new plan for reforming the Serbian **PEM** system is urgently needed. This cannot however be imposed from the 'outside' or by donors. While the government as a whole must be committed to such a plan, a strong minister has to champion it or else it will not succeed.

Fundamental for the successful implementation of **PIFC** is a reform of the organisation and culture of the civil service, in order to introduce the notion of managerial accountability. In undertaking this reform, a greater separation of political and managerial responsibilities should be established, urging ministers to focus on strategy and policy and managers to ensure that services are delivered. Focusing only on PIFC as a technical control issue without also addressing this wider context will not produce effective results. The responsibility of the CHU is to recognise and support the introduction of these wider contextual reforms. The same applies in principle to the DIS preparations – focusing only on formal procedures and on the training of a narrow group of staff will not improve significantly the general management and control environment, and certain risks will remain.

Activities needed in both areas are very much interlinked and are therefore summed up jointly:

1. The government should establish a strategic planning process that sets out the main objectives of government policy, and line ministries should prepare, following these main objectives, their own strategic plans with objectives and timescales, including an assessment of the resources that will be required. The government should also develop managerial structures that are designed to deliver the agreed objectives, with the allocation of responsibilities, delegation of budgets, and introduction of reporting arrangements.
2. The MoF needs to provide appropriate methodological support, guidelines and training to facilitate the new strategic planning elements of the budget. Strategic economic and financial planning should cover not only macroeconomic issues but also the long-term costs of new policies and the impact of current expenditure costs of new investment projects on future budgetary resources as well as on long-term financing of major funds, such as pension funds and disability funds. Budget-users should respect the targets of the medium-term expenditure framework without the MoF needing to apply additional pressure. To secure control over budget allocations, budget-users' own revenues should be treated in the budget discussions as part of their agreed budget ceilings.
3. In order to develop strategic thinking, the MoF should carry out a number of reforms including moving to a less detailed, three-digit basis for budget provisions. Attention should also be paid to the management of commitments. The ambitions for programme budgeting and performance budgeting should be reconsidered and brought in line with the administration's analytical capacities.
4. The MoF needs to create effective communication and co-ordination mechanisms within the administration to avoid duplication of activities and to ensure the assignment of clear responsibilities, especially where policies or tasks require input from different areas.
5. In order to enhance controls, the MoF also needs to clarify and formalise the relationships between Direct Budget Beneficiaries and both Indirect Budget Beneficiaries and public enterprises. The same applies at the local government level.
6. The excessive detail in the Budget System Law should be eliminated to provide sufficient scope for introducing administrative changes without having to amend the Law.
7. FMC and internal audit should be developed as support services to management, not as "control" functions.

8. As internal audit strengthens, the MoF should refocus financial inspection on major financial irregularity, fraud and corruption.

For *external audit*

1. The SAI will need to ensure the formal adoption of the strategic plan and of the audit methodology and manuals to provide a sound foundation for its co-ordinated programme of institution-building and capacity-strengthening. The SAI should ensure that its management and staff are dedicated to its implementation.
2. Similarly, the Staff Certification Training Programme needs to be adopted and implemented.
3. It will also be important to ensure that the current plans for the recruitment of staff are fulfilled, especially in view of the upcoming Twinning, so that the maximum benefit may be obtained from this support, which will complement the ongoing support by the OAGN.
4. The SAI's positive relations with the Budget and Finance Committee of the National Assembly should be fostered and an "awareness-raising" programme of the SAI's work in the National Assembly is needed, as the general oversight function of the parliament is still very weak and needs to be considerably strengthened.
5. To minimise the potential impact of political interference with the SAI's activities, it would be worthwhile if the SAI undertook a detailed review of the legal framework in comparison with international standards and guidelines.

PUBLIC EXPENDITURE MANAGEMENT

1. Budget Legislation

Article 92 of the Constitution of the Republic of Serbia provides that the Republic, autonomous provinces and local self-governments are to have a budget, the procedures for which are to be regulated by law. The Constitution also requires budget implementation to be audited by the State Audit Institution (SAI), which is to present its evaluation to the National Assembly for its consideration. Procedures for Assembly approval of the government's budget proposal are regulated in the Rules of Procedure of the National Assembly.

The law regulating fiscal matters in Serbia is the Budget System Law (BSL). This law was originally drafted in 2002 and has since been amended on several occasions. The most recent amendments were adopted in September 2010 and December 2010, which means that amendments to the basic budget legislation occur more often than one would expect in an EU Member State. While the amendments introduced – such as the introduction of fiscal rules and the establishment of an independent Fiscal Council in 2010 and the July 2009 amendments that required preconditions for the management of EU funds, created the legal base for a medium-term budgetary framework with expenditure ceilings and introduced the concept of programme budgeting – may have been positive steps in themselves, the necessity of so many amendments indicates that the Budget System Law is simply too inflexible.

As one would expect, this law outlines the planning, preparation, adoption, execution, accounting, reporting and control of the budgets of the central government, autonomous provinces and local self-governments as well as the preparation and adoption of the financial plans of social security organizations, which are extra-budgetary funds. As such, it meets most of the requirements of a comprehensive organic budget law. However, its content goes beyond the provisions of an organic budget law by stipulating procedures regarding administrative issues concerning the various government bodies. Unfortunately, this excessive detail has resulted in a law that restricts and impedes the implementation of operational measures that would enhance the efficiency and effectiveness of the overall budgetary system. This inflexibility is the reason why so many amendments are required.

For instance, the December 2010 amendments in the Law on Amendment and Addenda to the Budget System Law were required to legalise salary reductions designed to underpin the lower expenditure target for 2011 and thus ensure that the new budget deficit target would not be breached. Furthermore, Section 2 of the Law on Amendment refers to salary provisions for the period 2013-2015, which means that further amendments to the Budget System Law may be required in the medium term if the prevailing economic volatility continues. Such amendments are cumbersome and would not be considered as good practice or even as a requirement in EU Member States, where planned but unimplemented increases to public servants' salaries can be re-negotiated or revised. It should be noted that such changes are different from reducing salary scales that are already in place, which could require the amendment of legislation in some countries.

It would be better if the existing Budget System Law and the Law on Amendment were properly consolidated and redrafted so as to include only those provisions that are appropriate to an organic budget law. In particular, this requires removing those articles that restrict the government from implementing rapid changes that may be necessary. The organic budget law should empower the Ministry of Finance to draft regulations that ensure the efficient and effective implementation of budgetary procedures. Such a law would be more flexible than the existing legislation.

2. Parliament/Executive Relationships

Although both the Constitution and the Budget System Law provide that the National Assembly is to approve the state budget and the financial plans of extra-budgetary funds, in reality the Assembly's ability to hold the executive accountable is particularly weak in Serbia.

While the Budget System Law provides for measures that are in compliance with good practice, the following functions are subject to little more than “rubber stamp” approval by the National Assembly:

- All financial liabilities incurred by the government have to be formally approved by the Assembly through its approval of a budget that includes limits on borrowing and on the total amount of guarantees that can be issued.
- The realisation of the budget is to be audited by the State Audit Institution and approved by the Assembly.
- The Assembly may propose expenditure-increasing amendments to the draft budget as long as these amendments are accompanied by corresponding expenditure decreases or revenue increases elsewhere.
- The government requires the approval of the Assembly if it wishes to make reallocations of more than 5% of the original allocations, with the result that significant changes in current-year expenditure require Assembly approval through a supplementary budget.

The National Assembly’s ability to hold the government accountable with regard to the budget is compromised by:

1. a very short time frame for considering the draft budget since the Budget System Law still requires the government to submit its draft budget to the Assembly by 1 November and the Assembly to adopt the budget by 15 December, which gives the Assembly insufficient time for a comprehensive scrutiny of the budget. Indeed the situation was even worse than this in the past two years because the 1 November deadline was not met and the Assembly was given only a few days to conduct its scrutiny before formal adoption;
2. a lack of analytical resources, since the Assembly has no staff to carry out the necessary research and basic analysis;
3. the very weak position of the individual Assembly member if he/she offends the government, as article 102 of the Constitution also provides that “under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at the disposal of the political party upon which proposal he or she has been elected a deputy”.

The 1 November deadline for submitting the draft budget to the Assembly must be adhered to in the future. While a six-week scrutiny period may not comply with the practice seen in most EU States, allowing for an even shorter period is worse. Moreover, unless the existing deadlines are respected, there is little value in providing for even tighter, more demanding deadlines.

It must be acknowledged that the Law on Amendments and Addenda to the Budget System Law of September 2010 provides for the establishment of the Fiscal Council as an independent body, with the aim of improving the culture of fiscal accountability in Serbia by allowing for independent analysis and expert debate on the government’s fiscal policy. Furthermore, the Budget System Law clearly sets out the powers and functions of the three-person Fiscal Council, whose members are nominated by the President of the Republic of Serbia, the Minister of Finance and the Governor of the National Bank. It also provides for the Council’s secretarial and analytical resources. The timetable of the budget cycle has been changed to allow for the role of the Fiscal Council in this process and to introduce two new steps that may help the Assembly (these steps are discussed below under *Budget Process*). As at the time of writing the members of the Council had not yet been appointed, the effectiveness of this new body in practice remains to be seen, but its establishment is a positive step. While the Council is not strictly part of the Assembly, it could nevertheless provide a valuable resource to the Assembly as long as it is allowed to operate effectively.

However, the power that political parties hold over individual members of the Assembly constitutes a serious impediment to holding the government accountable. This part of the Constitution should be changed, even if it requires a referendum.

In general, the imminent establishment of the Fiscal Council is a step in the right direction. However, a culture of respect for existing deadlines must be developed before consideration can be given to providing for even more demanding deadlines. Furthermore, the very weak position of Assembly members is the most serious barrier to the establishment of a budgetary system where the Assembly can hold the government to account. Accordingly, there remains considerable scope for strengthening the Assembly's role in fiscal matters.

3. Scope of the State Budget

The State budget does not include all public sector transactions. The Law allows for transactions of local government, state enterprises and extra-budgetary funds to operate in parallel to the State Budget. However, the activities of these bodies must be in accordance with the Law, which also requires that a consolidated financial statement incorporating these bodies be presented to National Assembly each year. Therefore, the scope of the Budget is satisfactory.

The budget process and budget documentation have not undergone any visible improvements in recent years, apart from the inclusion of information regarding EU funds and the co-financing that is necessary to draw on these funds. However, while fiscal data were based on GFS 86 standards up until 2009, it is now increasingly based on GFS 2001, which is another improvement.

The budget publication is divided into two parts, with the first part containing main fiscal parameters and the second made up of appropriations for the 188 first-line spending-units – direct budget beneficiaries – and the more than 9,000 second-line spending-units – indirect budget beneficiaries. There are seven levels of expenditure:

- Level 1 is expenditure at the direct budget beneficiary level (“Chapter”), such as Ministry of Finance, Ministry of Education etc.;
- Level 2 is expenditure at the indirect budget beneficiary level (“Subchapter”); such as Tax Administration, Primary Education
- Level 3 is expenditure expressed on a functional basis in accordance with GFS 2001;
- Levels 4-6 are only used for direct budget-users using programme expenditures;
- Level 7 is expenditure expressed by means of a three-digit economic classification, in accordance with GFS 2001.

In general, the structure of the budget is excessively detailed, especially in terms of the number of line items. On the one hand, this detail is justified by the need for close monitoring of expenditure by budget-users with internal control mechanisms that require significant improvement. On the other hand, monitoring and control must be based on a system that is compatible with the number of available staff, IT tools and capability of the staff to fulfil their roles. It seems clear that the detailed level of monitoring cannot be carried out effectively by the understaffed Budget Preparation Department. Furthermore, the level of detail in the budget documentation makes it less understandable and less transparent for both the National Assembly and the general public.

The budget documentation is quite comprehensive in terms of the definition of public money. Budget preparation for the three extra-budgetary funds covering pensions and disability insurance, health care and unemployment largely follows the procedures for preparing the state budget. The financial plans for these funds are submitted alongside the budget for Assembly approval, and therefore the Assembly has a full presentation of all expenditure and revenue affecting the central government's net lending. The funds are not fully self-financed, and there is a significant transfer of funds from the state budget. While it would be desirable to incorporate these funds into the state budget, such a step may not be absolutely vital as long as the actual own revenues are properly scrutinised against the original targets.

However, own revenues of all budget-users – not just extra-budgetary funds – are a major concern in ensuring comprehensive budget preparation, as these revenues are for the most part not included in the expenditure ceilings established for budget-users in the process of budget preparation. Consolidation of the rules for the use of own revenues is important in order to ensure that the government as a whole and the National Assembly have better control over the use of all governmental revenues.

In accordance with the Budget System Law, an assessment of outstanding guarantees and other contingent liabilities, as well as a tax expenditure report, are now included in the budget documentation. However, it seems that the accuracy of the tax expenditure report is questionable.

According to the Budget System Law, all new initiatives must be properly costed and submitted to the Ministry of Finance for its opinion before being submitted to the government. In practice these requirements seem to be formally complied with, but the costing provided is often seen as inadequate, and the Ministry of Finance (together with the Treasury) is only allowed limited time (often some hours only) to comment on the explanation, which is clearly insufficient to ensure a meaningful contribution from the Ministry. Efforts should therefore be made to create working procedures and to improve administrative capacities (at the level of both line ministries and the Ministry of Finance) for carrying out impact assessments of new policy initiatives.

The Budget System Law provides that indirect budget beneficiaries include public enterprises established by local self-governments, which means that these agencies are subject to the expenditure management and control provisions of the law. The law also stipulates that the Ministry of Finance is to carry out budget inspections of the public enterprises established by the state. It further stipulates that the State Treasury and local government treasuries should monitor wage bill trends in public enterprises and submit reports to the Ministry of Finance. Given the fact that there are about 600 local self-government public enterprises, 20 provincial public enterprises and 25 state public enterprises, it is clearly important that these enterprises be monitored and controlled. However, within the Ministry of Finance, there is apparently little interest in exerting controls over these agencies as they are commercial and do not spend public money. This attitude is ill-advised, and greater interest should be taken in ensuring that these agencies are operating efficiently and effectively.

There are major challenges to be faced in terms of improving the quality and transparency of the budget documentation. There are too many budget-users, too many budget items, and too many tasks for the Budget Preparation Department to carry out if it is to function effectively. While there are strong arguments for incorporating extra-budgetary funds into the budget, of even greater importance is the inclusion of own revenues of all budget-users in their expenditure allocations in order to ensure that the government has better control over the use of all governmental revenues. While state commercial bodies may not be included in the consolidated budget (although transfers to these bodies of course constitute public expenditure), there should be monitoring and control to ensure that these bodies are operating efficiently and effectively.

4. Monitoring of Public Balance and Public Debt

There is a strong awareness of the importance of a sustainable budget balance and public debt ratio. The Budget System Law provides for general fiscal rules, which limit the budget deficit to 1% on a cyclically adjusted basis over the period 2011-2015 and impose a limit of 45% on the debt ratio. Data on both the budget balance and the debt ratio are published monthly on the Ministry of Finance website. There is a clear distinction between domestic and external debt. A time series goes back to 2000 for public debt and to 2005 for the consolidated general government balance.

The Public Debt Administration (PDA) is responsible for managing the debt and seems to be operating quite well. Although its staff admit that they are lacking in middle-office risk management, this candour and clear desire to improve augurs well for the future of the PDA. However, a new law on public debt is being drafted without the direct involvement of the PDA. It is recommended that the PDA be involved in the drafting of any new legislation on the public debt.

There is also an awareness of the importance of monitoring state guaranteed debts. For instance, local self-governments can borrow from the market, with or without a state guarantee. Only state guaranteed debt is included in the public debt figures, which is inconsistent with European System of Accounts (ESA) 95 conventions. Nevertheless, the non-guaranteed debt data is reported in the Treasury's annual report.

The fiscal data is largely based on GFS 2001 standards. The National Statistical Office is also working on producing national accounts data in accordance with ESA95, but the Ministry of Finance is not involved in this process, which suggests that the establishment of a systematic development process for the adoption of ESA95 is not a priority.

For the year 2010 the level of consolidated public spending in Serbia (including extra-budgetary funds and local government funds) was estimated to be 1,360 billion RSD, which is just under 45% of GDP. This figure represents an increase compared to 2008, when it was 43%, but is broadly the same as for 2009, when it was just over 45%. For 2010 the government's original intention was that the public deficit should not exceed 2.6% of GDP. However, a supplementary budget was required in the autumn as a result of a weaker economic performance than had been forecast, and the final outturn for 2010 was a deficit of 4.4% of GDP. The 2011 budget target is 4.1% of GDP.

The consolidated general government balance in Serbia has been in deficit since 2006. Even if the 2011 target is respected, this will mean a deficit for six consecutive years for the period 2006-2011. The economic downturn has obviously been a significant factor in this situation, but as the budget deficits have grown from 2.6% in 2008 to 4.3% in 2009 and then to 4.8% in 2010, it is clear that the Serbian budget position is unsustainable.

While considerable progress was made between 2005 and 2008 to reduce Serbia's public debt ratio as a proportion of GDP, this ratio has been rising since the end of 2008. The ratio was reduced from 50.2% of GDP at the end of 2005 to just 28.4% at the end of 2008. However, at the end of 2009 the public debt ratio rose to 31.5%, and it rose again to 40.7% at the end of 2010. While the ratio fell to 37.1% at the end of January 2011, it is far too early to suggest that this figure represents a positive trend that is likely to continue, especially given the forecast budget deficit of 4.1% for 2011.

The consolidated general government budget balance and the debt ratio are important in Serbia. On a purely technical basis, more emphasis could be placed on developing a systematic process for the adoption of ESA95 standards. On a practical level, the Serbian Government has striven to control its budget balance and debt ratios in recent years. On a short-term basis it has had some success, with reforms of the pension bill and of public sector salaries and numbers. However, previous slippage on pay freezes and promised reforms suggest that it will be difficult for the government to attain its 2011 targets, not only for second-tier fiscal targets, such as salaries, but even for first-tier targets, such as the deficit and the debt. Strengthening the capacity within the administration will be a contributory factor in achieving the efficiency that will be required to ensure that budget balance and debt limits are not breached.

5. Medium-Term Expenditure Framework

The Budget System Law provides for a three-year fiscal strategy report containing a large quantity of macroeconomic and fiscal data, including assessments of fiscal risks and potential liabilities. While the report does not include expenditure ceilings for individual budget-users, it does contain the overall aggregate expenditure ceiling for the years in question (although to date the latter two years have been indicative only). Furthermore, as from 2011 the Budget System Law provides for specific and general fiscal rules that must be adhered to. The specific rules indicate ceilings in salaries and pensions, as well as for the capital budget. The general fiscal rules limit the public debt ratio to 45% of GDP and limit the budget balance to a deficit of 1% on a cyclically adjusted basis over the economic cycle.

The Ministry of Finance has asked line ministries in recent years to provide more substantial information over a three-year period, which means that the basic circumstances for developing the medium-term budgetary framework have improved. However, these fiscal strategies do not seem to be part of a

systematic strategic planning framework but are rather prepared at the individual line ministry level only. Accordingly, it is unclear how the fiscal strategy report will incorporate these ministerial strategies into the government's overall fiscal strategy.

The three-year Fiscal Strategy Report is considered to be an improvement compared to the previous Budget Memorandum. The Budget System Law requires the report to contain a large quantity of macroeconomic and fiscal data, including assessments of fiscal risks and potential liabilities as well as the overall fiscal parameters, such as central government revenue and expenditure and central government and general government net lending. Unlike the Budget Memorandum, the Fiscal Strategy Report must provide a detailed explanation of the government's fiscal targets, in accordance with both the general and specific fiscal rules contained in the Budget System Law. The specific fiscal rules include ceilings for salaries and pensions, which is a new development.

Despite these changes, the medium-term expenditure framework still exists in name only, and the budget continues to be prepared in a one-year perspective. According to the Budget System Law, the budget proposals that budget-users submit to the Ministry of Finance should contain information on the two fiscal years beyond the upcoming year. These projections should then be consolidated into the government's budget proposal, with the budget presented as a full picture of the development of government finances over a three-year period. However, it would seem that the second and third-year targets are seen as indicative targets at best. In recent years, the initial targets have been hopelessly optimistic and have had to be revised significantly in subsequent years.

In parallel, the EU funds' planning work is actively taking place in the critical socio-economic areas, such as entrepreneurship, active labour market policies, vocational education, regional development and agriculture. Although the Serbian authorities have produced good quality documents (Operational Programmes for the Instrument for Pre-Accession), and in general there is a recognisable capacity to prioritise, the process is still strongly supported by technical assistance. Furthermore, the medium-term plans for EU funds do not seem to have direct linkages with the medium-term budgetary framework that has been established by the Budget System Law. The medium-term planning for EU funds could serve as a good basis for the establishment of a more systematic, sector-specific planning framework within the medium-term budgetary framework.

The Current Budget Reserve, which is used to finance both shortfalls in funding for existing policy initiatives and also new policy initiatives approved by the government within the budget year after the adoption of the Budget, is set at an artificially low level and should be much larger in order to provide a true picture of additional spending linked to new policies. These new policies are often approved without much attention being paid to their costs in subsequent years, which is another indication of a lack of strategic planning. While the need for a reserve like the Current Budget Reserve is understandable in a rapidly changing and developing environment, it should be set at a more realistic level, and new initiatives should be properly costed, not just for the first year but also for the following years if medium-term expenditure framework principles are to be applied.

Article 48 of the Budget Law and article 39 (4) of the Rules of Procedure of the Government stipulate that the explanation attached to draft legislation should contain an estimate of the financial resources required for implementation, both capital and revenue, for three years, and that no proposal should be submitted to the government without the favourable opinion of the Ministry of Finance. In practice, the Ministry of Finance views around 95% of draft legislation as part of the inter-ministerial consultation process, although often at very short notice, but ministries habitually assert, usually wrongly, that there is no financial consequence or that it is impossible to calculate that consequence (there is no guidance for ministries on how to calculate costs). It is left to the Ministry of Finance to calculate financial consequences, and these calculations are often ignored.

Despite the changes introduced by the specific and general fiscal rules and their inclusion in the three-year Fiscal Strategy Report, it is too early to say whether this will have a positive effect on the development of a medium-term expenditure framework that is closely interlinked with multi-annual planning and fiscal impact assessment. The creation of systematic, operational-level links with the EU

funds' planning framework could increase the positive consequences on the work of the Ministry of Finance and, later on, in other policy areas. Moreover, a considerable challenge remains in terms of strengthening the capacity within the administration to make reliable, medium-term macroeconomic and fiscal forecasts, both in the Ministry of Finance and in line ministries. This challenge leads to the need to increase the analytical capacity of ministries to conduct fiscal impact assessments.

6. Budget Process

Despite the amendments to the Budget System Law in recent years that have introduced a top-down expenditure ceiling, budget preparation in Serbia remains an incremental, bottom-up process that is heavily focused on a division of expenditure into line items. There has been no success in developing a strategic framework that would link strategic plans to budgeting and thus provide budget authorities with systematic information to facilitate a top-down approach. However, for 2012 it is intended to base the government's proposed budget on the strategic priorities of line ministries.

With the establishment of the Fiscal Council in 2011, the timetable for budget preparation in the Budget System Law has changed. The overall timetable nevertheless remains broadly similar to the previous one. The process still starts with a forecast of relevant macroeconomic parameters by the Ministry of Finance and a specification by 15 March of priority objectives for the next three years by the direct budget-users. This initial phase culminates in a fiscal strategy report, containing a medium-term macroeconomic framework, main fiscal parameters for the upcoming years, and information on the government's main policy priorities. However, whereas previously this report had to be adopted by the government by 15 May, it is now presented to the Fiscal Council and adopted by the government by 15 July. The Fiscal Strategy Report constitutes the basis for the preparation of the state budget and of the financial plans for extra-budgetary funds. Whereas previously the negotiation process between the Ministry of Finance and line ministries lasted from 1 June to 1 November, when the draft Budget Law is presented to the National Assembly, this process now begins on 1 August.

The parts of the budget cycle that have been allocated less time according to the new timetable are the drafting of budget proposals by budget-users (cut from 12 weeks to six weeks) and the analysis of these proposals by the Budget Preparation Department within the Ministry of Finance (cut from four weeks to two weeks). While the previous 12 weeks was more than sufficient for drafting a budget proposal, it seems likely that six weeks will be challenging for budget-users, especially given the fact that this period includes the holiday season. Limiting the time allowed for analysing these proposals to two weeks will also render this task very demanding.

The revised preparation process introduces two new steps involving the National Assembly. The first step allows the Assembly to offer comments and recommendations on the government's Fiscal Strategy Report by 31 August. It is expected that the Assembly will be able to provide its opinion based on the analysis of the Fiscal Council. The second new step obliges the government to provide the Assembly with an updated Fiscal Strategy Report by 5 October – in advance of the submission of the draft Budget Law by 1 November.

There has been no change in the time available to the Assembly for the analysis of the government's budget proposals, which remains six weeks. The reality is that to date the Ministry of Finance has had difficulty in meeting the 1 November deadline, and the Assembly has often had only a few days to carry out its role by the 15 December deadline. It remains to be seen how the revised schedule will evolve in terms of meeting the 1 November deadline.

The changed calendar for preparation and approval of the budget is summarised below.

15 February	Minister of Finance provides instructions for proposals on the financing of priority areas
15 March	Direct budget beneficiaries submit proposals for priority area financing for the budget year and the following two years
30 April	Minister of Finance prepares the Fiscal Strategy Report containing the

	government's economic and fiscal policy and budget projections for the upcoming three-year period
15 May	Minister of Finance delivers the Fiscal Strategy Report to the Fiscal Council
15 June	Fiscal Council provides its opinion on the Fiscal Strategy Report
1 July	Minister of Finance presents the Fiscal Strategy Report to the government
15 July	Government adopts the Fiscal Strategy Report
1 August	Minister of Finance issues instructions for the preparation of budget proposals based on the Fiscal Strategy Report and delivers the report to local governments and extra-budgetary funds
31 August	National Assembly delivers comments and recommendations on the Fiscal Strategy Report to the government
15 September	Direct budget beneficiaries and extra-budgetary funds submit their budget proposals to the Ministry of Finance
1 October	Government adopts the revised Fiscal Strategy Report, updated with the most recent macroeconomic projections
5 October	Government delivers the revised Fiscal Strategy Report to the Assembly
15 October	Minister of Finance submits the draft Budget Law and draft decisions on the financial plans of extra-budgetary funds to the government
1 November	Government adopts the budget and submits it to the Assembly
15 December	National Assembly adopts the budget

As indicated above, the Fiscal Strategy Report is considered an improved document in comparison with the previous Budget Memorandum. The report must take into account the general and specific fiscal rules contained in the Budget System Law. The specific fiscal rules include ceilings for salaries and pensions, which is a new development. Now that these ceilings are to be adopted by the government, there is cause to believe that budget-users will take the expenditure ceilings more seriously. This is important because if the institutional arrangements in the budget preparation process fail to restrict budget-users' expenditure proposals by means of firm ceilings, it could lead to a deterioration in the government's finances, and the Ministry of Finance would be unable to resist pressure for increased expenditure. Again, however, it is too early to say how effective the new specific fiscal rules will be, as they will be applied for the first time for the 2012 budget cycle.

The establishment of the Fiscal Council is a positive development, as has been the introduction of the Fiscal Strategy Report, which is to contain expenditure ceilings. If the formulation of the 2012 budget takes significant account of the strategic priorities of line ministries, this will represent a major achievement. Taken together, these measures can enhance the development of top-down budgeting, which will provide stability to the budget process, promote fiscal discipline and ensure sustainable public finances. However, it remains to be seen how effective these measures will be in practice.

7. Budget Management and Management of Public Investments

Total government expenditure is not captured in the state budget since it does not include all donor funding. However, EU funding is shown separately in the published budget documentation, as is the co-financing element on the Serbian side. Overall, the capacity for dealing with EU funds is relatively good and is considered to be above the average in the region.

Although the Serbian budget includes capital expenditures, there is also a separate National Investment Programme (NIP), which is not fully incorporated into the budget. The NIP has been an issue for some years, but no action has been taken to address it. The fact is that the NIP is passed in January or February each year, even though the budget has been approved the previous December. Although the Ministry of Finance has indicated that only capital expenditures provided for in the budget can be executed and that the NIP is becoming less important as a proportion of total capital spending, it seems pointless to have two allocative processes that are drafted separately. Steps should be taken (if this is not already the case) to ensure that all proposed investments are fully included in the budget documentation.

The elements of the NIP should also be included in the expenditure ceilings that are established during the budget preparation process. As the situation now stands, no consideration is given to the effect of capital expenditures on the current expenditures side of the budget (for example, the projected costs of building a hospital could be included in the capital expenditures without any reference to the cost of running that hospital once it is built). The authorities should merge investment planning with the standard budget process.

In the 2008 and 2009 budgets, five ministries (Ministry of Public Administration and Local Self-Governments, Ministry of Trade and Services, Ministry of Religion, Ministry of Education, and Ministry of Health) had their budgets divided according to a programme structure. In addition, the annual financial statements for these ministries were required to include a report on the outputs of programme budgets. This requirement was intended as a first step towards developing a full system of programme budgeting, which in turn was intended as a step towards performance budgeting.

While some ministries – the Ministry of Health in particular – have expressed satisfaction with programme budgeting, the system as it now stands is excessively complex and fails to enhance transparency and accountability. This situation is unlikely to change in the short term as it has not been developed internally by budget-users. The reality seems to be that managers in the budget-users do not have the authority, flexibility or capability to prioritise within the programme in order to deliver on these priorities.

Programme budgeting was intended to be a key element in the strategic planning framework that was expected to be fully functional by 2010. Although Section 37 of the Budget System Law seems to oblige budget-users to prepare their financial plans on a strategic basis for the budget negotiation process, there is no evidence to suggest that this is the case, and the capacity for performance management and impact assessment remains weak. At best, the links between strategic plans and programme budgeting is tenuous. At worst, the focus on programme budgeting, according to some senior staff in the Ministry of Finance, has shifted attention away from the more immediately important task of developing a more strategic approach to the policy-making process. While the inclusion of activity-related and/or performance-related information could eventually make the budget more accessible and transparent, this information seems to serve as a distraction from more immediate priorities, and it should be scaled back.

It is now clear that the time frame for introducing programme budgeting has proved to be too ambitious and has diverted focus from the more important short-term goal of improving policy-making within line ministries. It should not be abandoned completely, but it should be developed slowly on a much higher level.

8. Budget Execution and Monitoring

The Budget System Law provides for most of the basic principles necessary for effective budget execution and monitoring. The state budget, the financial plans of the extra-budgetary funds, and the budgets of local self-government units are controlled by the Treasury through the Treasury Single Account system. At the same time, the Treasury also registers all transactions in the treasury general ledger (see below with regard to government sector accounting). Through the centralisation of budget execution, a stringent control of transactions is possible. One clear weakness, however, is that the Treasury is not informed in advance of commitments by budget-users. It only learns of commitments when invoices are presented for payment, after the service has been completed.

The Treasury performs detailed control of all payment requests to ensure that the detailed line-item classification of the budget is complied with and that monthly cash apportionments are not exceeded. Furthermore, improvements have been made in cash forecasting capacity. All direct budget-users have been asked to submit their cash plans online by means of a financial planning module in the Treasury's IT system. The increased use of IT in recent years has meant that the checking of all invoices presented by budget-users is no longer carried out manually by the Treasury as these invoices are now processed online, which is a more streamlined approach, although there is no evidence to indicate whether expenditure control has in fact improved or worsened as a result.

The Treasury reports to the Ministry of Finance on liquidity shortages in order to reduce the danger of cash shortages that would prevent the completion of payments. Despite the fact that there is no formal liquidity committee, the Treasury works with the Ministry of Finance and the Public Debt Administration to forecast funding requirements in order to ensure that sufficient liquidity is available in the Treasury Single Account to execute payments. As a result, the availability of liquidity has improved in the past two years.

The Public Debt Administration was separated from the Treasury in recent years and is operating independently and effectively. According to the Public Debt Administration, Serbia has developed as a result a greater access to financial markets that enable the management of short-term liquidity positions. The Administration is succeeding in providing the system with essential funding by issuing government paper. This function was previously identified as a precondition for efficient financial management and represents further improvement in the PEM system.

However, despite these improvements, the government has still had to use its authority to suspend part of the public expenditure for up to 45 days and to introduce supplementary budgets in recent years. While the economic downturn was a factor in the decline of its fiscal position, Serbia has been paying the price for having pursued pro-cyclical fiscal policies when the economy was performing particularly well. It seems vital therefore that the existing budgetary targets are not breached in 2011. In this regard, the increased reliance on fiscal rules in the Budget System Law is encouraging, as it will enhance the power of the Ministry of Finance to set limits on public expenditure programmes and to enforce those limits. As indicated above, however, monitoring and control must be based on a system that is compatible with the available number of staff, IT tools and capability of the staff to carry out their roles. Monitoring by the Budget Preparation Department is based on an extremely detailed six-digit line item level, which is beyond the capacity of that department, given its limited number of staff. This level of detail should be changed so that the monitoring of the budget is less onerous.

A previous recommendation concerned a provision that would allow funds to be carried over to the next budgetary year, with a view to avoiding wasteful decisions by budget-users in their attempts to make use of all available funds by the end of the year so that they are not lost. This recommendation has not been followed, and it should be considered as a means of ensuring that scarce resources are not wasted.

The Treasury seems to be working well, insofar as it can control and record payments for direct budget-users and can provide information on indirect budget-users. Daily liquidity and cash-management issues are also being resolved quite well. However, it is not yet clear whether the new fiscal rules will enhance the ability of the Ministry of Finance to apply ceilings and to ensure that they are respected. To facilitate monitoring by the Budget Preparation Department, the basis should be changed to the more manageable three-digit level as opposed to the current six-digit level. In order to avoid inefficient end-of-year spending, consideration should be given to setting rules that would allow a carry-over of certain funds to the next year.

9. Accounting and Reporting

The Treasury is responsible for keeping a record of all transactions executed from the Treasury Single Account. This treasury ledger maintains a full record of all payments according to an organisational, functional, programme (for five ministries), three-digit economic, six-digit economic, and source-of-financing classification. In addition to the treasury ledger, direct budget-users are required to

keep accounting records of their own operations and of the operations of subordinate, indirect budget-users, although in practice most seem to rely on the Treasury accounting system. The Treasury produces reports on the execution of the budget, which are presented to the government within two weeks of the end of each month. The budget and accounting classification, previously based on the GFS 86, has changed to GFS 2001 in the past few years.

The Treasury keeps the state accounts on a cash basis. This cash basis poses some difficulties with regard to the accounting for EU funds, which needs to be on an accrual basis, and thus today there are no plans to rely on the existing state accounting organised by the Treasury for EU-funded programmes.

Furthermore, as stated above, the Treasury is not informed in advance of commitments by budget-users, which is a weakness that should be addressed.

The consolidation of fiscal reports is currently being co-ordinated by the Macroeconomic and Fiscal Analysis Department in the Ministry of Finance. The Budget Accounting and Reporting Department in the State Treasury is primarily responsible for reporting on the execution of the budget of the Republic of Serbia. The social security organisations and local self-government units submit their reports to the Treasury, which performs their consolidation.

Section 92 of the Budget System Law requires that the annual financial report of the Republic of Serbia and the annual financial reports of the extra-budgetary funds are to be subject to external audit by the State Audit Institution (SAI). The SAI operates in accordance with the Law on the State Audit Institution, under the direction of the five-member SAI Council. According to the Budget System Law, the consolidated financial reports of the Republic of Serbia must be sent to the National Assembly by 1 November. It would be preferable if this submission date was earlier.

Currently, direct budget beneficiaries are required to submit annual reports to the Treasury by 31 March and those with indirect budget beneficiaries should consolidate their own data with the data from these indirect budget-users and produce an end-of-year report. The Ministry of Finance is to prepare and present to the government a draft law on the end-of-year report of the Republic by 20 June, which also is to include the end-of-year accounts for the extra-budgetary funds. By 15 July the government should submit the final accounts to the National Assembly (the final accounts of the state budget and the decisions on the final accounts of the financial plans of the social security organisations separately). If the 1 November deadline for submission of an audited annual report to the Assembly is to be brought forward to an earlier date, these earlier deadlines would have to be amended as well.

The Treasury provides the accounting system for budget beneficiaries and enables timely and comprehensive reporting on the budgetary transactions, the previously mentioned weaknesses of the National Assembly in holding the executive to account notwithstanding. However, the failure to record commitments is a serious weakness that should be addressed

10. Capacity for Upgrading the Public Expenditure Management System

The capacity for sustainable reform is quite weak in Serbia. Understaffing and lack of administrative capacity remain problems in many key areas. A central problem is that the Ministry of Finance is not yet in a strong enough position to impose discipline and respect for the budget system law, existing regulations and budgetary decisions. Therefore, changing the budget system law and introducing new rules and procedures is not likely to make any real difference in practice as long as the Ministry of Finance is politically not in the position to enforce them.

A concise and pragmatic new plan for reforming the Serbian public expenditure management system needs to be elaborated and approved, placing an emphasis on clarifying the roles and responsibilities of the various stakeholders in the public expenditure management process and on creating proper co-operation mechanisms. Capacity in the area of expenditure prioritisation needs to be strengthened, and new expenditure initiatives need to be included within a medium-term budget framework. These improvements can potentially be achieved with the proper design of the strategic planning framework.

The plan should start with an assessment of the current situation and should set concrete goals and targets, as well as planning measures to achieve the targets that are set. However, the plan must be realistic and must not set overly-ambitious targets to be achieved within a short time frame. Emphasis should therefore be placed on sequencing the activities for reform – the ambition and calendar of activities should be determined as a function of what can realistically be achieved.

Under the new plan a clarification of roles and responsibilities of the various stakeholders is crucial, this means that a clear demarcation of functions will have to be made. However, changing the division of functions is difficult at present since the functions of certain bodies, such as the Treasury, are described in great detail in the Budget System Law. The law will therefore have to be amended as part of the reform plan. In the course of amending the law and transforming it into an organic budget law, it would be strongly advisable to leave aside the detailed description of duties and responsibilities and to have those roles and functions provided by secondary legislation, which can be changed more easily in response to changing circumstances or to acquired practical experience.

Public expenditure management in Serbia is a long way short of good European and international practice and the capacity for reform is weak. A new reform plan is urgently required, and such a plan cannot be imposed from the outside or by donors. It needs to come from within the government and it must enjoy widespread support throughout the public sector if it is to have any chance of success. The experience of other countries (including EU Member States) has shown that the reform agenda must be driven in the first instance at the political level. While the government as a whole must be committed to the reform agenda, a strong minister should be appointed to champion the reform as otherwise it will not succeed.

PUBLIC INTERNAL FINANCIAL CONTROL

1. Baseline Questions

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

1.1.1 *The Budget System Law*

The Budget System Law (BSL) provides the legal underpinning for the development of public internal financial control (PIFC). There are no separate laws governing internal audit or FMC. The BSL applies to: central government; local governments; all public institutions; “other indirect beneficiaries of budget funds; public enterprises and legal entities established by public enterprises; and/or legal entities over which the Republic, or local government, has direct or indirect control of more than 50% of the capital or has more than 50% of the votes in the board of directors or where public funds comprise more than 50% of total revenues”. All such entities are required to introduce financial management and control (FMC) and to have internal audit (although not necessarily their own internal audit units).

This law is subject to regular amendment. The most recent substantive edition of the BSL was the one published in 2009, which is to be read in conjunction with the amendments made in 2010 and for the purposes of PIFC needs also to be read in conjunction with other laws such as the Law on State Administration and the Law on Civil Service¹²². Articles 80-83 define the concept of PIFC, FMC, internal audit (IA) and the central harmonisation unit (CHU). The last amendments relating to PIFC, made in 2010, include a definition of managerial responsibility (article 2, item 51a) as “the responsibility of the top management heading the public fund beneficiaries for the financial, management and program-related tasks and responsibilities that were assigned to them”. This definition is opaque (at least in English) because it does not clarify what the terms “financial, management and programme related tasks and responsibilities that are assigned to them” actually mean. It would be much clearer if the law referred specifically to the responsibility of the top manager to achieve objectives, meet performance standards, and establish appropriate management arrangements to ensure that this has occurred. The BSL itself is unclear about the relationships between the roles of the head of the organization and the executive or manager.

1.1.2 *Definitions for Internal Financial Control and FMC*

The 2010 amendments introduced new definitions in the BSL (article 2) for internal financial control in the public sector (item 51b) and financial management and control (item 51c). The former definition is intended to cover public internal financial control as a whole, that is including ex ante financial control and ex post internal audit (although it does not refer to these aspects) and the latter just to the financial management and control arrangements that are to be applied within a particular direct or indirect budget beneficiary. The latter definition appears to give too much weight to “risk management” as the means of achieving “an adequate, cost-effective, efficacious and effective manner of ensuring the delivery of objectives” because risk management is not the main vehicle for achieving the delivery of objectives. Responsibilities

Article 71 of the BSL, “Accountability of Executives and/or Managers of Direct, and/or Indirect Budget Beneficiaries”, provides a basis for establishing managerial accountability and delegation of authorities concerning commitments and.

The BSL (article 72) provides for the separation of the functions of the “ordering party” (who is the executive and/or manager of a budget beneficiary) and the “accountant”. The former is responsible for the “management of funds, commitment creation, issuance of payment orders to be executed from the authority’s funds”, and the latter for “legality, correctness and preparation of records on business changes and other business events that pertain to the usage of the authority’s funds, and/or budget appropriations,

¹²² See SIGMA assessment on public service and administrative law.

as well as the legality, correctness and preparation of records on business changes and other business events that pertain to the usage of the funds and other property". (The treasury system then adds a further automatic financial control check.)

This separation confuses "managerial accountability" because the manager should be responsible for both sets of activity, but within that responsibility a separation of duties should occur to ensure that checks and balances exist to prevent the misuse of funds. Managerial accountability also cannot be effective without the systematic delegation of authority from the head of the budget user. Although article 71 appears to permit such delegation, this power is operationally ineffective if it is not accompanied by a clarity of objectives, a clear allocation of responsibilities, accompanying budgets, performance standards, timelines, and reporting to ensure accountability. In practice, delegation does not seem to occur in any substantial and formal way.

1.1.3 Definition of Efficiency

Article 4 (3) of the BSL refers to "technical or operational efficiency which shall imply the use of budget funds and possibility of their application with the lowest possible costs". This definition of efficiency is inadequate because it seems to suggest that the only indicator of efficiency is the "cost". This same article also states that "in the course of budget preparation and execution, principles of efficiency, cost effectiveness, effectiveness, publicity, comprehensiveness, accuracy and unique budget classification must be observed". First of all, it is strange to link "accuracy and unique budget classification" with the "principles of efficiency, cost effectiveness, effectiveness". Secondly, these principles of "efficiency, cost effectiveness, [and] effectiveness" are not defined in the BSL. Thirdly, in article 71 there is an obligation placed on "executives, and/or managers of direct and/or indirect budget beneficiaries" to be accountable for "legal, purposeful, cost effective and efficient usage of budget appropriations". However, nowhere else in the law does this exhortation appear, and evidently there is no appreciation of what these terms mean or how these objectives might be achieved.

1.1.4 Internal Audit and CHU

The legal basis for the establishment of internal audit and the CHU is also set out in the BSL (as amended in 2010). Articles 82 and 83 provide appropriate legal authority for both internal audit and the CHU. The definition of internal audit in article 2, item 51c, is consistent with the international definition.

1.1.5 Secondary Legislation

The secondary legislation for PIFC consists of the "Rulebook on the joint criteria for setting up and functioning of financial management and control in the public sector", the "Rulebook on joint criteria for organising and standards and methodological instructions for performing internal audit in the public sector", both adopted in 2007, and the "Regulation on terms, manners and procedures of exam-sitting for acquiring a title of certified internal auditor in the public sector, adopted in June 2009. The FMC and IA rulebooks are currently under revision to reflect the current BSL. Both rulebooks place much emphasis on risk management, and whilst important risk management is not the primary aspect of FMC.

The FMC rulebook defines "sound financial management" as the requirement to spend and manage public funds in line with the principles of "economy, effectiveness and efficiency", whereas sound financial management is also about achieving the policy objectives of the organisation. The IA rulebook is not clear about managerial accountability and also includes definitions, e.g. concerning "control" or "independence" that – at least in the English translation – do not seem to be compatible with international standards. It also introduces new concepts that are not defined either in the rulebook or referred to in the BSL, such as an "audit board", and it incorrectly relates the concept of an "audit board" to international audit standards (defined earlier in the Rulebook as IIA standards). Both rulebooks require further revision before they are approved but as those Rulebooks interpret the BSL the provisions of that law may also require amendment first.

1.1.6 Preparations for the Decentralised Implementation of IPA Funds

The legal basis for the management of IPA funds is currently established in the IPA Framework Agreement between the European Commission and Serbia. This framework agreement was prepared by the EC as a standard agreement for all countries, and it does not fit well into the framework of the Serbian BSL. The Serbian authorities are preparing a horizontal decree or law (still to be decided) to govern the implementation of IPA funds, which aims to ensure better legal grounds for IPA activities under decentralised management. It is important, however, that this IPA law/decreed does not become merely a transposition of the IPA Framework Agreement into national legislation, as it should provide sound legal grounds for other aspects of managing the programmes, such as placing obligations also on final beneficiaries and including grounds for recovering from beneficiaries the potential misuse of funds. For this purpose, a decree might not suffice (unless the BSL is complemented by a relevant delegation norm). It would also be beneficial for medium-term and longer-term developments if this IPA decree/law relied as much as possible on, and referred to, the principles established by the BSL.

The formal legal framework for PIFC for internal audit and the CHU is broadly satisfactory. However, the regulations for FMC require change. The main problem lies in the legal clarity and application of the principle of managerial accountability and the separation of the role of the executive from the role of the accountant. The proposed secondary legislation for both FMC and internal audit requires further review, but a precondition to this is that the BSL is clarified first with regard to FMC.

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

The structure of spending-units in Serbia consists of first-level spending organisations – direct budget beneficiaries (DBBs) – and second-level spending organisations – indirect budget beneficiaries (IDBBs).

The allocation of budget funds to each DBB includes the sums that are to be made available by the DBB to each of its IDBBs. Each DBB is required to inform each of its IDBBs of the sums to be allocated to them, after having first obtained the agreement of the Treasury. In the event that a DBB fails to do so, that DBB is not entitled to retain for its own purposes the funds that should have been allocated to the IDBB(s).

1.2.1 Budgetary Arrangements

The budgetary arrangements are based on traditional input budgets and the PIFC arrangements are focussed on cash control against the budget. Budgets tend to be held centrally within DBBs and are not allocated to individual line managers as would be necessary with the development of managerial accountability. Programme budgeting is in its infancy and no consideration is given to the achievements made through the budgetary funds allocated to DBBs and IDBBs. For some services responsibilities for the provision of the service are divided. For example, the education service is partly funded by the state (establishment of teachers' positions and salaries) and partly by municipalities (provision of buildings and other facilities). This division of responsibilities complicates effective management, with each funding organisation focusing on its own area of interest in the control of expenditure. Outputs or outcomes cannot be easily monitored with such a heavy focus on inputs or such a divided set of responsibilities.

Discretion to reallocate funds between budget lines and programmes is limited, in accordance with the provisions of the BSL. Up to 5% of funds may be reallocated between budget lines and 10% between programmes, with the approval of the Ministry of Finance. These same principles apply to local governments, with the formal approval of the local authority substituting for that of the Ministry of Finance. There appears to be no appreciation of the need to undertake any form of strategic financial planning, an activity that is essential for increasing efficiency and effectiveness. Also, there is apparently no appreciation of the need to assess the financial impact on current accounts of investment projects. Economic and social analysis of the costs of infrastructure projects did not appear to be undertaken. Again, there is apparently no long-term strategy for the financing of pension and health insurance funds.

1.2.2 Treasury Controls

The Treasury manages public expenditure by means of cash control against the budget. Control by the treasury system means that when a limit is met, expenditure payments (other than salaries) may be delayed, with the result that creditors then are not paid. The treasury system does not include records of commitments, and there is no evidence that DBBs or IDBBs keep this information either. Therefore the management of expenditure during the year can be problematic leading to inefficiency.

DBBs and some IDBBs have direct access to the treasury system, and those IDBBs that do not have direct access submit paper copies of invoices to Treasury regional offices for payment. The Budget System Law requires each spending organisation to appoint an accountant, who is responsible for the financial control processes and has a separate legal function from the executive management, although he/she is part of the establishment of the DBB or IDBB.

Apart from cash control against the budget, the Treasury also exercises control against a forecast of monthly cash flow. Forecasts are initially prepared by DBBs and IDBBs, covering a three-month period, and negotiated with the Treasury.

During the financial year, budget rebalancing may occur (for example, in the event of a shortfall in revenues against those planned), and this may result in delays in the payment of creditors (employee payments are generally not delayed).

The Treasury provides the accounting system for all DBBs, IDBBs, local governments and, some (but not the main) state enterprises. The Treasury controls expenditure down to the third level. The control exercised by the Treasury, apart from ensuring that budgets are not exceeded, focuses on compliance, and each payment has to be authorised by three persons, i.e. "prepared by" the first person, "certified by" the second and "approved by" the third.

The Treasury also prepares the payroll for all DBBs and for primary and secondary education staff.

1.2.3 Controls within Direct Budget-Users (DBBs)

Each DBB is required under the BSL to establish a separate finance unit, which has the responsibility of preparing a financial plan for the execution of the budget, submitting requests to the Treasury for the execution of the budget, and preparing reports on the results of the budget execution. The finance unit is also responsible for inputting information directly into the treasury system online. The manager is the head of a budget user and the finance unit provides him with reports about spending. Cost Financial information is generally not supplied to lower levels of managers who are responsible for providing services or activities. Detailed analytical information (such as cost information) is not yet provided at all. Financial management and control (FMC) therefore can be concerned only with "control".

The head of the DBB (minister) is to approve all expenditure, although for some expenditure the state secretary of the ministry may approve. The head of the DBB may allocate budgetary funds based either on his/her own judgment or on the advice of a committee established by the DBB head, but the head retains overall responsibility for the allocation of funds within a DBB.

Revenue collection arrangements were not assessed in detail by SIGMA. However, for some revenue (social and health insurance funds, for example), there are significant arrears, stretching back over long periods of time (around 20 years). Responsibility for collecting these arrears lies with the Tax Inspectorate rather than with the relevant fund. There also appeared to be little information available as to the extent of fraud in relation to these funds and whether the trend of fraud was increasing or decreasing.

1.2.4 Controls on Indirect Budget-Users (IDBBs)

Extensive use is made by DBBs of IDBBs and public enterprises for the delivery of public services. Belgrade City Council alone has some 800 IDBBs, including about 24 public enterprises (not all of which were profitable). Many of these IDBBs are small organisations, such as schools, libraries and childcare facilities. Others are more substantial, such as hospitals and universities. The operation of public services through subsidiary organisations does not present difficulties if the managerial control over those subsidiaries is

tight and effective. If it is not (and “tight and effective” does not mean detailed supervision and checking of all activities), then there is a real risk that these IDBBs, as they are not directly under the control of the DBB, will develop their own agendas and operating standards. Clear terms of reference and objectives, as well as governance and operating standards, should be set for each IDBB as part of the annual budget-setting process in the form of a public service agreement, in return for a budget being made available. The IDBBs should be held to account by the DBB for the achievement of those objectives and for the maintenance of those governance and operating standards.

1.2.5 Controls on Public Enterprises

Public enterprises owned by the state, which in total number 25, are all said to be profitable except for two. These two enterprises are subsidised from the state budget, and the remaining 23 contribute to the state budget. From a PIFC point of view, there are apparently a number of weaknesses with the arrangements for the control of public enterprises. These weaknesses include the lack of clear terms of reference (which would go into much more detail than those contained in legislation establishing the enterprises) and the arrangement whereby the boards of these enterprises are appointed by the state and the board elects the chairman. This arrangement would be unusual if the state required (as it ought to do) clear leadership to drive the enterprise in a particular direction and for this to occur the state should appoint the chairman of the board. Therefore, the chairman should not be elected by the members of the board but should separately and directly be appointed by the State. The Chairman also should be given specific terms of reference to reflect what the State expects the public enterprise to achieve.

Again, public enterprises should be expected to adhere to the standards of corporate governance laid down by the state, and these standards should include, *inter alia*, arrangements for establishing internal audit units and the terms under which they are to operate. Another feature of the current arrangements is that the board appoints the external auditors. Again, this arrangement seems to be inappropriate, and the Minister of Finance should appoint the external auditor, who should report to the minister as well as to the board.

Some public enterprises have appointed internal auditors. In 2009 in 5 public enterprises a total of 50 internal auditors were appointed, although as there appeared to be no independent audit committees established, those internal auditors have received no independent support. Therefore, in any serious conflict between the internal auditor and the chief executive, the consequence renders substantive internal auditing ineffective. The same comment could be made about local government enterprises.

Overall, so far as IDBBs and public enterprises are concerned, the relationships between them and the relevant DBB should be strengthened and if legislation is required to achieve this, then the BSL law should be amended and the secondary legislation should specify how FMC and internal audit ought to be applied to both these types of organisations, IDBBs would fall within the framework of the law relating to budgetary institutions but separate provisions would be required to address public enterprises.

1.2.6 Funds

The SIGMA interviews led to the impression that there appears to be little concern about the level of risk associated with fraud concerning both the health insurance fund and the pension and disability fund. (The health insurance fund may have had information in this regard, but the Ministry of Health did not, which should have been expected.) No information was available concerning the level of fraud or trends in fraud. Also for both funds there were significant arrears of contributions by employers, which covered a number of years. Responsibility for collecting those funds lies with the Tax Collection Agency of the Ministry of Finance. No statistics were available concerning the scale of, or trends in, those arrears, which in itself was surprising, even though the organisations interviewed were not directly responsible for the collection process.

1.2.7 Managerial Accountability

In the management of public services in Serbia it is not clear who the managers of DBBs really are – apart from the head of the budget beneficiaries. No information were provided showing how the head of the organization delegated authority to line managers and set objectives, performance standards or reporting

arrangements. While delegation is in principle permitted, in practice little delegation actually occurs and is not accompanied by the delegation of budgetary resources or the specification of objectives to be achieved or performance standards to be established. Neither is there any specific requirement on individual managers (other than general exhortations) to achieve efficiency and effectiveness of activities. As a result of this lack of establishment of managerial accountability, the substantive implementation of FMC and internal audit is very difficult. The scale of managerial reform that is required extends beyond the immediate scope of the CHU, and therefore the CHU's role should be to work with those responsible for wider civil service reform and training.

Some recent reforms have been made concerning the arrangements for inputting information online into the treasury financial control system. DBBs now input information directly, which automatically blocks payments if resources are not available. However, this task hardly amounts to managerial accountability.

1.2.8 Financial Inspection

Financial inspection is regulated by Articles 84 – 91 of the BSL. The Inspection Department is headed by an assistant minister. It currently has five staff, including the assistant minister, and foresees the appointment of an additional seven staff to bring staffing numbers up to the full level.

The main objective of inspection arrangements (whether at central or local government level) is to ensure compliance with the law and with approved processes (Art. 86). Therefore, while systems to prevent and take action against mistakes and irregularities and to recover any amounts lost as a result of irregularities or negligence exist in theory, their practical effect at this stage of development can only be limited.

There is a potential overlap between internal audit and inspection activities because both of these areas are concerned with compliance. The fact that both functions have clear separate legal basis will not alter on its own the actual practice or the perception of managers. As internal audit and inspection continue to develop, the potential for overlapping and the confusion that this might cause need to be carefully monitored.

1.2.9 Present Arrangements for the Independent Review of Expenditure and Income

The overall, "independent" review of the quality of the control of public expenditure in Serbia by internal audit and inspection is limited. This situation is due to the fact that there are relatively few internal auditors and very few inspectors, and overall experience is lacking. Reliance is placed on the treasury system to ensure that budget limits and cash flow limits are not exceeded. There are no arrangements to assess the achievements that were made through the use of the budgetary funds that had been provided.

1.2.10 Preparations for the Decentralised Implementation of IPA Funds

The institutional framework for the decentralised implementation of IPA funds (DIS) has basically been decided for all IPA components, and with the help of two technical assistance projects and one twinning project the various authorities are making preparations to support these structures with procedures and basic know-how. The only exception is that the placement of the Audit Authority remains an open issue, as no institution seems to be taking responsibility for the matter in Serbia. It is likely that the constant repetition of the required independence of the Audit Authority, to the point where nobody – except the Minister of Finance personally – could be involved in establishing it, has led to a lack of operational leadership. The incapability of establishing, staffing and preparing the function of the Audit Authority constitutes one of the most critical risks for Serbia in its ambition to be ready for DIS by the end of 2011 or at the beginning of 2012.

Budgetary control is exercised through the treasury system, and managerial accountability for that expenditure is limited, with no definition of what is intended to be achieved or is being achieved with that expenditure. FMC at this stage of its development focuses only on "control" and not on "financial management". There is no systematic process that has as its focus an improvement in the quality of public expenditure with the aim of increasing efficiency and effectiveness.

Besides the lack of managerial accountability (which is a serious constraint on the development of PIFC), a lack of clear rules governing the relationships between DBBs, IDBBs and public enterprises also weaken

the efficiency and effectiveness of public expenditure. An awareness of the potential levels of fraud also seems to be lacking in some areas of activity. The CHU should cooperate with organisations responsible for overall civil service and public administration reform to ensure that a full appreciation of managerial accountability exists and that managers appreciate their responsibilities with the establishment of PIFC. Arrangements to prevent the overlapping of internal audit and inspection activity should be put in place.

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

All public organisations specified in the BSL have to ensure that internal audit is provided, either in the form of an internal audit unit or in some other manner. The BSL requires internal audit units to be independent, have no other functions and report to top management.

In total 21 internal audit units are required to be established in DBBs. The remainder of the DBBs and all IDBBs are nevertheless required to ensure that their activities are subject to internal audit even though they may choose not to establish an internal audit unit themselves, and therefore in practice 31 such units exist. Overall there are approximately 130 internal auditors (none has yet been certified). These statistics are based on the latest information provided in the March 2010 annual questionnaire of the CHU. What is not known is whether all other DBBs and IDBBs have put in place internal audit arrangements.

In those DBBs that have established internal audit units, the focus of internal audit activity is on the DBBs themselves rather than on the total public expenditure and income environment, which for the most part can be administered by a DBB through its IDBBs. For example, there are only two internal auditors covering health (most health institutions are financed from the health insurance fund and would be regarded as indirect budget beneficiaries or independent organisations, and the health insurance fund has only one internal auditor). The possible transfer of health insurance supervisors to internal audit may help to remedy this weakness but the work presently carried out by those supervisors would still need to be undertaken and overall the competence of internal audit in health should be significantly strengthened. Other internal audit staffing levels include five covering education, two for defence, one in the Treasury, and one in the Ministry of Finance, while the Ministry of Interior and the City of Belgrade each has nine internal auditors.

The envisaged number of auditors to be required by a DBB seems to depend on the extent to which resources are made available from the budget, regardless of the fact that these entities are controlled by the state and may have significant "own funds" or may be funded indirectly by the state, as hospitals are, and whether or not services are directly administered by the DBB itself or through IDBBs. A further problem is that personnel numbers are subject to limitations due to the economic circumstances in Serbia, and there are examples of recent reductions in the number of internal auditors and of an inability to fill vacancies.

While a formal internal audit framework therefore exists, in practice its capacity is limited. In any event, as no managerial accountability exists, the extent to which internal audit can be effective is questionable. Again, as no information on objectives or outputs is required, annual and strategic audit programmes cannot be based on helping organisations to achieve their objectives.

The BSL specifies that internal auditors are not to undertake any operational activity, and this provision is appropriate. However, especially because internal audit units are small, internal audit is potentially vulnerable to pressure from top managers, in terms of both what it reviews and reports on and how those reports are treated by top management. Furthermore, no alternative route appears to be available to an internal auditor in the event that such pressure is applied.

Independent internal audit has been established, but its functional capability is limited at present by the shortage of staff and by other factors linked to its current state of development. The definition of internal audit contained within the BSL is appropriate. However, the lack of effective managerial accountability, together with the accompanying management structures and output objectives, makes the development of internal audit extremely difficult, other than its development as an element of the financial control system. The levels of staffing of DBB internal audit units should reflect not only the risk associated with

the DBB but also – unless its IDBBs have established internal audit units – the risks associated with those IDBBs and with the income arising from “own funds”.

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

Although the CHU was established formally in March 2010 as a department of the Ministry of Finance, headed by an assistant minister, in reality it has been in existence for over three years, initially as a function of the internal audit department of the Ministry of Finance. This “acting CHU” has already been supported by two technical assistance projects. The present CHU has two units: one for financial management and control (FMC) and the other for internal audit (IA). The CHU is comprised of eight staff but has a further five vacancies. Currently arrangements are in place to appoint these additional staff. These numbers include the assistant minister and his secretary. Most of the existing staff was part of the unit in the Ministry of Finance that had previously been the “acting” CHU.

The CHU is still engaged in a learning process and although some of the key staff has experience in the development of IA and FMC the CHU has relied heavily in the past on technical assistance support and will continue to do so over the next two years. Its limited staffing also means that it will be unable to undertake all of the functions that would normally be associated with a CHU until the full number of staff foreseen in the systematisation act have been recruited. Those additional staff should be appropriately qualified and trained. The new technical assistance project should extend beyond the immediate technicalities of internal audit and FMC and focus on increasing the awareness of the meaning of managerial accountability in the PIFC context.

Developments in FMC have been relatively limited and mainly focused on technical control training and risk management. Also the training of managers on FMC and IA has been very limited and should be developed as part of current training activity.

The CHU/IA is training internal auditors, with the first certification examinations to be held in May 2011. The certification arrangements have been formally specified by regulation. At this stage there does not appear to be a potential alternative to the CHU as an IA trainer, and no assistance is available from the local IIA.

Annual surveys of both FMC and internal audit are carried out by the CHU. The extent to which FMC and internal audit are accepted by management is unclear, but from discussions with some managers it does appear that there is no common view either on their own role or that of internal audit. For example, obtaining value-for-money was perceived by some managers as a function of internal audit or indeed of inspection, not of management. There is also some evidence in the 2009 questionnaires analysed by the CHU in March 2010 that internal auditors can be expected to undertake inspection-type investigations.

The provisions of articles 81 and 82 of the BSL require the heads of DBBs and IDBBs to report to the Minister of Finance on the adequacy and functioning of the established financial management and control system and of internal audit. The annual questionnaire is the only method used by the CHU to assess the state of development of FMC and IA. This annual survey does not yet attempt to assess quality. This current approach only provides a “snapshot” of the situation, and the knowledge of the CHU would be helped by introducing in the future systematic, ongoing processes, such as site visits or networking to create an “*esprit de corps*” within the internal audit and FMC community, or a help desk and advisory service. Furthermore, an annual questionnaire provides only a limited source of realistic information, because failings or weaknesses are unlikely to be disclosed. A proposal has been made by the CHU to develop a website as an information source, and while this would be a beneficial development, it would not overcome the need for personal interactions between CHU staff and their clients.

None of the internal audit staff or FMC staff interviewed during this SIGMA assessment in DBBs or in local governments had had any contact with the CHU, which demonstrates its low visibility. A generally higher visibility of the CHU is very desirable.

The existing overall arrangements for a central harmonisation unit for FMC and IA are satisfactory, but in practice the operational effectiveness of the CHU is still limited. This is partly due to the current staffing levels of the CHU, its present focus on training and developing technical information with little interaction with FMC and internal audit staff in DBBs. A limited appreciation of the key significance of managerial accountability means that technical and training activity do not reflect the need for organisations to develop appropriate managerial structures. To remedy this, the CHU itself will have to not only increase its visibility in the public administration but also considerably enhance its appreciation of managerial accountability and the range of its advisory activities for both FMC and IA. The technical assistance support should help also to this regard and not merely deal with technical issues.

2. Capacity to Further Develop the System

The development of PIFC should reflect the Action Plan that was published as part of the Strategy Paper published in 2009. In general, the activities and timetable set out in the Action Plan are being adhered to, with a limited number of exceptions (for example, the delays in the publication of revised rulebooks and the delay in the internal audit certification process).

However, the Action Plan does not address the substance of the comments made in this assessment, as it is primarily concerned with the technicalities of FMC and internal audit and not with the context in which they are to operate. Again, another limitation of the Action Plan is that it makes no reference to the quality of the actions that are required to be undertaken. Of course it makes no reference to the current need to clarify the BSL with regard to FMC as well as the need to update the present manual and rulebooks. These are significant deficiencies and the present action plan should be reviewed. The current technical assistance project should pay particular attention to the need for this.

The CHU is supported by enthusiastic staff, and while its numbers are limited, the leadership of the CHU is eager to make progress. There are nevertheless significant weaknesses in the development of PIFC. The principal weakness lies in the lack of establishment of a managerial culture within the Serbian public sector. This weakness again affects Serbia's aspiration to move towards decentralised management of IPA-funded programmes, as a weak control environment may lead to reluctance by the European Commission Services to grant DIS status to Serbia. Finding the remedy for this state of affairs will be beyond the capacity of the CHU, although the CHU can contribute significantly to the development of PIFC. In the DBBs and in local government there does appear to be a willingness to accept the development of internal audit, but as a "control" activity rather than as a support to management.

There is no real comprehension of the concept of value-for-money, and while the terms "efficiency" and "effectiveness" are used, what they mean in practice for managers has not yet been developed.

In general terms, the CHU seems to be familiar with the technical aspects of internal audit, but FMC is more difficult to apply because, without a well developed idea of managerial accountability, the application of FMC becomes a series of technical steps (such as training in risk management) without an appreciation of the managerial context in which they need to be applied. Although the current technical assistance project should provide support to the CHU, it may in fact have a perverse effect if it focuses on technical issues, such as how to improve the rulebooks or how to improve training or risk management. What is really required is technical assistance that will help the CHU and the key managers in the Treasury and Budget Departments to fully understand what managerial accountability actually means and what the ultimate objectives of PIFC are, and to then communicate those objectives within the Ministry of Finance and on a wider basis, especially to top managers and subsequently to line managers.

Also, the extensive use of public enterprises and IDBBs means that the CHU should play a particular role in supporting DBBs in setting up arrangements with these subsidiary bodies so as to ensure that they have clear objectives, governance and reporting requirements.

A more distinct separation of political and managerial responsibilities would also clarify the roles in the decentralised management of IPA funds (DIS) and would reduce the risks that the 2012 general elections could represent in terms of Serbia's readiness for DIS.

The authorities responsible for the preparations for DIS (primarily the Ministry of Finance, but also the Secretariat for EU Integration and the Ministry for Agriculture, Water Management and Forestry) have enjoyed relative stability among their key staff. Staffing nevertheless remains one of the critical problems in the DIS preparations, as in the midst of fiscal consolidation, it has proven difficult to increase staff numbers, especially in the Ministry of Finance. However, the recent staffing decisions of 2010 have improved the situation in all of the key structures (National Fund, Central Financing and Contracting Unit, NIPAC secretariat) except for the Audit Authority, which has not yet been established. Further staff increases are justified, but even when the government formally decides that the necessary recruitment can be initiated, it will be a challenge to attract, within only a year, close to 100 new staff (which represents approximately the number of staff required for all IPA components).

Otherwise, the capacity to prepare for DIS in Serbia is relatively good and has improved. This capacity has increased since the EU candidacy of Serbia has become more visible to authorities. The National Authorising Officer and the National Fund exercise an active role in co-ordinating the preparations for all five IPA components, and the technical assistance that is available at the moment is generally appreciated by all stakeholders.

There is a continuing risk that the DIS preparations will remain noticeably independent from the development of the rest of public finance management. In some areas, such as accounting and preparation of the financial management information system, there is in principle no need for separate systems and duplication of work.

Other managerial reforms that would help in the development of PIFC and also of future management systems for post-accession EU funds would be either a reduction in the number of IDBBs or an organised effort to rationalise the relationships between DBBs and their IDBBs by putting in place specific agreements concerning their governance and internal control arrangements, the role of the governing body, the objectives that they aim to achieve with the resources made available, and the reporting arrangements.

Until managerial accountability is introduced and understood it will be very difficult to develop FMC or internal audit as effective tools for improving the quality of public management and hence public services. To this end, FMC should be more clearly defined in the BSL than it is at present as without this clarity of definition and that appreciation of managerial accountability, both internal audit and FMC will continue to be regarded as "control activities" rather than as a support and advisory service to management. The CHU will in turn find it difficult to promote PIFC (because it will be working within the framework of a traditional administrative culture) and to demonstrate to top-level officials the benefits that can accrue from the development of PIFC.

EXTERNAL AUDIT

1. Introduction

The State Audit Institution (SAI) of the Republic of Serbia was established by the Law on the State Audit Institution of November 2005 (*Official Gazette of the Republic of Serbia*, no. 101/05). An amendment to the law was adopted in May 2010 (*Official Gazette*, no. 36/10) to provide for the increased remuneration of the members of the SAI Council, supreme state auditors, certified state auditors and state auditors as the recruitment of staff had proved to be very difficult.

In 2006 the Constitution of the Republic of Serbia (article 96) confirmed the autonomy and independence of the SAI, subject to oversight by the National Assembly, to which it is accountable for its work (*Official Gazette*, no. 98/2006).

The SAI Law (article 1¹²³) stipulates the establishment and activities, legal status, competencies, organisation and operating methods of the SAI and other issues of importance for the functioning of the institution, as well as the rights and obligations of the entities that are subject to audit. The SAI Council (article 13), the supreme body of the SAI, it is a collegial body. It is comprised of the president, vice-president and three members. The President of the Council is also the President of the SAI. Decisions of the Council are by majority vote. Members of the Council (article 15) contribute to the operational and decision-making activities of the Council, observe the activities of respective audit departments, and take part in operational activities of audit departments and perform other activities as delegated by the President of the Council.

The SAI has established five audit departments (brief titles):

- Budget of RS and of Budget Funds (17 staff in post¹²⁴);
- National Bank of Serbia (use of public funds, EU and other funds – five staff in post);
- Mandatory Social Insurance Funds (two staff in post);
- Public Enterprises (10 staff in post);
- Local Government (14 staff in post);

and plans to establish additionally a Performance Audit department in the future.

The SAI Council has decided that performance audit will not be a priority area until 2013, and therefore no staff has been allocated yet to this department. The SAI has opened two local offices in Novi Sad (5 staff) and Niš (7 staff).

The number of staff allocated to each department is significantly less than the planned number due to the continuing shortage of adequate staff. The SAI currently has 71 staff in post, including the five Council members of 159 staff in its systematisation act (of whom 132 will be audit staff). It plans to recruit the additional staff by the end of 2011. Despite the lack of staff the SAI was nevertheless able to undertake a limited audit of the execution of the state budget for 2008 (with just eight auditors), and for 2009 (with 11 auditors).

The SAI's budget for 2009 was 98 million RSD (approximately 1 million EUR). In October 2009, having previously been allocated temporary accommodation in the National Assembly building, the SAI moved into more suitable premises provided by the government (as stipulated in article 51 of the law). In view of the planned increase in staff numbers, the SAI is currently making arrangements for additional office space, through government channels. Budget cuts across public services that had been previously decided by the

¹²³ References are to the relevant articles in the Law on the State Audit Institution.

¹²⁴ Staff numbers as at 31 December 2010.

government in response to the international financial crisis may continue to have an impact on future reform activities, including those planned for the SAI.

2. Baseline Questions (Public Sector External Audit – Baseline 2002)

2.1 Does the SAI have clear authority to satisfactorily audit all public and statutory funds and resources, bodies and entities, including all EU resources?

The SAI is empowered (article 5 of the SAI Law) to plan and conduct audits and to submit reports to the National Assembly and to the assemblies of local authorities. Its audit mandate (article 10) covers all beneficiaries of public funds, direct and indirect budget beneficiaries, mandatory social insurance funds, the National Bank of Serbia, public enterprises, territorial autonomies and local governments, political parties, beneficiaries of EU funds, and donations and aid from international organisations and other entities that use funds and assets under the control and at the disposal of the Republic, territorial autonomies, local governments or mandatory social insurance funds. The SAI's mandate covers approximately 9,000 entities.

Due to the lack of staff resources, however, the SAI has been able to undertake only limited audit coverage with regard to its mandate. Coverage increased for the audit of the financial statements for 2009 compared to the (first) audit of 2008, and it is planned to increase in 2011 for the audit of the 2010 financial statements. The SAI has applied a risk-based approach to the selection of entities to audit and has considered the need to plan to cover all entities over a reasonable period. As more staff are recruited and trained, the situation should improve.

The SAI Law is broadly in line with international requirements for the independence of SAIs, and the SAI has a sufficiently broad audit mandate to audit state and EU funds. However, as a direct result of the lack of staff resources, the SAI is still not able to fulfil its audit mandate satisfactorily.

2.2 Does the type of audit work carried out cover the full range of regularity and performance audit set out in INTOSAI auditing standards (1.0.38 – 1.0.44)?

The SAI is empowered (article 9) to audit revenues and expenditures, financial statements, the regularity of business operations, the appropriate use of public funds¹²⁵, systems of financial management and control of the budgetary system, internal audit, and the accounting and financial acts of audited entities. The SAI Law (article 34) requires that the performance of auditing activities be in accordance with the "common principles and rules" and with "selected internationally-recognised auditing standards" and that these standards be published in the *Official Gazette of the Republic of Serbia*. The SAI initially applied IFAC Standards, as these had been published in the *Official Gazette*. Subsequently, INTOSAI Auditing Standards have been translated and adopted by the SAI Council.

In accordance with international standards, (ISA 705, para 10) the SAI disclaimed an opinion on the financial statements for 2008 because the audit performed and the evidence collected did not provide a sufficient basis for an opinion. The SAI noted that this was due to a lack of trained and experienced SAI staff. The SAI's audit coverage amounted to 27% per cent of the total budget expenditure. It sampled transactions from 14 budget entities, based on a "risk assessment", including the operations of the National Bank of Serbia relating to public funds. The SAI reported that it had conducted the testing in accordance with international auditing standards. However, this was the first time that the state budget had been audited since 2001. The audit report also drew attention to shortcomings in the accounting system, internal control and internal audit, reconciliation of receivables, liquid assets and liabilities management, compliance in records and donations, public debt and off-balance sheet records.

Regarding the audit of the financial statements for 2009 the situation had improved and the audit covered 10 budget entities and 70% of the total budget expenditure. The SAI provided a qualified audit opinion. The

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"The audit of business activities' rationalities" in article 2 of the SAI Law may be considered as performance audit.

SAI recognises that more staff needs to be recruited and trained before the full implementation of INTOSAI Standards can be achieved.

The SAI undertakes regularity audit, as far as is practicable given the current resources, in accordance with international standards. The SAI does not regard performance audit as a priority at this stage of its development, which is to be commended, and the SAI Council has decided that performance audit should be introduced as from 2013.

2.3 Does the SAI have the necessary operational and functional independence required to fulfil its tasks?

The Constitution of the Republic of Serbia (article 96) provides sufficient overall independence for the SAI. It stipulates that the SAI is the supreme state body for independently auditing public finances in Serbia, while it is subject to supervision by the National Assembly, to which it is accountable for its work. This independence is further reinforced in the SAI Law (article 3), which stipulates that the SAI is the supreme state body for the audit of public funds in the Republic of Serbia; it is an autonomous and independent state authority; it is accountable to the National Assembly of the Republic of Serbia; it is a legal entity; and the actions that it undertakes in exercising its audit competence are not to be subject to review by the courts or other state bodies.

With regard to financial independence, the SAI Law (article 51) requires that the “funds of the Institution are apportioned from the Budget of RS within the separate budgetary appointment”. Although the SAI does not have a separate account in the state budget (as the National Assembly has), it does have a separate budget line in the state budget. The SAI Council prepares its financial plan in accordance with the budget framework laid down by the government and proposes this plan to the competent working body of the National Assembly for approval; SAI requests for budgetary funds are therefore restricted only by the consent required from the committee of the National Assembly responsible for finance. Upon the Assembly’s approval, the SAI submits the budget proposal to the “ministry responsible for budgetary affairs”. The SAI exercises its rights in line with its financial plan, and to date the SAI has received the funds that it had requested.

The government (article 51) provides “the premises, equipment and other assets” required for the activities of the institution. The SAI initially had difficulties in obtaining suitable premises and equipment, etc. but, with the support of the Budget and Finance Committee of the National Assembly, its situation has considerably improved. These improvements should continue with the further support of the Budget and Finance Committee. The law (article 56) provides for the labour rights of SAI employees, who are under the same labour regime as state employees. This article establishes the right of employees to a salary, which may be increased by up to 30% due to the “extraordinary complexities” of SAI activities. Employees are recruited and dismissed by the SAI President, and the bonus mentioned above is regulated by the SAI. Overall, these arrangements provide the SAI with adequate independence from undue interference by the state administration.

With regard to operational independence, the law (article 59) required the SAI to submit its Rules of Procedure to the National Assembly for approval, which was to be provided within three months of the selection of the members of the SAI Council (which took place in September 2007). The National Assembly was slow in approving the Rules, and they were not adopted by the SAI Council for formal implementation within the SAI until February 2009 (article 6). Now that the Rules are in place, there should be no further problems in this regard. The Rules of Procedure provide a comprehensive basis for the operations of the SAI.

Concerning access to information, the SAI has adequate powers (article 36) to obtain timely, unrestricted, direct and free access to all documents and information required for the purpose of proper performance of its legal responsibilities. In practice, the SAI has not reported any difficulties involving the deliberate obstruction of access to information during the course of its audits.

The SAI Law, however, contains a number of provisions that have a potential impact on the operational independence of the SAI. These provisions may not be strictly contrary to the provisions of the “INTOSAI Guidelines and Good Practices Related to SAI Independence” (ISSAI 11), but it could be argued that they are contrary to the spirit of the Guidelines.

The terms of office of the president, vice-president and members of the SAI Council are relatively short (five years), and raising the initiative of their dismissal is possible by means of a vote of only 20 members of parliament, even though a vote of the National Assembly is also required for their exclusion from office. Supreme state auditors (article 27) and the SAI General Secretary (article 32) are also appointed for a limited time (six years, renewable once), but these positions could be regarded as professional and, as such, should not be exposed to any possibility of political influence.

The president, vice-president and members of the Council were all appointed at the same time, in 2007, and this fact has the unfortunate consequence that all senior members of the SAI will require re-appointment at the same time, in 2012, which also happens to be an election year. This situation will need to be carefully managed to ensure that proper assessments of performance are carried out by the National Assembly with regard to the renewal of terms of office. It may be justified to stagger future terms of office to ensure that the loss of institutional experience is minimised.

The fact that the SAI is required to obtain the consent of the Ministry of Finance for its staffing plan also has a potential impact on the independence of the SAI, as the government is able to delay or prevent the recruitment of staff. Finally, article 59 of the SAI Law requires the National Assembly to approve the SAI's Rules of Procedure. This requirement places undue scrutiny on the internal processes and procedures of the SAI and might therefore impact on the operational independence of the SAI.

The SAI is empowered to decide on the work that it will carry out, and so far it has not reported any interference in such decision-making. As the activities of the SAI expand and its reports gain in importance, it may be subject to political pressures. It is therefore very important that its legal framework is robust and its implementation of activities “free” in practice. While the Constitution provides the SAI with sufficient overall independence, some provisions of the SAI Law will need revision to make sure that potential risks to the operational and functional independence of the SAI are mitigated.

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

The SAI Law (article 6) requires the SAI Council to adopt Rules of Procedure, with the prior consent of the National Assembly. These Rules, adopted by the Council in February 2009, specify in detail the manner and procedure in which the SAI is to perform its duties of auditing, advise the beneficiaries of public funds, report to the National Assembly, determine the organisation and composition of the SAI, mode of providing publicity on its activities and mode of decision-making, and resolve all other issues concerning its operations. (The Rules of Procedure are published in the *Official Gazette of the Republic of Serbia*, no. 9/09.) The law (articles 35 to 42) also stipulates specific requirements for the SAI, which concern the following: the audit programme, SAI access to documents, the collection of information prior to the audit, procedures for audit commencement and conclusion, response reports by audited entities, procedures for reporting offences to competent authorities, and confidentiality of data.

The law (articles 38 and 39) stipulates dispute procedures for clearance of the draft audit report. Audited entities have an opportunity to object to the findings in an audit report, and the responsible supreme state auditor or the Council member decides on the objection to the draft report. If the audited entity objects to this decision, the SAI Council makes the final decision on the objection. There is no legal recourse against the decision of the Council. Article 40 also requires the audited entity to submit to the SAI a report on the elimination of detected irregularities or deficiencies that had not been eliminated during the course of the audit. If the audited entity's response is unsatisfactory, the SAI may decide that the audited entity is in breach of the obligation of sound business, and if the matter is serious, the SAI may inform the National Assembly. In that event, following a hearing, at which the audited entity is invited, the National Assembly adopts recommendations and measures to remedy the breach.

The SAI must submit (article 41) to the competent authority, without delay, any evidence relating to misdemeanours or criminal offences, and that body is required to inform the SAI of its decision. For the audits of the financial statements for 2008 and 2009, the Ministry of Finance has accepted the SAI's findings and informed the SAI that the identified deficiencies have been eliminated. Cases where the SAI has initiated "offence procedures" against officials have not yet been satisfactorily resolved, although the process is continuing. The SAI will follow up these cases during the subsequent audits. The time taken to prepare the evidence for these cases concerning potential charges against officials is significant, but this time is nevertheless provided for under the law, and the expectations of the media and the public concerning the successful prosecution of these officials are high. The requirement of the SAI to "press charges" is demanding in view of the limited staff resources, and it is difficult to fulfil satisfactorily as part of a modern audit methodology. The implementation of alternative approaches to this requirement of the SAI Law should result in more efficient and effective ways of working.

The SAI is required (article 50) to establish a system of quality control procedures for its work, in accordance with international auditing standards. Advice from the OAGN has been obtained, but such procedures have not yet been adopted by the SAI Council.

SAI reports (article 43) to the National Assembly by submitting an annual activities' report on its work by 31 March of the following year (article 45). The SAI submits special reports during the year and an audit report on the audit of the annual statement of the budget of the Republic, the annual financial statements of the mandatory social insurance funds, and the consolidated financial statements of the Republic. The SAI also reports (article 44) to the assemblies of local authorities on audits related to audited entities within its competence, and it simultaneously submits these reports to the National Assembly.

The SAI submitted its first "Report on Financial Audit of the Final Accounts Statement of the 2008 Budget of the Republic of Serbia" (No.1/2009) to the National Assembly in November 2009. The SAI's "Report on the Audit on the Execution of the State Budget for 2009" was submitted to the National Assembly in December 2010. Although these reports were provided considerably later than the legal requirement, which obliges the SAI to submit its annual report to the Assembly by the 31st March of the following year (Article 45), it was a significant achievement given the limited staff resources available for this work.

Taken together, these procedures provide a stringent, detailed and comprehensive control of the SAI's audit processes to ensure that its reports are fair and factual. The SAI's reports are made public as soon as they have been submitted to the National Assembly. During the course of the audits undertaken so far, the SAI has not reported any deliberate obstruction of its work by budget beneficiaries or oversight institutions. There are a number of issues that might be taken into consideration as part of the legal review referred to in the previous section. Also, some questions arise regarding the practical efficiency of some of the provisions of the SAI Law (in particular, the requirements to fulfil the requirements of article 41 – the "pressing charges" requirement). In the medium term, the SAI should develop a system of quality control procedures for its work, in accordance with international auditing standards (especially ISSAI 40). It also needs to make sure that, with enhanced capacity, reports are submitted on time.

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

Following consideration of the SAI's reports, as set out above, the responsible body of the National Assembly submits (article 48) its conclusions and recommendations to the Assembly in the form of a report. Based on this report, the Assembly decides on recommendations, measures and deadlines for their implementation. The Assembly may request additional explanation of facts and circumstances from the SAI.

The SAI's Report for 2008 was not discussed by the National Assembly in official session, but the opinions of the SAI President, the Prime Minister, the Minister of Finance and the Minister of Education were provided in response to questions of members of the Assembly on 25 March 2010. The SAI held a press conference on the day of submission, and the discussions in the National Assembly were open to the media. In February 2010 the SAI initiated offence procedures against 19 officials, including six incumbent and five

former ministers of the government, for violations of the Budget System Law, public procurement regulations and budget decrees; these cases are ongoing.

The SAI's Report for 2009 was considered by the Budget and Finance Committee on 9 February 2011. (The hearing took place during the Sigma mission, and we were informed that the Committee had adopted all of the SAI's recommendations.) The Committee will submit the SAI Report to the National Assembly. The SAI will initiate offence procedures against 14 state officials.

Article 48 of the SAI Law provides for deliberation by the competent working body of the National Assembly and for its reporting to the National Assembly on its observations and recommendations. There is no requirement for the National Assembly to publish a report. At present, the National Assembly entrusts the Budget and Finance Committee with the task of deliberating on the SAI's report. The working practices of EU legislatures vary considerably, but consideration by a specialised committee on public accounts might be a preferable arrangement for the Republic of Serbia.

The SAI plans to follow up each year the implementation of its recommendations by means of the "feedback report" which the SAI Law (article 40) requires the auditee to submit to the SAI on "the adjustment of discovered irregularities and irrationalities within a time frame of 30 and 90 days".

The legal provisions in the SAI Law set out an appropriate framework for reporting the SAI's findings and recommendations. As the National Assembly gains more experience and awareness of their respective role and responsibilities and those of the SAI, appropriate conventions will be required to ensure that the processes of the National Assembly for deliberating on the reports of the SAI and for following up the actions required are appropriate and robust and that these processes thereby enhance the effectiveness of audit recommendations. The National Assembly might also establish a committee on public accounts to review specifically the reports of the SAI. There remains uncertainty about the role of the SAI, as the identification of "guilty parties" and the successful prosecution of these individuals appear to be expected by the media.

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

The SAI became a member of INTOSAI in 2008 and EUROSAI in 2009. It intends to apply INTOSAI Auditing Standards to its audits, but these standards have not yet been published in the *Official Gazette*, as required by the SAI Law (article 34). Currently, the SAI applies IFAC Standards, which have been adopted and are applicable throughout Serbia.

The Office of the Auditor-General of Norway (OAGN) has provided comprehensive advice and guidance to the SAI Council on the development of a financial audit manual and a financial audit methodology. The Council had been expected to adopt the audit manual and methodology by the end of 2010. Discussions are taking place between the OAGN and the Council regarding the level of detail required, such as checklists and practical instructions.

The SAI Council has considered the audit experiences of the supreme state auditors and the advice of the OAGN. A Council member is currently responsible for finalising the audit manual and the associated audit methodology. The reporting and planning modules are available for implementation by SAI staff, but they have not yet been formally adopted by the Council. The SAI plans to finalise the manual by the end of 2011. Further study visits by SAI staff to the OAGN have been proposed so as to further develop financial audit methodology and quality control processes and to further strengthen the capacities of supreme state auditors and certified state auditors, as well as the IT function in the SAI.

The SAI conducts audits on the basis of an annual plan that it prepares and adopts in accordance with the SAI Law (article 35). The audit plan for 2011 covers: the budget of the Republic of Serbia, mandatory social insurance funds, a selection of local self-governments, operations of the National Bank of Serbia related to the use of public funds, and a selection of public enterprises, including legal entities in which a public body has a share. The SAI decides autonomously on the subjects of audit, the subject matter, the scope and type

of audit, and the start and duration of the audit. During the year of the audit, the SAI may amend or supplement the audit plan. The SAI may engage auditors from state audit institutions in other countries or from commercial audit firms. The SAI may utilise reports on completed audits issued by commercial audit firms or, based on these reports, it may plan to undertake additional procedures in the audited entity.

The adoption of appropriate standards (IFAC) has taken place and, in the context of the limited staff resources, these standards are being implemented by the SAI. The financial audit manual and associated audit methodology need to be adopted and implemented as soon as possible.

2.7 Is the SAI appropriately aware of the requirements of the EU accession process?

The SAI is aware of the necessity to develop as a supreme audit institution so that, as the EU accession process goes forward, it will be in a position to comply with the specific requirements expected of the SAIs in EU Member States. The SAI is empowered to audit EU funds (article 10 of the law). However, the systems related to the control of EU funds have received only limited attention so far. The “Audit Authority”, which is to have specific authority in this area, is not yet operational, and the SAI will need to co-ordinate with and cover the activities of this body with its own audit activities once the Audit Authority becomes operational.

In 2010 the SAI joined the network of the European Court of Auditors, which provides opportunities for peer exchanges with SAIs in the region.

The SAI is aware of the challenges arising from the EU accession process. Limited staff resources have meant that progress in the audit of EU resources has been slow, and this area will need development as resources increase. The SAI has nevertheless demonstrated its commitment to be involved in and to utilise relevant international support activities.

3. Reform Dynamics – Capacity to Further Develop the System

The SAI benefits from a Joint Statement of Co-operation for the period 2008-2013 with the Office of the Auditor General of Norway (OAGN). The technical advice of the OAGN includes: on-the-job training, methodological assistance, quality control, and technical workshops. The main areas for support have been:

- Audit processes;
- Strategic plan for 2010-2015;
- Audit methodology and associated audit manuals; and
- Public relations training for SAI Council members.

The SAI’s strategic plan is in the final stage of preparation. Its adoption by the SAI Council had been expected by the end of 2010 but is currently under review. The draft plan sets out the SAI’s “Vision, Mission and Core Values”, and its strategic goals and objectives are defined as follows:

- To provide high-quality audit services;
- To increase independence and develop internal governance;
- To attract and retain professional staff and ensure well-functioning human resource systems;
- To improve organisational and managerial capacities, and the infrastructure of the SAI;
- To build partnership relations with key stakeholders in order to improve the reputation, knowledge and impact of the SAI.

The strategic plan aims to focus on the continuing education of staff, both officials and officers. Implementation plans are in the course of development.

The SAI has applied for IPA 2011 funds to set up a twinning project in order to further strengthen its institutional capacity. This additional support to the SAI will require close co-ordination with the OAGN.

The professional capacity of SAI staff needs to be significantly developed. On 24 December 2010, the SAI Council adopted the “Rules and Regulations on the Programme and Manner of Taking the Examination for the Title of State Auditor and Certified State Auditor” (SAI Council No. 110-2041/2010-2). These rules prescribe the conditions for the acquisition and revocation of auditor titles, the organisation and implementation of auditor examinations, and the issuing of auditor certificates. They also determine the training programme and examinations for state auditor and certified state auditor.

In May 2009 the SAI adopted a Code of Ethics, and in December 2010 the SAI adopted its Audit Programme for 2011 and other documents required to ensure the regularity of the operations and procedures of the institution.

The SAI is a partner in UNDP’s project on “Strengthening Accountability Mechanisms in Public Finance”, which is to provide support for the establishment of effective and stable accountability mechanisms in public finance in Serbia, with the aim of improving the preventative and investigative aspects in the public-spending cycle through capacity development of the SAI and other institutions. The project component devoted to the SAI provides support for the development of SAI capacities through training, development of a communications strategy, and improved public relations. The SAI has also contributed to the project on improving and strengthening co-operation with the National Assembly. To assist in the development of its certification training programme, the SAI has co-operated with the Court of Audit of Slovenia and the State Audit Institution of Montenegro, as both institutions have already implemented such a programme.

Future SAI development will not be effective if it is implemented in isolation. There has been only uneven development in the areas of internal audit and internal control in the Ministry of Finance and in budget beneficiaries; SAI reports on the financial statements of the budget of the Republic have pointed to weaknesses in these functions. Although budget beneficiaries have complied with the requirement to inform the SAI once they have undertaken the necessary measures to establish these functions, it is likely that satisfactory compliance with international standards in these areas will not be effective for some time.

The SAI is keenly aware of its development needs, and most of the elements for further institution-building and capacity-strengthening are currently present. Despite progress in adopting the various policies and procedures required, the strategic plan and the audit methodology and manuals are still in draft form and are in urgent need of adoption. Once they have been adopted, the SAI will thereby clearly demonstrate its commitment to the actions necessary for the achievement of its development objectives. The current staff recruitment process will also need to be completed so that the planned level of new recruits is achieved, and the training of these staff, together with existing staff, will need to be undertaken.

PUBLIC PROCUREMENT

Summary

Main Developments since Last Assessment (May 2010)

There has been no significant development in the legislative framework of Serbia's public procurement system since the last assessment in 2010.

The Public Procurement Office (PPO) has in recent years undertaken some important activities aimed at improving transparency and professionalisation of the system, including the setting up of a public procurement web portal in 2009, operated by the PPO itself. An officially recognised training and certification programme for procurement officers at all state levels has become operational, with the first certificates being issued in December 2010. However, the efforts so far have had limited impact on improving the quality of procurement operations in the field (there is more than 3,500 contracting authorities in Serbia, but only 100 procurement officers have been certified). The weak professional capacity of contracting authorities still poses a serious problem for the quality of procurement operations.

The preparation in 2011 of amendments to the Public Procurement Law is foreseen, within the framework of a 21-month Twinning project to strengthen Serbia's public procurement system (the PPO being the main beneficiary).

There has been no progress since last year in the area of concessions and Public-Private Partnerships (PPPs). The Ministry of Economy and Regional Development is still working on a new draft concessions/PPP law and intends to finalise the draft by the end of the year. Recently (February 2011), the Ministry elaborated a draft policy paper on the development of a legal framework for concessions and PPPs. The document does not recognise EU law as a main source of inspiration, but rather gives equal preference to all international models (EBRD, EU, UNCITRAL), without any clear prioritisation. This approach represents a potential danger that the future concessions/PPP law will not properly transpose the EU Directives.

After a long delay, the Republic Commission for Protection of Rights in Public Procurement Procedures (a procurement review body) was finally established in October 2010, in accordance with the procedure stipulated by the 2008 PPL. The institution still faces basic problems (in terms of its staff, premises and office equipment) and as a result is not fully operational. A great deal of work remains to be done to fully implement its procedures (especially with regard to the transparency of its operations).

In general, all central institutions responsible for developing and implementing the system (Ministry of Finance, Ministry of Economy, Public Procurement Office, and Commission for Protection of Rights in Public Procurement Procedures) remain weak and understaffed. There is no co-ordination whatsoever between these institutions. No significant efforts are being made to curb corruption.

Main Characteristics

1. Integrity of Public Procurement Operations

Corruption is undoubtedly the most serious problem of public procurement in Serbia.

The general opinion of the procurement community interviewed by SIGMA (Anti-Corruption Agency, PPO, Transparency Serbia, and several economic operators) is that the quality of public procurement operations has recently deteriorated and that widespread corruption poses a great risk to the integrity and efficiency of the system.

Corruption is present across all sectors of public procurement. The scale and seriousness of irregularities seem to overshadow all other problems and to undermine the whole system. The general opinion is that the situation is deteriorating and is now much worse than it was immediately after the adoption of the previous Public Procurement Law (2002). At this stage, the prevention and fight against corruption in the field of public procurement appear to be limited to mere statements in laws, as there are no real and visible efforts to enforce these laws in practice. Without undertaking serious actions to curb corruption in public procurement, the impact of all other legal and institutional improvements will be negligible.

2. Public Contracts – Legislative and Institutional Framework

The current PPL (*Official Gazette of the Republic of Serbia*, no. 118/08), which entered into force at the beginning of 2009, has brought significant changes to the public procurement system in terms of facilitating professionalisation and ensuring further legal alignment with EU standards. The PPL is for the most part, although not fully, aligned with EU standards.

The provisions in the PPL concerning national preferences (20% price preference for domestic bidders offering goods of domestic origin) are clearly incompatible with the fundamental EU principles of non-discrimination and equal treatment. In addition, several sectoral laws require the local registration of companies and/or products for them to be eligible to participate in public tenders.

The core institutions in the field of public procurement face at least one common problem: an institutional weakness which is caused either by insufficient staffing and inadequate premises, or by problems arising from the context in which the top-level management is appointed. There is no co-ordination and co-operation between institutions responsible for the development and implementation of the system. This situation, together with the high-level of frustration openly expressed by economic operators, reflects the extreme fragility of the whole public procurement system.

The PPO's most pressing problem of the lack of formal appointment of its director. The current acting director's initial appointment expired in August 2006 and has not been officially renewed. This situation needs to be clarified urgently to avoid weakening the institution and make sure it is not exposed to the arbitrary exercise of influence. An official competition for the position took place in late 2010, but the government has not yet made a decision.

The strategy and action plan for the improvement and development of public procurement still has to be adopted. It is foreseen that this issue will be resolved during the second half of 2011, as it is one of the priorities of the Twinning project. However, given the low level of inter-institutional co-ordination, it is doubtful whether a positive outcome which encompasses all necessary areas, can be achieved at this stage.

3. Concessions and PPPs

The 2003 Law on Concessions does not comply with EU standards. Serbia's concessions/PPP system is currently not functioning. There were no recorded cases of concessions or PPPs awarded in Serbia during 2009 or 2010. The Government recognises the need for an appropriate legislative framework for promoting infrastructural projects to be implemented as concessions and/or PPPs, but so far progress in drafting legislation is limited. The proposed legislative reforms appear to be managed outside the administration, with only rare attempts of co-ordination with other reforms under Chapter 5 of *EU negotiations*.

4. Review System

The review body in its current form remains the weak link in the public procurement system. The establishment of the Republic Commission for the Protection of Rights in Public Procurement Procedures (Review Commission) has so far not contributed to improving the system and has instead added to the frustration of the public procurement community. The appointment of Commission members was delayed by more than one year, with members of only being appointed by the parliament on 12 October, following a proposal by the government (in accordance with the procedure stipulated in the PPL).

The work of the Review Commission is perceived as lacking transparency due to the partial publication of its decisions, the absence of published statistical data, and lengthy procedures. Its decisions have sometimes been ignored by contracting authorities. These problems have undermined the trust of the business community in the review system.

Reform Capacities

The capacity to improve the functioning of the public procurement system appears to be inadequate. The core institutions that should champion the reform (relevant units within the Ministry of Finance and Ministry of Economy and Regional Development, Public Procurement Office, Republic Commission for the Protection of Rights in Public Procurement Procedures) have demonstrated neither their own initiative nor political support. They lack the basic resources required (staff, funds, premises, office equipment) to function properly.

There is no co-operation and co-ordination between the above-mentioned institutions. Strategic thinking about long-term and medium-term development seems to be absent.

It seems that in Serbia today there is no true will to deeply reform and improve the public procurement system; the only driving force is EU integration. An in-depth analysis of the real problems faced by Serbian contracting authorities and economic operators is lacking.

Although the formal quality of the legal framework of the public procurement system has undergone positive changes in recent years in some areas (except for concessions/PPPs), its practical implementation is severely lagging behind. The level of corruption seems to have increased, according to the perception of key stakeholders. It will therefore be crucial to establish high-level political commitment to curbing corruption and improving the functioning of the system. For the moment such a commitment appears to be non-existent.

Recommendations

Short-term Reforms

- Improve the co-ordination between the Ministry of Economy and the Ministry of Finance and between these two ministries and other concerned ministries and institutions regarding work on a new concessions/PPP law.
- Prepare and adopt a policy on developing concessions/public-private partnership (PPP legislation in line with EU requirements).
- Immediately launch the implementation of anti-corruption measures.
- Implement transparency measures regarding the work of the Republic Commission for the Protection of Rights in Public Procurement Procedures (publication of all decisions on the Internet, introduction of tools enabling sophisticated browsing and searching);
- Formally appoint the director of the Public Procurement Office.
- Provide the Ministry of Finance's public procurement unit with adequate staff and resources.
- Provide appropriate premises for the Republic Commission for the Protection of Rights in Public Procurement Procedures (Review Commission).

Medium-term Reforms

- Establish a sound interministerial co-ordination mechanism to deal with Chapter 5 negotiations, which will require setting up a communication process between the Ministry of Finance, the Public Procurement Office, the Ministry of Economy, and the Secretariat for European Integration, as well as with other concerned parties.

- Review and amend legislation in the area of concessions and PPPs in coherence with the Public Procurement Law, with priority given to EU requirements.
- Improve the training programme for the professionalisation of public procurement officials.
- Prepare and implement policy for fighting and preventing corruption in the field of public procurement, which will require close co-operation between the Anti-Corruption Agency and stakeholder organisations, and a large-scale awareness-raising campaign.

1. Legislative framework

1.1 Public Contracts – Legislative Framework

1.1.1 Contents of the PPL and Compatibility with EU Legislation

The current Public Procurement Law – PPL (Official Gazette of the Republic of Serbia, no. 118/08), which entered into force at the beginning of 2009, has brought significant changes to the public procurement system in Serbia in terms of facilitating professionalisation and ensuring further legal alignment with EU standards. Ten by-laws have been adopted since the entry into force of the new PPL.

The PPL is based on the current EU Public Procurement Directives, although there are several discrepancies and many provisions of the Directives have not been transposed.

The law covers, in consolidated form, contracting entities (in both the public sector and the utilities sector), procurement procedures, qualification and contract award criteria, domestic preferences, and rules on remedies.

The scope of the PPL encompasses all public contracts in accordance with the meaning of the term used in the EU Directives – supplies, services and works – awarded by contracting authorities (referred to as “procuring entities”). However, the PPL does not cover contracts for works or service concessions, and it does not make a clear distinction between concession contracts and public procurement contracts. With regard to the foreseen amendments to the PPL, it will therefore be necessary to harmonise the development of public contracts with reforms in the area of concessions and PPPs.

The definition of a procuring entity in the PPL is similar to the one provided in the EU Directives, but it also differs in some important aspects – it refers to the entity as a budget beneficiary rather than to its function as a public authority.

Associations formed by one or more procuring entities are not fully included in the scope of the law.

Public undertakings (also including undertakings other than those carrying out activities in the utilities sector) are generally within the scope of the law. Their inclusion in the scope of the PPL has a strong potential of creating difficulties in the daily activities of public undertakings that operate exclusively on a commercial basis and face market pressures (i.e. other than those operating in the utilities sector).

Private entities that carry out activities in the utilities sector are covered by the PPL when operating on the basis of special or exclusive rights. Unfortunately, the definitions related to relevant activities are provided in a very summary manner; as a result, the current wording of the PPL makes the transposition of the relevant requirements of the EU Directives incomplete. When compared with the EU Directives, the PPL grants broader exemptions in the utilities sector,, and the postal sector is not covered while the telecommunications sector is covered. The PPL appears to disregard the specifics of utilities and, unlike Directive 2004/17/EC, it does not provide them with a more flexible framework than the one used in the classical sector (e.g. freedom to use the negotiated procedure with prior publication of a notice), which may lead to unnecessary formalism.

Definitions of exempted and excluded contracts are broader in the PPL than those allowed in the EU Directives (e.g. goods procured with the prior approval of the government from certain government entities), while some possible exemptions seem to be absent. The PPL does not expressly address exemptions for defense procurement, but as procurement in the areas of the armed forces and the police is considered confidential, they are not covered by the law. There is no exemption for specific financial services (central bank services and instruments).

The PPL provides for open, restricted and negotiated procedures, in the last case with and without the prior publication of a notice. The design contest is also a specific procedure that can be used in the areas of urban planning, architecture, engineering, design and data processing. However, procuring entities may freely use only the open procedure. To use the restricted procedure, it is necessary to demonstrate that the concerned goods, services or works – due to their complexity – can only be supplied/provided/performed

by a limited number of economic operators that have a specific capacity (similar to UNCITRAL rules). However, unlike the previous PPL, no prior approval from the PPO is required to use this procedure.

The conditions for the use of the negotiated procedure should be reconsidered with regard to their alignment with the conditions provided for in Directive 2004/18/EC. In some cases the PPL defines conditions for applying this procedure that are less restrictive than those in the EU Directives.

The competitive dialogue procedure, which is an alternative for awarding very complex contracts according to Directive 2004/18/EC, is not provided in the PPL. There are no provisions regarding other new methods of procurement, such as framework agreements (despite a considerable interest in their use expressed by contracting entities), electronic auctions, and dynamic purchasing systems. Instead of framework agreements, the PPL stipulates the use of a special kind of restricted procedure, which rather matches the prequalification system as stipulated in Directive 2004/17/EC and is not coherent with the EU approach.

The PPL contains few provisions concerning e-procurement. Secondary legislation on the procedure for handling electronic bids and the manner of conducting electronic auctions in public procurement procedures was adopted to facilitate and promote the use of e-procurement, but e-procurement currently does not play a role in practice.

The qualification and award criteria of the PPL largely reflect those of the EU Directives (although some differences remain in the case of the qualification criteria). It could be considered as an important step towards de-bureaucratisation that, according to the new PPL, only the tenderer to whom the contract is awarded (and not all candidates as was previously the case) is obliged to submit a certified copy of the documents required to prove that the mandatory qualification requirements have been met. However, the fact that the PPL allows for supplementing the originally missing documents in only a few cases could still lead to the rejection of good tenders on purely administrative grounds, especially if contracting entities adopt a strict, formalistic approach (which is often the case).

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

Another cause for concern regards the provisions for preferential treatment of domestic businesses and goods (20% price preference with regard to domestic bidders and goods of domestic origin), which are clearly incompatible with the fundamental EU principles of non-discrimination and equal treatment. In addition, several sectoral laws require the local registration of companies and/or products for them to be eligible to participate in public tenders.

1.1.2 Secondary Legislation and Other Regulatory Tools

Ten by-laws to the PPL were adopted in 2009 (available on the public procurement portal), covering the following topics:

- Guidelines on small-value public procurement procedures;
- Regulation on the procedure for awarding certificates to public procurement officials;
- Regulation on determining evidence proving that a bid was submitted by a domestic bidder and on determining goods of domestic origin;
- Regulation on criteria for establishing commissions for public procurement;
- Regulation on mandatory elements of tender documents in public procurement procedures;
- Regulation on the procedure for opening bids and the form of minutes taken on opening of bids;
- Regulation on the maintenance of records on public procurement;

- Regulation on the procedure for handling electronic bids and the manner of conducting electronic auctions in public procurement procedures;
- List of international organisations having their own public procurement procedures, which may be applied instead of applying provisions of the PPL;
- Regulation on the form and contents of a loan application and the form and contents of documentation demonstrating the credit rating of a procurement entity in the public procurement of a loan as a financial service.

The adoption of this secondary legislation can be considered as a positive development, notwithstanding some criticism in the procurement community concerning its quality.

In addition, the PPO has published a set of standard forms, templates and models on the public procurement portal to facilitate procurement practice:

- Model tender documents (available since 2009);
- Model procurement notices and decisions;
- Model public procurement plans.

1.1.3 Low-value Procurement

With regard to the rules for low-value procurement, the PPL provides that the minister in charge (Minister of Finance) is to regulate the procedures for this level of procurement. The respective by-law (guidelines on small-value public procurement procedures) was adopted in July 2009. The threshold relevant to low-value procurement is to be regulated in the annual Budgetary Act (in 2010 the threshold was set at 2 900.00 RSD).

1.1.4 Concessions/PPPs

Legal and Institutional Framework

The 2003 Law on Concessions is not fully compliant with EU and international norms, and it is clear that Serbia would benefit from a strengthened and improved new law.

It is commendable that the law acknowledges the “principles of equal and fair treatment, free market competition”. Furthermore, these principles are defined and described in the law. The principle of “autonomy of the contracting parties’ volition” as described appears to provide a flexible framework for the contracting parties to agree on the project agreement, although it should be pointed out that the same terms may appear to permit an element of post-tender negotiation.

However, one very important principle missing from the law is that of “economic efficiency”, which should usually be the main purpose of pursuing a public need through a concession/PPP form of implementation.

The responsible institution for concessions and PPPs is the Ministry of Economy, while other highly important related functions, such as public investment management and fiscal risk management, remain the responsibility of the Ministry of Finance. There is no evidence of more than superficial co-operation in these matters.

There is a further lack of clarity concerning the institutional arrangements for filing complaints and appeals. The law only refers to “the government” rather than to any specific review body. In common with other concession acts in the region (e.g. Croatia), the current law attempts to legislate for all forms of concessions, regardless of size, complexity or modality, which is very difficult to do effectively. Therefore the law attempts to legislate for large, privately-financed, BOT-style infrastructure projects and at the same time for simple concessions for small-scale, natural resource exploitation. This issue should be considered carefully during the drafting of any new concessions law.

Importantly, concession and PPP laws should avoid mimicking existing procurement legislation and should specifically prevent a parallel system from developing by default. When drafting tendering procedures in

concession/PPP laws, mistakes can easily be made. The confusion thereby created can result in delays through interminable legal proceedings. Instead, in the interests of cohesion of the entire system of awarding public contracts, references to tendering procedures should be made through simple references to the appropriate clauses in the Public Procurement Law. Concession/PPP laws should only deal with those issues that specifically relate to such concession/PPP projects, some of which are mentioned in the paragraph above.

The proposed legislative reforms (led by the Ministry of Economy and Regional Development) appear to make only scant attempts at co-ordination with other reforms under Chapter 5 negotiations. The Ministry of Economy and Regional Development is working on a new draft law and intends to finalise the draft by the end of the year. Recently (February 2011), the ministry elaborated a draft policy paper on the development of a legal framework for concessions and PPPs. This document does not recognise the EU law as a main source of inspiration, but rather gives equal preference to all international models (EBRD, EU, UNCITRAL), without any clear prioritisation. This approach represents a potential danger that the future concessions/PPP law will not properly transpose the EU Directives. The problem appears to be enhanced by a lack of proper co-ordination between international donors.

From a general point of view, it is clearly visible that the PPL aims to implement the relevant EU law in the field of public procurement and to transpose the EU Directives' requirements on public procurement into a single act. This goal has been achieved to a large extent. The PPL can be considered as a solid element of the legal framework covering Chapter 5 negotiations in Serbia and as a basically sound basis for professional purchasing. There are still several discrepancies and therefore room for improvement. It will also be necessary to align the terminology of the PPL as closely as possible with the wording of the EU Directives so as to avoid misunderstandings or improper interpretations.

However, at this stage practical implementation of the law and ensuring compliance appear to be crucial for the functioning of the public procurement system in Serbia and should therefore be the focus of current efforts rather than rapid further legal alignment with EU requirements.

An area for real concern is the legislative situation in the area of concessions and PPPs. It does not comply with EU requirements and international standards. In addition, it seems that the respective legal reform initiatives currently led by the Minister of Economy lack a basic understanding of the measures that need to be taken to secure the necessary coherence of the system and alignment with EU law. Relevant actions are not properly co-ordinated and thus endanger the establishment of a sound and consistent legal framework for the award of concessions and PPPs.

2. Central Public Procurement Organisation

The key central institutions in the area of public procurement in Serbia are the Ministry of Finance with regard to the legislative process and the Public Procurement Office (PPO) and the Republic Commission for the Protection of Rights in Public Procurement Procedures (Review Commission).

2.1 Public Procurement Office

The Public Procurement Office (PPO) is an independent body, responsible directly to the government. According to the provisions of the PPL, the PPO is to perform its activities in the area of public procurement, providing conditions for the economic, efficient and transparent use of public funds and for the promotion of competition and equality of tenderers in the public procurement procedure. The regulations pertaining to the government administration are to apply to the activity and organisation of the PPO.

The functions of the PPO are described in the PPL as follows:

- participation in the drafting of regulations pertaining to the sphere of public procurement;
- provision of advice to procuring entities and bidders;

- monitoring of public procurement procedures;
- submission of requests for the protection of rights in the case of violation of public interest;
- informing the body in charge of public fund auditing, budget inspection and other bodies of the initiation of offence proceedings concerning irregularities in the conduct of public procurement procedures and provision of public procurement reports that have been prepared in the course of the performance of the activities within its competence;
- issuance of certificates to public procurement officers as well as maintenance of the register of public procurement officers who have been issued certificates;
- publication and distribution of relevant technical literature;
- preparation of model decisions and other acts that the procuring entity has adopted in public procurement procedures;
- collection of information on public procurement in other countries;
- collection of statistical and other data on the procedures conducted and public procurement contracts concluded and on the efficiency of the public procurement system as a whole;
- formation and maintenance of the public procurement portal for the purpose of improving the provision of general information to procuring entities and bidders;
- co-operation with foreign institutions and experts in the field of public procurement;
- co-operation with other governmental bodies and organisations, compulsory social insurance organisations, and bodies of territorial autonomy and local government;
- performance of other activities in accordance with the law.

The PPO is required to submit to the government by 31 May of each year a public procurement report on the previous year, including proposals for measures to be undertaken.

The current staff of the PPO numbers 18 persons, comprised of six economists, eight lawyers and four administrative staff. The PPO's activities are organised in three departments: economics, monitoring/reporting and human resources. In the course of the twinning project that currently supports the PPO's work, an analysis of the sufficiency and quality of staff is to be carried out so as to develop a profile for future recruitment. The government has agreed to increase the PPO staff by four persons, who are to carry out the upcoming tasks concerning the design of the IT infrastructure. It is important to provide the PPO with the agreed additional staff and to ensure sufficient budgetary resources so as to strengthen its performance, with a view to obtaining the maximum benefit from the ongoing twinning project.

However, the most pressing problem of the PPO is to obtain the formal appointment of its director. The current acting director's initial appointment expired in August 2006 and has not been officially renewed at the time of writing (March 2011). This situation needs to be clarified urgently to avoid the weakening of this institution and to eliminate its exposure to the arbitrary exercise of influence. An official competition for the position of director started in autumn 2010, but to date no decision has been taken.

The PPO is currently the main beneficiary of an EU twinning project, which aims to review and enforce the legislative framework and to enhance the professional skills and capacity of the central public procurement institutions. In the first stage the focus is to be on the overdue adoption of a strategy and action plan for the public procurement system and on the improvement of the public procurement portal, which is a key tool for the daily practices of the procurement community (see below).

The PPO plays a key role in organising and providing training in public procurement and acts as the responsible body for the certification of public procurement officers (see below).

In the fight against corruption, the PPO co-operates closely with the State Audit Institution, the Agency for the Fight against Corruption, the Free Access to Information Commissioner, the Ombudsman and the Budget Inspection (Ministry of Finance). Several events (conferences/roundtables/seminars) have been

organised jointly for that purpose. Moreover, regular co-ordinative meetings among regulatory institutions were organised in 2010.

2.2 Ministry of Finance

Within the Ministry of Finance (MoF), the Public Procurement Department is responsible for legislative initiatives and policy-making in the field of public procurement. This function includes the drafting of the PPL and relevant by-laws, drafting a strategy for development of the sector, as well as participation in the interpretation of the provisions of the PPL. The Department for Budget Inspection is responsible for supervising the implementation of the PPL.

In practice the PPO is the key institution for drafting legislation and a strategy, and for monitoring procurement procedures, whereas the MoF only facilitates the political process. This division of responsibilities appears to be due to the serious lack of staff in the MoF. For a long time there has been only one person in charge of this area in the MoF. Two more posts were advertised, but so far no additional staff have been hired.

However, in reality, instead of good co-operation between these two institutions, it seems that there is rather a conflict or at least a lack of communication.

2.3 Review Commission

The 2008 PPL stipulated the establishment of the Republic Commission for the Protection of Rights in Public Procurement Procedures (Republic Commission) as an autonomous and independent legal entity, which is to ensure the protection of bidders' rights and of public interests in public procurement procedures. The Commission is directly responsible to the National Assembly and is provided with a separate budget.

The chairperson and members of the Review Commission are to be elected for a five-year period and may be re-elected only once. The Commission consists of five members: the chairperson and four members, who are elected by the National Assembly on the proposal of the government.

The current Review Commission was finally elected in October 2010 after a period of more than one year, during which time its legally correct establishment appeared to be doubtful (see below). This ambiguous situation, in addition to considerable delays in the delivery of decisions (due to severe understaffing, inadequate premises, and lack of office equipment) resulted in the loss of trust on the part of the procurement community in the work of the Commission.

Currently, in addition to the five Commission members, 20 employees (including four to five support staff) are working in the Review Commission. Parliament has accepted a staff increase up to a maximum of 70 employees, which seems to be disproportionately high in comparison to similar institutions in other countries of the region and unnecessary, given the workload of the Commission.

The core institutions in the field of public procurement in Serbia face at least one common problem, namely institutional weakness due to either the lack of sufficient staff and premises or problems arising in the context of the correct appointment of the top management level. This situation, combined with the high level of openly expressed frustration of economic operators, reflects the extreme fragility of the whole public procurement system in Serbia.

The strategy and action plan for the improvement and development of public procurement in Serbia still have to be adopted and implemented. This issue is foreseen to be resolved in the second half of 2011, as it is one of the priorities of the twinning project. However, bearing in mind the low level of inter-institutional co-ordination, it is doubtful that a sound result, encompassing all necessary areas, can be achieved at this stage.

3. Procurement Operations and Practices

3.1 Publication of Procurement Notices

The PPL contains provisions for the publication of procurement opportunities that basically reflect the requirements of the EU Directives. It requires contracting entities to publish invitations to tender (contract notices) as well as the results of procedures (contract award notices), information on the termination of procedures, and annual prior indicative notices (PINs) for procurement above a specified threshold. Publication of these notices is required in the *Official Gazette of the Republic of Serbia* and on the recently established public procurement portal of the PPO (<http://portal.ujn.gov.rs>). The publication of notices on low-value procurement on the public procurement portal is voluntary. The PPO has published model notices (standard forms) for use by contracting entities.

Publication on the public procurement portal is free of charge and has led to substantial savings of public funds (totaling more than 10 million EUR) in comparison to the previous situation, which required commercial advertisements in the daily press. To date 2100 procuring entities have been registered on the portal and 68,000 advertisements have been published (25,000 calls for competition, 7700 notices on selection of the most advantageous bid in a negotiated procedure without a prior notice, as well as further notices on concluded contracts, suspended procedures, and preliminary notices).

The public procurement portal can be regarded as an important tool that provides a transparent and well-structured source of information for the business community as well as a professional tool that facilitates the PPO's tasks. It will therefore be important to further develop the system, ideally with the support of the ongoing twinning project. Consideration could also be given to the necessity of having a dual publication of procurement notices (both in the *Official Gazette* and on the portal). If the web portal is easily accessible to the procurement community (especially to businesses), perhaps it would suffice to publish procurement notices there only (i.e. without publishing notices in the *Official Gazette*).

3.2 Availability and Use of Standard Tender Documents

Standard tender documents were developed by the PPO in 2009. They are published on the public procurement portal. There is a special regulation concerning the mandatory elements of tender documents in public procurement procedures.

3.3 Electronic Procurement

There are basic provisions in the new PPL concerning electronic procurement. Further details are set out in the regulation on the procedure for handling electronic bids and the manner of conducting electronic auctions in public procurement procedures. So far e-procurement does not play an important role in practice, but the PPO is aware of its importance, and it has drafted a concept paper and in the autumn 2010 it organised a conference on centralised and electronic public procurement, with the support of a UNDP project.

3.4 Framework Agreements and Centralised Purchasing

Provisions concerning framework agreements have not yet been introduced in the PPL, and there are no specific provisions in the PPL allowing for the establishment of framework contracts. The PPL allows for co-ordinated purchasing arrangements: the contracting entity may authorise another procuring entity to conduct the public procurement procedure or to undertake specific actions in that procedure on its behalf. Centralised purchasing is currently in an initial phase, as contracting authorities in general only recently started to internally centralise their procurement activities.

3.5 Practice regarding Tender Security

The annual budgetary law sets the thresholds above which contracting entities should request a tender security. In the context of the prevention of corruption, this general obligation may be seen as problematic, as well as in the context of stimulating the participation of small and medium-sized enterprises (SMEs).

3.6 Organisation of the Procurement Process within Contracting Entities

Contracting entities are required to set up a tender committee for each procurement process, in accordance with criteria set by the regulation on criteria for establishing commissions for public procurement. The committees are set up for individual public procurement procedures, taking into account the specific experience relevant to the subject matter of the contract.

It seems that the level of professionalisation in dealing with procurement procedures within contracting entities varies, but it is generally not particularly developed, although there is a willingness to participate in training events. The centralisation of procurement processes internally is just slowly starting. The evaluation of the economic performance of contracting does not appear to be of relevance. On the other hand, it is clearly visible that certain procurement tools, such as framework agreements, are currently unavailable, and multi-annual contracts are not possible according to the budget law. Contracting authorities have a tendency to complain about the restrictions that they have to face in applying the PPL. This attitude could be seen as an indication of a certain rigidity of the law. It could also be seen as a sign of a lack of professionalism and a reluctance to comply with the law, which has been confirmed by the respective statements of various stakeholder institutions.

3.7 Training and Support

In 2010 the PPO conducted a significant number of seminars, workshops, and training courses for procuring entities and bidders, with a wide regional coverage. The training covered several topics, such as the full procurement cycle, centralised public procurement at local level, and infrastructure systems. The seminars and training courses were attended in total by more than 1500 participants. A number of seminars were supported by the G2G project of the Dutch Government and TAIEX, including a study visit to the Italian CONSIP.

There is a visible focus on organising training in co-operation with other state bodies, business associations, civil sector organisations and NGOs (e.g. "Coalition for Public Finance Oversight" and "Transparency Serbia").

In co-operation with the Ministry of Finance and the Review Commission, the PPO prepared the *Manual for Training and Examination to Acquire Certification for Public Procurement Officers*. This manual is available in both a printed version (2000 copies have been distributed to contracting entities) as well as in electronic form, which is free to download from the PPO website. The PPO is responsible for organising the certification programme, which rates level II credits in CIPS. The first certified procurement officers graduated in December 2010 (so far 100 officers have been certified).

3.8 Size of Procurement Market (number of contracting authorities, number and value of contracts, etc.)

According to statistics submitted by the PPO, the total number of purchasing entities is 3529 . The total number of contracts awarded in 2010 was (with a total worth of 2.6 billion EUR).

The general interest among economic operators in participating in procurement procedures appears to be decreasing, in spite of the fact that the state is the most important purchaser due to the economic crisis. The participation rate in 2010 was lower than in previous years.

3.9 Openness to Foreign Competition

The mandatory use of domestic preferences (20%) would be expected to result in a lower level of foreign participation, and this seems to have been the case in recent years.

In addition, other obstacles seem to be restricting the access of foreign businesses to the Serbian procurement market, as an example of the sector for medical supplies shows. In this sector, foreign companies can only submit offers of their products via certified intermediators registered in Serbia, as foreseen in the Law on Drugs and Medical Supplies.

3.10 Concessions and PPPs

The concessions/PPP system in Serbia is not functioning at present.

There were no recorded cases of concessions or PPPs awarded in Serbia during 2009 or 2010 on the basis of the 2003 law, but this is not the same as saying that there were no concessions or PPPs. It is likely that there were a number of examples of concessions/PPP during this period, but that the award processes were conducted on a different legal basis.

There is clearly no monitoring or control of the preparation or award of concession/PPP contracts. What is not clear, however, is the extent to which the opportunities provided by such concessions/PPP are competitively awarded. This complete lack of monitoring and control also means there is no possibility of assessing the level of economic need for individual projects or the effectiveness of the investments made in terms of delivering public services.

During the course of the assessment it became clear that the missing link is to be found between the theory of the law and its implementation. Investors and financiers are usually required for many concessions and for virtually all PPPs, and they are likely to avoid Serbia if they believe that the tendering practices there are untrustworthy.

As a potential source of widespread abuse and corruption, the issue of “unsolicited proposals” from the private sector should be given more attention. This issue is becoming more commonplace (not only in Serbia), and the government will need to have, as a minimum, a policy position on such interventions that is preferably implemented by law.

The establishment of the PPO’s public procurement portal and the implementation of serious training activities are positive developments.

The greatest problem of the public procurement system in Serbia is still the questionable implementation of the PPL in practice. Contracting authorities show a lack of awareness and professionalism in applying the law. The key institutions responsible for mitigating this situation are currently not strong enough to act accordingly.

There is a lack of information on activities in the area of concessions/PPP.

4. Control, Review and Integrity

4.1 Legal Framework

Although the PPL is largely aligned with EU legislation, there are still some discrepancies with the EU Directives regarding review and remedies, especially concerning the illegal award of contracts and certain instruments of the new Remedies Directive 2007/66/EC.

Some provisions of the Remedies Directive 2007/66/EC have not been fully transposed into the Serbian PPL, including for example:

- time limits for applying for review (article 2c of the Remedies Directive) – some of the deadlines for tenderers to submit their applications for review procedures are too short, e.g. the three-day deadlines in articles 110, 111 and 112 of the Serbian PPL;

- standstill period (article 2a of the Directive) – some modifications are needed (e.g. with regard to time limits: at least 10 calendar days from the day following the date on which the contract award decision was sent to the tenderers instead of the 8 days specified in article 107 of the PPL; no reference is made in the PPL to means of communication);
- the derogations (article 2b of the Directive) have not been implemented;
- ineffectiveness of contracts (e.g. awarded without prior publication of a contract notice; direct award of contracts) – (article 2d of the Directive); the Serbian PPL provides for an absolute nullity of contracts in article 120, which might prove to be difficult in practice when the overriding effects of the contract should be maintained (e.g. parts of the contractual obligations have been fulfilled). There is no possibility of limiting the scope of the cancellation to those obligations that still have to be performed (e.g. an *ex nunc* ineffectiveness of contracts). Although there is no EU obligation for an *ex nunc* ineffectiveness of contracts, procurement practice might need to have this legal possibility;
- there are also no provisions for some alternative punishments mentioned in the Remedies Directive (article 2e): e.g. the Serbian PPL does not provide for the shortening of the duration of the contract, although it does provide for the imposition of fines on the contracting authority in article 121.

4.2 Institutional Set-up: Republic Commission for the Protection of Rights in Public Procurement Procedures (Review Commission)

Under the previous PPL, the key central review institution in Serbia was the Commission for the Protection of Tenderers' Rights (the previous Review Commission), which was part of the PPO. The current PPL now provides for a new and independent body, the Republic Commission for the Protection of Rights in Public Procurement Procedures (new Review Commission).

Establishment of the new Review Commission (article 102 PPL): According to the previous PPL, the previous Review Commission was part of the PPO and did not have its own budget, and it thus had limited independence. In September 2009, the government – and not parliament as foreseen in the PPL – appointed new members to the existing Review Commission, which functioned until 12 October 2010 as an interim review institution. Only as late as 12 October 2010 were the members of the Republic Commission for the Protection of Rights in Public Procurement Procedures (new Review Commission) appointed by parliament upon a government proposal, in accordance with the PPL. The chairperson and members of the Commission are elected for a five-year period and may be re-elected only once. The chairperson and the members are elected and dismissed by the National Assembly on the proposal of the government. The new Review Commission was established as an autonomous and independent legal entity responsible directly to the National Assembly, with a separate budget.

Commission Budget: Since early 2011 the Review Commission has its own budget of 1.8 million EUR for 2011 and thus the necessary funds to carry out operational work. The fees for review procedures enter into the state budget and therefore do not contribute directly to the Commission's budget.

Overall perception of stakeholders and the general public: The overall perception of stakeholders and the general public in the procurement process – also fostered by media coverage – reflects the problems and irregularities that occurred during the establishment of the new Review Commission. In addition, the work of the Review Commission is perceived as lacking in transparency due to the partial publication of its decisions, the absence of published statistical data, and lengthy procedures. This general atmosphere has undermined the trust of contracting authorities and the business community in the review and remedies system. This phenomenon is aggravated by the fact that the decisions of the Review Commission are not always implemented by contracting authorities/entities, as has been reported by both the stakeholders in the process and the Review Commission itself.

Statistics for 2010: In 2010 the Commission had to deal with a total of 1044 cases, which may be divided, in accordance with article 101 of the PPL, into the following main categories:

- 799 decisions on *requests for legal protection*, including 149 decisions upholding the appeal request, which meant the cancellation of the procedure, either wholly or partially. The remaining requests were dismissed for formal reasons (62 requests), rejected as unfounded (166 requests), or withdrawn by the applicants;
- 85 decisions on *appeals to contracting authorities*, including 18 rejected appeals, 9 dismissed, 51 adopted, 3 terminated procedures, 2 appeals resolved along with the request for protection of rights, 1 returned to the contracting authority, and 1 resolved in another manner;
- 16 decisions on *statements to continue the procedure*, including 9 decisions rejecting the statement, 4 cases of withdrawal, 1 decision joining the statement on the protection of rights., 1 decision adopting the request of the contracting authority, and 1 terminated procedure;
- 77 decisions on *requests for damages*, including 34 adopted, 27 rejected, 8 decided along with the request for protection of rights, 6 terminated procedures, and 1 request returned to the contracting authority;
- 14 decisions on *proposals to continue activities*, including 4 rejected proposals, 2 adopted, and 8 proposals resolved along with requests for protection of rights;
- 1 decision on a *proposal of return to previous state*;
- 4 decisions on *requests for return of funds*;
- 1 decision in the case of a *bidder's letter*;
- 5 decisions on *appeals on delivery of documents*;
- 1 decision on the *judgment of the Supreme Court*;
- 41 *lawsuits filed with the Administrative Court against decisions of the Review Commission*.

Over the past five years (2005-2010), an increasing number of requests have been submitted by tenderers, and the proportion of upheld requests has increased.

The most common problems for the Commission to resolve: According to the Review Commission, the most common problems have remained quite similar (e.g. discriminatory or unclear tender documents, discriminatory conditions of participation, incorrect setting of contract award criteria, and selection of a tenderer whose tender was not ranked as the best). The Commission has recently experienced, however, more "sophisticated" practices that give preferential treatment to certain tenderers, such as the adjustment of technical specifications to favour the preferred tenderer, but these practices are difficult to prove, especially in the early stages of the procedure.

Staffing and premises: The Review Commission is well aware of the stakeholders' general perception of its work and blames the difficult situation on the lack of staff and office equipment and an increasingly heavy workload. It hopes to remedy this situation by hiring additional staff (a maximum of up to 70 employees has been approved by parliament). The Commission is still working on the premises of the National Bank, but it is trying to find new premises as it is planning to hire new staff and thus needs more space to accommodate its employees. Currently, in addition to the five members (one chairperson and four members), 20 more employees (including four to five support staff) are working in the Commission. The staff assisting the members in preparing their decisions are all lawyers. Although the Commission intends to increase its staff by up to 70 employees, SIGMA does not support a disproportional increase of staff. The current size of the Commission corresponds more or less to other review institutions in other countries in the region that have to deal with a similar workload.

Enforcement of decisions (article 118 PPL): The fact that decisions of the Review Commission are not always implemented by contracting authorities/entities has been reported by both the stakeholders in the process and the Commission itself. The Commission cannot provide precise data in this regard, although there is a

legal obligation under article 102 (5) of the PPL for the Commission to monitor the implementation of the decisions it has adopted. The Commission intends to monitor this implementation in the future after hiring additional staff and to report non-compliant contracting authorities and entities to the auditors, budgetary control, government and parliament, in accordance with its legal obligation to do so. SIGMA considers the enforcement of such decisions by contracting authorities/entities as one of the cornerstones of any functioning public procurement system. Immediate action by the Commission is vital for the public procurement system in Serbia.

Publication of decisions: The Review Commission publishes some of its decisions on the portal of the PPO as a means of ensuring transparency and of providing guidelines for practitioners, which is generally appreciated by SIGMA. Until recently the Commission has published only randomly selected decisions. The Commission declared its intention to publish all decisions as of March 2011 on a new portal (www.kjn.gov.rs), but no decisions were published in March¹²⁶.

As a second step, there remains the need for a database of decisions, including browsing and search tools for individual legal problems to orient practitioners in their daily procurement operations.

In addition, the Commission should publish legal analyses of the most common legal problems and give indications as to how such problems are dealt with in its decision-making (e.g. qualification criteria, costs of tender documents, contract award criteria).

Decisions not always within the PPL deadlines (article 114 PPL): According to representatives of the business community and of contracting authorities/entities, the Review Commission often does not take its decision within the PPL deadline of 15 days (plus 20 days for difficult cases). The general perception is that the parties concerned receive the decision only after two to four months, whereas the dates of the decision are within the legal deadlines. The Commission is aware of this situation, but stresses that most decisions are taken within 35 days. It blames this “maximum legal deadline” on understaffing and poorly prepared complaints by the applicants (tenderers, public attorneys). The Commission did not provide SIGMA with any exact data on the backlog of decisions.

4.3 Complaints Review Procedure

The review procedure consists of two stages: the first stage starts with a request to the contracting authority/entity and the second stage with a request to the Republic Commission for the Protection of Rights in Public Procurement Procedures (Review Commission).

At first the request (referred to as the “request for the protection of rights”) is submitted directly to the contracting authority/entity (with one copy to the Review Commission). A request may be filed by any person having an interest in concluding a contract for the particular public procurement. A request may also be submitted by the PPO, a public attorney, or a government body or organisation authorised to supervise the contracting authority/entity’s business activity (legal standing, article 106 PPL). The PPL explicitly states that all decisions of the contracting entity can be challenged by a request. A request may be filed basically at any time during the procedure (unless specified otherwise in the PPL), e.g. when the content of a call for competition or tender documents is disputed, prior to the expiry of the time limit for the submission of bids, or – in the case of a decision of the procuring entity – within eight days of the date of receipt of the decision.

Automatic suspension of the contract award procedure: Submission of the request results in the automatic suspension of the contract award procedure (and the public procurement contract may not be concluded prior to the expiry of the time limit for submission of a request for the protection of rights) unless – at the request of the contracting authority/entity – the Review Commission decides otherwise (which rarely happens). Within 10 days of receipt of the request for the protection of rights, the contracting authority/entity is to take a decision – either to accept the request, thus annulling the procedure wholly or partially, or to reject the request. According to the PPL, the decision of the Commission must be

¹²⁶ Website last checked on 14 April 2011.

accompanied by an explanation. If a tenderer is not satisfied with the decision of the contracting authority/entity regarding the request or has not received the decision of the contracting authority/entity within the 10-day period, the tenderer may submit – within three days – an appeal to the Commission.

The Review Commission is a second-instance body in the review procedure, and it decides on appeals filed by dissatisfied tenderers. The manner of operation of the current Review Commission is regulated by its Rules of Procedure. The Commission makes its decisions in sessions by a majority vote. The competences of the Commission, as defined by the PPL, include the possibility to cancel entirely or partially a public procurement procedure. The Commission's decision should be reached – according to the PPL – within 15 days (plus 20 additional days in more complex cases) of the date of delivery of the complete documentation. The Review Commission so far has been unable to respect these deadlines, and it explains that this situation is due to insufficient staff and poor technical conditions. On average, according to contracting authorities/entities and the business community, the decision-making process lasts for two to four months, and as a result the review system at the moment is a weak element in the Serbian public procurement system.

Fees (article 116 PPL): According to the PPL, to start a review procedure the complainant is to pay a fee – 60,000 RSD (approximately 600 EUR) in the case of higher-value procurement and 30,000 RSD (approximately 300 EUR) for low-value procurement. The amount of the fee does not seem to restrict the propensity to complain; on the contrary, the Review Commission suggests raising the fee to avoid abusive complaints that are aimed at simply delaying the contract award procedure.

No legal possibility for the Commission to hold oral hearings: The Review Commission makes its decisions only on the basis of the tender documents and written statements from both parties, because there is no legal possibility, according to the Commission, to clarify a complex statement of fact or a complex legal issue in oral hearings. Assuming that with so many cases there must be several cases of a higher value and of greater complexity than the average case, it might be worthwhile to consider the introduction of a legal provision that would allow for oral hearings. According to international good practice, oral hearings give opponents the opportunity to directly exchange their points of view, which helps review institutions to clarify the facts in particularly complex cases.

Administrative disputes (article 118 PPL): Decisions of the Review Commission may be challenged in court (administrative court). An administrative dispute may also be initiated whenever the Commission fails to make and deliver a decision within the time limits specified in the PPL.

Damages: Damages may be subject to separate proceedings before the court, but such proceedings are rare. The PPL also sets out cases where the contract concluded is to be deemed as null and void (article 120).

4.4 External Audit¹²⁷

The supreme audit institution in Serbia, the State Audit Institution (SAI), was established by the Law on the SAI in 2005, but staffing only started in 2007 and the SAI did not undertake its first audits until 2009. The SAI has a sufficiently broad mandate to audit all public funds, including public procurement, but due to its limited capacity, the SAI so far has carried out only financial audits of a limited number of existing budget-users. Within the remit of those audits, it has reported some irregularities in public procurement procedures. In its audit reports, the SAI has indicated in particular the use of non-transparent and unjustified urgent procedures.

However, as the SAI has only recently become operational, it does not yet have the capacity to exercise the full range of audits. The SAI will need at least several years before it can have an impact on procurement procedures in the public sector in terms of both its preventive role and its advisory role in improving the system.

¹²⁷ For more information, see Sigma's 2011 assessment report on External Audit in Serbia.

4.5. Integrity of Procurement Operations¹²⁸

Corruption is undoubtedly the most serious problem of public procurement in Serbia. No exact data is available on the real scale of corruption. The common perception – expressed by representatives of the business community and confirmed by all institutions responsible for monitoring the public procurement system – is that corruption is present across all sectors of public procurement. The scale and seriousness of irregularities seem to overshadow all other problems and to undermine the whole system. The general opinion is that the situation is deteriorating and is now much worse than it was immediately following the adoption of the previous Public Procurement Law (2002). Without undertaking serious steps to curb corruption in public procurement, all other legal and institutional improvements will remain negligible.

It appears that even if the legal system in place contains important elements for fighting corruption, these elements do not work, and there is no effective enforcement of sanctions in the case of irregularities. This state of affairs is also reflected in the corruption perception index, which rates Serbia at 3.5 (a high level of corruption), which is also rather typical for countries in the region. The most sensitive sector appears to be the construction sector, and a general problem arises in the context of requesting bank guarantees. There is a lack of control, especially in the planning phase of procurement procedures, and budget inspection does not work properly.

The PPL contains specific provisions on anti-corruption. An anti-corruption rule, which applies throughout a public procurement procedure, is included among the general public procurement principles. This rule stipulates that a contracting authority may refuse a tender where there is indisputable proof that a bidder tried to bribe a member of the public procurement commission, a person participating in the preparation of tender documents, a person participating in the planning of public procurement or any other person, with the intention of influencing that person to unveil inside information or to affect the decision-making of the contracting authority in any phase of the public procurement procedure. A tender may also be refused where a tenderer has tried to threaten any of the above-mentioned persons.

The PPL has introduced public bid-opening. Details of the procedure for opening bids and of the form for taking minutes on the opening of bids are set out in the regulation on this procedure.

The Anti-Corruption Agency started operations in 2010. Although there is a strategy on fighting corruption that dates from 2005, which contains a chapter on public procurement, its implementation was delayed and is slow. Although public procurement is reputed to be a major source of corruption, no data is available on the level of corruption in public procurement, but the agency has expressed very strong criticism of the public procurement system, notably that contracting authorities generally do not adhere to the PPL and that the Review Commission is not prepared to fulfil its tasks properly. The agency has plans for closer co-operation with the PPO, the SAI and the Review Commission on the development of effective measures for fighting corruption in public procurement.

The review and remedies system remains a weak element in the public procurement system in Serbia.

So far the establishment of the Review Commission has not contributed to the improvement of the system but has rather added to the frustration of the public procurement community. The overall perception of stakeholders in the procurement process – also fostered by media coverage – reflects the problems and irregularities that occurred during the establishment of the Review Commission. In addition, the work of the Commission is perceived as lacking in transparency due to the partial publication of its decisions, the absence of published statistical data, and lengthy procedures. This general atmosphere undermines the trust of contracting authorities and the business community in the review and remedies system. This phenomenon is aggravated by the fact that the decisions of the Review Commission are not always implemented by contracting authorities/entities, as has been reported by both the stakeholders in the process and the Commission itself.

The Review Commission is well aware of these facts and blames the difficult situation on the lack of staff and office equipment and an increasingly heavy workload. It hopes to remedy this situation by hiring

¹²⁸ For additional information, see Sigma's 2011 assessment report on the Public Integrity Framework in Serbia.

additional staff (a maximum of up to 70 employees has been approved by parliament). SIGMA does not support a disproportional increase of staff. The current size of the Commission corresponds more or less to other review institutions in other countries in the region that have to deal with a similar workload. Currently the five Commission members and 20 additional staff are working in the Review Commission, and the Commission's staffing level and workload are comparable to those of other review institutions of countries in the region.

The State Audit Institution has only recently become operational. In 2010 there was no special focus on the audit of public procurement.

Currently the prevention and the fight against corruption in the field of public procurement appear to be limited to mere statements in the laws, as there are no real and visible efforts to enforce these laws in practice.

ANNEX 1

PROCUREMENT/CONCESSIONS STATISTICS for 2010¹²⁹

A. Number of contracting entities¹³⁰		
Central government (bodies of state administration, judiciary)	328	
Regional and local authorities	688	
Other (bodies governed by public law) (health, culture, education)	1892	
Utilities (publicly-owned enterprises)	621	
Total number of contracting entities	3529	
B1. Awarded¹³¹ public contracts/Contracting entities (including small value contracts)	Total (estimated) value (Mio EURO)	Total number¹³²
Central government	487.727.695	12.381
Regional and local authorities	224.410.210	6.989
Other (bodies governed by public law)	405.897.705	34.132
Utilities	1.482.491.114	30.191
Total public contracts awarded	2.600.526.724	83.693
B2. Awarded concessions/Contracting entities	/	/
Central government	/	/
Regional and local authorities	/	/
Other (bodies governed by public law)	/	/
Utilities	/	/
Total concessions awarded	/	/
C1. Awarded public contracts above the EU thresholds¹³³		
Works ¹³⁴	273.105.029	16
Services ^{135 136}	365.197.467	143
Goods ^{137 138}	393.185.467	552
Mixed contracts	/	/
Total public contracts above the EU thresholds	1.031.487.963	711
C2. Awarded concessions above the EU thresholds		
Works ¹³⁹	/	/
Services ¹⁴⁰	/	/
Other	/	/
Total concessions above the EU thresholds	/	/

¹²⁹ Statistics should cover contracts awarded in the period 1 January 2010 – 31 December 2010.

¹³⁰ As at 31 December 2010.

¹³¹ Statistics should refer to contracts awarded (based on contract award notices), if not available, please give the data on contracts advertised (based on contract notices)).

¹³² Please indicate whether the data includes low-value contracts.

¹³³ Please indicate whether the data includes contracts awarded by the utilities sector.

¹³⁴ Above 5.150.000€€.

¹³⁵ Above 125.000€ for public institutions, 387.000€ for utilities.

¹³⁶ Bodies governed by public law and public enterprises.

¹³⁷ Above 125.000€ for public institutions, 387.000€ for utilities.

¹³⁸ Bodies governed by public law and public enterprises.

¹³⁹ Above 4.845.000€€.

¹⁴⁰ Above 125.000€€.

D. Procurement methods used¹⁴¹ (above the national thresholds¹⁴²)		
Open procedure	1.293.852.848	18.219
Restricted procedure	270.823.057	5.768
Negotiated procedure with prior publication of a notice	556.444.619	6.045
Negotiated procedure without prior publication of a notice ¹⁴³	155.065.438	1.239
Other procedures (competitive dialogue, etc.)	77.143	5
D1. Low-value procurement	324.263.619	52.417
E. Participation rate (average number of submitted tenders)		
Works	3.61	
Services	3.38	
Goods	3.7	

F. Review procedures		
Number of complaints received	/	1044
Number of complaints treated	/	/
Number of decisions appealed to the Court	/	41
Number of decisions with interim measures	/	/

F. A list of 10 largest procuring entities (name, main activity, (estimated) annual procurement budget):

1. Građevinska direkcija Srbije
2. Ministarstvo za infrastrukturu
3. JP EPS „Termoelektrane i kopovi Kostolac“
4. JP “JAT Airways”
5. JP “Elektroprivreda Srbije”
6. Direkcija za gradjevinsko zemljište i izgradnju Beograda
7. EPS JP Rudarski basen Kolubara Lazarevac
8. Grad Beograd – Gradska uprava
9. JP “Beograd – put”
10. JKP “Termoelektrane Nikola Tesla” Obrenovac.

G. A list of 10 largest public contracts/concessions awarded and/or advertised in 2010 (subject of the contract, name of the procuring entity and contractor (if selected), (estimated) value, time of execution):

1. Ministry for Infrastructure and Group of Bidders: PZP Beograd, Putevi (Road Authority) Užice, Planum, Borovica – 80.476.190
2. Ministry for Infrastructure and Group of Bidders: PZP Beograd, Putevi (Road Authority) in Užice, Planum – 69.835.485
3. Thermal Power Plants and Mines in Kostolac, and Energoprojekt Entel Beograd – 50.292.704
4. JAT Airways and Unikredit Bank, Societe Generale – 40.000.000
5. Republic Health Insurance Authority and the National Bank of Serbia – 33.884.000
6. Mining Compound in Kolubara and “Kolubara usluge (services)” – 15.392.971

¹⁴¹ For both public contracts and concessions.

¹⁴² Including contracts above EU thresholds.

¹⁴³ Including single-source procurement.

7. Directorate for Construction Land and Development of Belgrade and “Ratko Mitrović niskogradnja (low-rise)” – 13.770.952
8. Directorate for Construction Land and Development of Belgrade and “Ratko Mitrović niskogradnja (low-rise)” – 13.757.876
9. Belgrade Power Plants and Oil Industry of Serbia (NIS) – 11.591.361
10. Hydro Power Plants “Đerdap” and Končar Power Transformers Zagreb – 10.010.628.

POLICY-MAKING AND CO-ORDINATION

Summary

Main Developments since Last Assessment (May 2010)

There have been no significant developments in policy-making and co-ordination since the last assessment. The concerns expressed in previous assessments remain.

The questionnaire from the European Commission concerning Serbia's progress towards membership of the European Union was successfully completed. This illustrates the relative strength of the European Integration policy and co-ordination system as well as of the Serbian Office for European Integration (SEIO) which managed the process.

Government policy has focussed on reaching fiscal targets. It has given less attention to governance reforms in the area of policy making, improving co-ordination at the centre of government or addressing the problems caused by the fragmentation at the centre of government.

There has been a slight improvement in the quality of the Annual Work Plan of the Government. However, this does not appear, as yet, to have had significant impact on how government work is conducted.

The new e-government system improves the process for distributing of documents to the government and, in principle, ensures that materials received after the deadlines must be postponed to the following government meeting. Its effectiveness in this regard is not yet proven,

There have been some technical changes on regulatory management, but it is too early to assess their impact:

- In December 2010, the government transferred the Secretariat of the Regulatory Reform Council into the Government Office.
- The Rules of Procedure were amended to require drafts of legislation submitted to government to be accompanied with a "table of concordance" showing the relationship between the draft and the relevant EU legal instrument.

The Regulatory Reform Council report a steady overall trend in the improvement of the quality in regulatory impact assessments but progress is uneven and much work remains to be done.

The process of reviewing existing legislation continued. According to a report carried out in cooperation with the International Finance Corporation (IFC), substantial savings (in the region of €195m) have been achieved.

Main Characteristics

The Law on Government and the Rules of procedure provide a good legal framework for a policy-making process and effective coordination at the centre of government. However the rules of procedure are often ignored. As discussed in the civil service assessment, the policy capacities in Ministries are usually weak and decision-making is concentrated at the highest level.

The policy system at the centre of government is divided into five poorly co-ordinated components, namely, the Prime Minister's cabinet (staffed with political appointees), the Section for Expert Work, the Department for Planning Monitoring and Policy Co-ordination, the Secretariat for Legislation and the Government Office for Regulatory Reform. Each of these components suffers from insufficient professional policy staff.

The primary arrangement for resolving disagreements between ministries is the meetings of the government and of its committees. The Rules of Procedure require the consideration of every item by a committee before it is submitted to the full government meeting. However, since most work is effectively tabled in the committee meetings, the effectiveness of the committee is very severely impaired. Furthermore, as the committees usually meet only two days before the government meeting to which they report, there is little or no time to reconcile disagreements between ministries in the intervening period.

Co-ordination of European Integration matters in Serbia is more effective than policy co-ordination on more general matters, and there are relatively effective EU Integration policy/co-ordination units in most Ministries. Also the planning framework for EU funds provides a more strategic and analytical approach to multi-annual planning. However, these activities have not yet had a positive impact on the work done in budgeting or government work planning and any such impact would only affect some socio-economic areas, such as entrepreneurship, labour market policies, vocational education development, regional development and agriculture.

The use of regulatory impact assessment means that there is a review of the quality of proposals, undertaken by the Council of Regulatory Reform, but the real adherence to the system may be questioned. For fiscal impact assessment, there are rules in place that no proposal should be submitted to the government without an opinion by the Ministry of Finance. In practice, the Ministry of Finance reviews around 95% of draft legislation as part of the inter-ministerial consultation. However, Ministries rarely undertake adequate assessments and frequently assert that there are no financial consequences.

There is a three-year fiscal strategy that is the basis for budget discussions. In addition, the government has its annual work plan that is prepared and analysed by the General Secretariat, and also ministries are required to establish medium term strategies. There are also a number of sectoral strategic plans that could have an essential role for meaningful strategic thinking across the ministerial boundaries and with the non-governmental stakeholders. However all this is not really coordinated and both analytical and methodological support from the centre of government is not meaningful. The majority of the work is driven by bottom-up proposals, which implies that there is no central capacity for strategic planning.

These factors contribute to lack of systematic policy coordination, strategic planning of government work and professional policy development within the government. The current system is not sufficiently robust to sustain the pressure of negotiations.

Reform Capacities

The capacity to reform is constrained by the political realities in Serbia. There are few incentives for officials to take initiatives and future reforms are dependent on the complex relationships inherent in coalition governments. The capacity for reform is also constrained by the structures at the centre of government.

The roles for coordinating policy making between the General Secretariat, the Ministry of Finance and the Secretariat for European Integration are not clearly enough established or articulated; it is difficult also for each of them to take the central role in building strategic planning and management capacity in the Serbian public administration.

Consultation is not sufficiently developed or regulated, except in respect of the EI agenda.

The Secretariat for European Integration (SEIO) has set up a relatively effective policy system for EI, which could be possibly leveraged for more general reform of policy-making. However this may risk making reform of the policy system a hostage to the progress of EI.

Apart from the SEIO, there appears to be little capacity, desire or incentive to reform and professionalise policy making. It is unclear whether the new Government arrangement (with the PM also acting as MoF) will lead to a greater desire for more professionalised policy-making.

Recommendations

The system is constrained by the weakness of incentives for professionalised policy making, with the exceptions of the EI, fiscal consolidation and administrative burden reduction agendas. The recommendations build on these, with the aim of influencing the overall appreciation of the advantages of professionalised inputs to political decision-making. The recommendations should be adjusted in the light of the decision of the European Council on Serbia's accession status, especially in respect of the role of the NPI/SEIO. If Serbia is granted candidate status, the management of negotiations will require a significant increase in policy capacities. But, in general, the main recommendation is to implement what is currently in place rather than proposing a fresh round of reform. In particular:

The role of filter committees should be consolidated and the timing adjusted so that the Committees can ensure that the government receives mature and coordinated drafts.

The government should establish more top-down elements to its policy planning by introducing a clearer strategic planning process that sets out the main objectives of government policy. Line ministries, following those main objectives, should prepare their own strategic plans with objectives and timescales including an assessment of the resources that will be required. It is important to ensure that the main policy priorities of the government are driving the administrative work-plans of the government and ministries. With a more top-down approach and right timing, the work plan of the government could serve as key strategic input to the budget planning process and also as a tool to better integrate the agendas of the political and administrative leadership.

The Department for Planning Monitoring and Policy-Co-ordination (DPMPC) within the General Secretariat could be strengthened as a centre for strategic and work planning. It could coordinate and tie together the sectoral strategies, three-year ministerial strategic plans, the medium term fiscal strategy, the NPI and the government work plan. For the DPMPC to fulfil this role, its staffing must be consolidated and regularised.

The General Secretary, with the backing of the PM, should launch a functional analysis of the General Secretariat and its component offices, taking into account the roles of other central bodies such as the SEIO, as a prelude to rationalising its structure.

1. Coherence of the Policy-making Framework

The Law on Government (2005) and the Rules of Procedure of the Government of Serbia (2006) provide many of the elements required for an effective policy-development and decision-making system. However, the insufficient number of officials with policy-making knowledge, skills or aptitudes and the tendency of ministers not to rely on policy advice from the executive branch of government reduce the effectiveness of the Law and Rules.

In addition, despite the latest amendments to the Rules of Procedure, a number of weaknesses remain, including:

- The preparation of materials for decisions and the review and decision-making by the committees and the government focus primarily on technical, legal issues and pay little attention to policy content.
- The role of the General Secretariat and the Secretary General in reviewing materials remains too limited and technical, focusing on compliance rather than on the quality of the content.
- The Rules set no deadline by which materials must be submitted to the General Secretariat before submission to the government and, therefore, permit ministers to submit materials at the last moment, which allows the General Secretariat little or no time to review the materials.
- The annual planning process, while a welcome step forward, is defined too narrowly as a process for pooling together the input from individual ministries rather than as a mechanism designed to achieve collective priorities.
- The Rules do not specifically establish a strategic planning system.
- Requirements for public consultation are imprecise.

Furthermore, many aspects of the Rules are not operative, for the reasons listed below.

The legal framework provides many of the elements required for an effective system of policy development and decision-making, but two serious weaknesses remain. There is insufficient professional policy-making capacity and many aspects of the Rules are not complied with.

2. Inter-ministerial Consultation on Policy Proposals

The initial process of drafting legislation and other policy proposals within originating ministries is weak. The analysis of policy problems and of the possible options for addressing them is inadequate. Insufficient attention is paid to practical issues of implementation. The quality of legal drafting is often poor. Attempts are being made to remedy these weaknesses. The government has adopted a decree on drafting secondary legislation. A law-drafting element has been added to the general training programme for civil servants that are provided by experts from parliament and the Secretariat of Legislation. The problem of the quality of drafting nevertheless remains. (It is to be noted that the Parliament has gone further than the Government and adopted for itself a binding instruction on drafting methodology.)

Very little consultation occurs between ministries (and sometimes within ministries) when policies are being formulated and laws drafted. The Rules of Procedure require the ministry initiating a law to consult any public administration body with activities that might be affected, including, for example, the Secretariat for Legislation, the Ministry of Finance, the Ministry of Justice and the Office for European Integration. Comments from these bodies must be provided within 10 days (20 days in the case of an organic law).

In practice, it seems that the above requirements are rarely observed. The reasons for this situation appear to be varied: ministries often regard consultation as a formality; they plan their activities poorly, leaving too little time to consult other ministries. The Rules of Procedure allow any minister to suggest that “the agenda include a certain issue where the failure to discuss the issue could have detrimental effects”.

Some flexibility for urgent matters is necessary. However, the Rules are interpreted so that most items are circulated at the last moment or are tabled directly at a government meeting. The agenda circulated to the government and its committees often contains only a small number of items, but the meeting can end up by considering as many as 70 items. Although legislation and major decisions make up less than 10% of these items, a surprisingly large number of laws are circulated to committee members without comments, in the hope that ministers at the meeting will deliver comments orally from the ministries affected. As a result, a very high proportion of draft laws undergo no proper consultation between ministries at all, although in the case of “systemic” laws the procedures are observed more frequently.

The obvious consequence of this state of affairs is that much of the legislation passed is flawed and has to be amended soon after its enactment.

The Secretariat for European Integration (SEIO) is, generally, only given one or two weeks to comment on the conformity of legislation with the *acquis communautaire*. Commenting on legislation has become easier thanks to the introduction of the requirement to accompany legislation with a “table of concordance”. There is also a close working relationship with ministries, which provides them with an awareness of forthcoming legislation that has a European dimension.

The rules for inter-ministerial consultation on draft laws are usually broken, either by circulating them late for comments or by not circulating them at all. Consequently, much of the legislation that is passed is flawed and, in part, ineffective. These rules work better in the case of consultation with the SEIO.

3. Work Planning

Articles 76 to 79 of the Rules of Procedure require the government to specify its main activities, including legislation, in its Annual Work Plan. The Rules also require the government to evaluate its achievements in carrying out these activities in a performance report. The ABP should specifically list all bills and proposals of other enactments that the government intends to put forward to the National Assembly, with a brief overview giving the reasons why each individual enactment is required (article 79 of the Rules).

The quality of the Annual Work Plan has undoubtedly improved considerably since its introduction in 2007. It has been linked to the ministry-level medium term planning methodology (GOP). All Government bodies now use a new IT application to submit their contributions to the plan that requires them to identify for each item goals, objectives, references to strategic documents, programs and projects, indicators and costs. Ministries can view each other’s contributions, permitting some degree of co-ordination. The Department for Planning Monitoring and Policy Co-ordination states that the Annual Work Plan is fully co-ordinated with the National Programme of Integration into the EU (NPI). Monthly reports are developed for the PM’s office on the implementation of the Annual Work Plan against the Government Agenda.

The process still has serious limitations. It is now more systematic than a mere compilation of proposals by ministries, but is still essentially a bottom-up process and lacks a top-down element: there is no overall strategic framework within which ministries must develop their GOP plans and their contributions to the Government’s Annual Work Plan. 20% of significant issues decided by the Government in 2010 had not actually featured in the Annual Work Plan, although that is an improvement on previous years.

Nonetheless, these positive achievements are encouraging and further developments are planned: in particular, the General Secretariat and the Ministry of Finance are discussing how to link this process to budget development, i.e., by using early inputs on existing and new policy initiatives to define priority financing areas.

Despite developments concerning the Annual Work Plan, there appears to be no effective mechanism for planning the work of the government or its committees in either the immediate term or the medium term, and the weekly agenda is determined by whatever ministries choose to put forward. The deadlines specified in the Annual Work Plan for the submission of items to the government are frequently ignored.

The agenda of the government and its committees is heavily overloaded with items that are not required – either by law or by their intrinsic importance – to go to the government for approval. This situation appears to be a matter of habit and culture, and the Secretary-General seems unable to prevent these unnecessary items from cluttering the agenda.

There appears to be no effective mechanism for planning the work of the government or its committees in either the immediate term or the medium term. The Annual Business Plan is a positive development but is still in the developmental stage.

4. Dispute Resolution Mechanisms

The main mechanisms for resolving disagreements between ministers are the meetings of the government and of its committees. As the inter-ministerial consultation process required by the Rules of Procedure is largely inoperative, there is no way of identifying or resolving inter-ministerial disagreements at an earlier stage of the process.

On the positive side, the four committees, envisaged by the Rules of Procedure, are operational and, between them, cover the full range of government work. Of these, the Committee for Economy and Finances considers some 80% of government work.

The Rules of Procedure require the consideration of every item by a committee before it is submitted to the full government meeting. However, since most work is effectively tabled in the committee meetings, the effectiveness of the committee is very severely impaired. Furthermore, as the committees usually meet only two days before the government meeting to which they report, there is little or no time to reconcile disagreements between ministries in the intervening period. Such reconciliations do occur, but they are necessarily rushed, and the quality of the resulting draft suffers accordingly. A committee can order the return of an item to the proposer for more work, but ministers often circumvent such action.

There is no way of identifying or resolving inter-ministerial disagreements until a very late stage in the process, which impairs the quality of the final decision and of the resultant legislation.

5. Central Co-ordination Capacity

As has been observed in previous Sigma assessments, for all practical purposes there is no centre of government in Serbia. Support is provided at government meetings to providing order in the proceedings by the Prime Minister and Deputy Prime Minister. In addition there is a constellation of small units with limited remits and capacities to ensure that the meetings run well.

The General Secretariat, headed by the Secretary-General, provides administrative and secretarial support to the government and its committees. The role of the Secretary-General under the Rules of Procedure is potentially influential, but in practice it is confined to dealing with procedural issues and facilitating the resolution of disputes.

A very significant factor in limiting the effectiveness of the roles of the Secretary-General and his/her staff is the fact that ministries routinely ignore the deadlines set in the Annual Work Plan for the submission of items to the government. In addition, ministers often ignore the committee meetings and table matters directly in the government meeting. The fact that most work arrives at the last moment – sometimes only half an hour

before the meeting – limits the capacity of the Secretary-General and his/her staff to exert any influence, and in any case there is no apparent political desire to empower them to be more active.

Within the General Secretariat, two departments are concerned with the policy-making and co-ordination system. The Section for Expert Work compiles and circulates documents prior to meetings and records and circulates decisions. It is generally regarded as doing its work effectively, as far as the lack of proper inter-ministerial co-ordination permits, and despite being severely hampered by ministries' lack of respect for deadlines. Its role is entirely logistical and technical. It has neither the remit nor the capacity to review the substance of proposals put forward by ministries.

In late 2008, the government established the Department for Planning Monitoring and Policy Co-ordination (DPMPC), headed by the Assistant Secretary-General. Its lengthy remit is comprehensive and in some respects appears to overlap with the remits of the Office for Regulatory Reform and the SEIO. The creation of the Department is intended to be the first step towards changing the role of the General Secretariat from a mainly administrative body to a focal point for policy-making and co-ordination. An agenda for reform has been agreed with the main stakeholder institutions within the government but, to date, the role of the Department has been restricted mainly to working on the compilation and monitoring of the government's Annual Work Plan. As part of that process it checks ministry contributions to point out areas of overlap between the proposals of different ministries.

The Department's staffing position is unclear: it has five civil service staff (and possibly more, depending on the outcome of appeals against redundancy). Since September 2009, it has been supported by a donor project, which has funded 9 or 10 consultants at remuneration levels that are slightly higher than those of civil servants. These consultants are now supposed to be transferred to civil service posts, but funding for the transfer of only three of these staff has been made in the budget for 2011, with the possibility of another three in 2012.

As in previous governments, a limited amount of co-ordination is carried out at Deputy Prime Minister (DPM) level. At present this activity is confined to the DPM for European Integration, Social Issues and Poverty Reduction, in whose interest the staff has been allowed to foster co-ordination between ministries on certain issues.

The Secretariat of Legislation plays an influential role. It has relatively large staffs of 45 that was protected, significantly, from recent cuts in civil service staff numbers. It reports directly to the government, and the government appoints its head. As in other former Yugoslav countries, the Secretariat is the legal adviser of the government, and the rules require that drafts of all legal acts be reviewed by this Secretariat in terms of their constitutionality, legal conformity and drafting style. The Secretariat is consulted on all draft legislation and comments on it. If time permits, it will also work with ministry staff to improve the quality of their legal drafts. This is an important role, given the poor quality of many of these drafts. However, the scope for this activity is limited by the fact that these drafts are usually circulated late. Secretariat staff attends the meetings of the committees and of the government in order to answer legal questions and to be in a position to produce the final drafts following the meetings. However, their support consists of opinions on the legality and legal format of items, not on their adequacy as policy.

In December 2010, the government added to this constellation of small units the Government Office for Regulatory Reform, which will provide, when fully staffed, an element of analytical capacity at the centre of government, but the Office is limited in its remit to reform and to resolve regulatory impact assessment issues (see sections 9 and 10 below).

Co-ordination of EI matters in Serbia is more effective than policy co-ordination on more general matters (see section 7 below). This situation is often the case in countries seeking accession to the EU, but the disparity is particularly marked in Serbia.

The new e-government system facilitates considerably the distribution of documents to the government and, in principle, ensures that materials received after the deadline specified in the government work plan cannot be circulated and must be postponed to the following government meeting. In practice, this constraint is undermined by the fact that the e-system is currently operating in tandem with the paper-based system. This duplication is also placing a considerable burden on staff.

The DPMPC reports regularly to the Prime Minister on the degree to which ministries are complying with the deadlines in the Annual Work Plan. This practice is useful, and the Prime Minister is apparently using these reports to chase progress with ministers.

According to article 89 of the Rules of Procedure, the Secretary-General of the Government has the duty of monitoring and enforcing the decisions of the government. In practice, the General Secretariat lacks the capacity to fulfil this function.

This fragmented group of units does not constitute an effective centre of government. The General Secretariat provides secretarial and administrative support to the government and its committees, but there is no capacity for policy review. There is no monitoring of the implementation of government decisions.

6. Central Capacity to provide Advice on Policy and Strategic Matters

The Prime Minister's Cabinet is staffed with political appointees (not civil servants) and has its own Regulation. It is not formally part of the General Secretariat of the Government. The Cabinet is concerned mainly with responding to the immediate needs of the Prime Minister, providing some policy advice but playing no strategic role. It is not involved in the preparation of items for decision by the government. The cabinet of the Deputy Prime Minister for European Integration, Social Issues and Poverty Reduction does play a limited strategic role within the social sector. The cabinets of the other deputy prime ministers do not.

The General Secretariat plays no policy or strategic role beyond the very limited role played by the DPMPC in relation to the Annual Work Plan, described above. It is intended that in time the DPMPC will develop a capacity to advise the Government and Prime Minister on policy and strategic issues.

There is no central capacity for strategic planning, and a notable deficiency has long been the absence of any strategic framework within which the budget, the Annual Work or ministries' strategic plans could be prepared. As is common in the region, there is a proliferation of sectoral or cross-sectoral strategies. A recent external analysis identified some 80 of these and recommended that 33% were fit for implementation, 20% should be scrapped and the remainder should be kept, updated and in some cases merged. However, there is no overarching strategic framework within which these strategies can be drafted, which inevitably leads to conflict.

There are plans to develop a more strategic approach over the next year or two, and an international expert engaged by the SIDA project has produced a thoughtful and realistic options paper on the subject, that, sensibly, seeks to build on existing processes. However, there has been no decision at political level whether to act on this and it remains to be seen whether this effort will actually lead to concrete change. It will need to be co-ordinated with a budgeting strategy and with the EI strategic documents being developed by SEIO.

There is neither a strategic planning system nor any capacity to provide policy or strategic advice at the centre of government. However, there are plans to develop a strategic planning system and such a system is under discussion within the General Secretariat, although the government has not yet approved them.

7. Co-ordination of European Affairs

The main co-ordinating body in this area is the Serbian European Integration Office (SEIO), which is generally respected for its effectiveness and role as an honest broker. SEIO reports to the Deputy Prime Minister for EI, whose political support for its work appears to be a more significant factor than under previous governments.

The inter-ministerial co-ordination arrangements for EI are the following:

- The Council for European Integration, chaired by the Prime Minister, consisting of a nationally representative selection of senior political and civil society figures, meets several times a year to foster political, social and economic consensus in support of EI.
- The co-ordinating body for the accession of the Republic of Serbia into the EU chaired by the Prime Minister and consisting of the Deputy Prime Minister for EI and other senior ministers meets to discuss the most important EI policy issues.
- At operational level, the expert group of the co-ordination body, consisting of the state secretaries of all ministries, meets regularly, usually monthly, to discuss more practical and technical issues, although these discussions often have some political complexion.
- 35 sub-groups of the expert group corresponding to the various chapters of the *acquis communautaire*, each chaired by a state secretary, played a significant part in responding to the recent EC questionnaire, which has helped to consolidate their role.
- EI units in all ministries vary in size from a section of 20 staff in those ministries most affected by EI to a single contact person in those that are least affected. The degree of EI expertise also varies. However, those ministries with the greatest EI responsibilities appear to recognise the need for their EI staff to be closely involved in the main policy-making dynamics of their ministry.

As noted above, this system appears to work well, with clear strategic plans on EI matters and effective co-ordination between the SEIO and line ministries.

There is an effective and still-developing mechanism for the co-ordination of EI matters. The EI Units in Ministries have the potential to “professionalise” policy-making in EI related areas.

8. Impact Assessment

8.1 Fiscal Impact Assessment

Article 48 of the Budget Law and article 39 (4) of the Rules of Procedure stipulate that the explanation attached to draft legislation should contain an estimate of the financial resources required for implementation, both capital and revenue, for three years, and that no proposal should be submitted to the government without the favourable opinion of the Ministry of Finance. In practice, the Ministry of Finance reviews around 95% of draft legislation as part of the inter-ministerial consultation process, although often at very short notice, but ministries habitually assert, usually wrongly, that there is no financial consequence or that it is impossible to calculate that consequence (there is no guidance for ministries on how to calculate costs). It is left to the Ministry of Finance to calculate financial consequences, and these calculations are often ignored.

8.2 Regulatory Impact Assessment

Article 40 of the Rules of Procedure sets out a requirement for a comprehensive regulatory impact assessment to be appended to all legislation, analysing the effects of the law, including “who and how would most likely be

affected by the provisions of the law, what costs would the citizens and the industry (in particular small and medium-sized enterprises) incur due to the implementation of the law, whether the benefits of adoption of the law would be such as to justify the costs, whether the law supports the creation of new economic operators and free competition in the market, whether all stakeholders have had a say in the drafting process and which measures would be undertaken in the course of implementation of the law in order to reach the goal of its adoption". An RIA checklist/manual exists, and civil servants are trained in its use.

The quality control function occurs in some cases during the policy formulation stage or at the stage it is submitted to government or at both stages of the process of drafting legislation. An opinion must be obtained from the Council for Regulatory Reform (CfRR) on each proposed legislative item prior to its submission to the Cabinet. The CfRR has a secretariat of 5 who since December 2010 have been established as a permanent office of the government.

This opinion is an assessment of whether the justification statement of the draft law must contain the Regulatory Impact Analysis (RIA) and, if RIA is needed, whether it contains all necessary clarifications. The opinions are not binding for the Cabinet and thus there are no sanctions if the quality of IAs is low. At present, the Council is chaired by the Minister of Economy and Regional Development.

Most ministries submit RIAs as required – some 111 in 2009 and 82 in 2010. In 2010, the Regulatory Reform Council judged them as follows: 34 very good, 29 partially good and 8 poor. The quality varies greatly between ministries. Some ministries carry out good RIA analysis but write it up badly. Overall, there appears to be a steady overall improvement in quality, in part due to an extensive training programme funded by SIDA.

The Council for Regulatory Reform which is chaired by a deputy prime minister exercises quality control of RIAs. Its secretariat, comprised of externally funded consultants, acts as both a help desk for ministries and as the reviewer of all RIAs, which has contributed to raising the quality of ministries' drafts.

In December 2010 the government converted the Council's Secretariat into a Regulatory Reform Office, to which a director and three staff (planned to increase to five) were being recruited at the time of writing. The existing Secretariat, comprised of consultants, will be phased out once their skills have been transferred to the new staff. This change is essential if RIA is to become sustainable, but obviously the transition needs to be carried out gradually and effectively so as to avoid a loss of expertise and institutional memory, which could seriously damage the RIA process.

Fiscal impact assessment requirements operate in an ineffective way. The system of regulatory impact assessment is developing but it will require several more years of operation before its effectiveness will be felt.

9. Better Regulation

In 2008, the new Government adopted a three year Regulatory Reform Strategy that set out principles of good regulatory practice; strengthened RIA; established tools for coordinating regulatory activities and maintaining the quality of the regulatory environment; and provided for a Comprehensive Regulatory Review (CRR). The strategy was clear and practical and had an action plan. The main activity has been a stock take and review of existing regulatory legislation –some 2000 items – to identify the scope for abolition, simplification or reform.

At February 2011, the CRR had recommended the abolition of 196 regulations, 192 of which had been implemented, or were being implemented. The CRR had also recommended the amendment of 340 other regulations, of which 90 had been implemented, 140 were in process of implementation, 74 are not implemented and 36 had been abandoned. The more significant reforms include reform of road transport legislation (e.g. abolition of travel orders for company cars), changes to the payments operations law (extending the period for depositing daily takings to once weekly) and allowing all taxpayers to file payroll tax and contributions returns electronically.

A review, carried out in cooperation with the IFC, estimated savings at €195 million.

A realistic and practical regulatory reform strategy is being implemented and is yielding results and savings.

10. Transparency, Consultation and Communication with the Public

10.1 Consultation

A rather vague requirement in the Rules of Procedure concerns public debate on draft laws “that substantially alter the way in which a specific issue is regulated or that govern an issue of particular relevance for the public.” The “explanation” that must be attached to all draft legislation requires a statement as to whether all stakeholders have had a say in the drafting process. This requirement is to be supervised by the relevant government committee, which in practice rarely addresses this issue.

Practice in this area has improved gradually in recent years. Most draft laws are published on ministry websites and the public can submit comments, but often no public announcement is made of this facility and the public is therefore unaware of this opportunity to comment. Where consultation does occur, the common complaint is that very little time is allowed for comment.

Otherwise, the practices between ministries in this regard vary immensely. The dominant impression is that of a strong cultural bias against consultation within the administration, and this situation is almost certainly aggravated by the absence of clear rules about when and how to consult and by the absence of practical guidance for civil servants who have not previously undertaken consultation. Nevertheless, there have been examples of serious and effective consultation. The SEIO has made use of it, particularly during the recent completion of the EI questionnaire. The RIA and regulatory reform processes have stressed its importance, and two recent pilot consultations have been carried out on company law and bankruptcy law reform. The regulatory reform exercise sought public input, including the creation of 10 consultative working groups with business representatives, although the overall response was disappointing. This low participation is a reflection of current political culture, but also of the low capacities of civil society to participate and respond, which is partly the product of the unfriendly legal and fiscal frameworks within which NGOs operate.

An Office for Co-operation with Civil Society established on paper some while ago, had at the time of writing just been given funds and a director. It remains to be seen what effect the Office will have.

10.2 Procedures for Informing the Public of the Government’s Work

Article 9 of the Law on Government requires the government to keep the public informed of its activities. Article 93-96 of the Rules of Procedure specify various means by which this process must be carried out, including press conferences, press releases and the Internet. It also specifies that the Deputy Prime Minister and ministers are responsible for informing the public of their decisions. Practices in informing the public vary greatly across the administration. There is a Communications Bureau of 25 civil servants reporting to the Prime Minister, and ministries have between one and six press officers. Central co-ordination is weak. For the most part, ministries operate autonomously in the area of communications, although it is now rare for an individual ministry to contradict agreed government policy. The willingness of ministries to provide information proactively or to respond to enquiries from the media varies markedly.

The SEIO provides a good example of well functioning procedures. It has a communications strategy and makes considerable efforts to inform the public as well as responding swiftly to press enquiries.

A weekly press conference takes place following the government meeting. The government and all ministries have their own websites.

10.3 Freedom of Information

Article 51 of the Constitution adopted in 2006 guarantees all citizens the right of access to information held by public bodies. This right was given practical effect by the Law on Free Access to Information of Public Importance, enacted in November 2004 and since amended. Its implementation has been supported and monitored by an effective coalition of NGOs and by the OSCE, but has faced the indifference and hostility of public officials (see assessment on Public Service and Administrative Framework).

10.4 Public Access to Laws and Governmental Decisions

Primary and secondary legislation and other decisions of importance (e.g. those taken by the Prime Minister) are published in the *Official Gazette of the Republic of Serbia* and are readily available in paper and electronic versions.

Arrangements for public consultation and for the provision of information to the public on the work of the government are slowly improving but are still underdeveloped, with great variations in practice between ministries. Public access to the texts of legislation through the Official Gazette is satisfactory.