

5. Recommendations

NB: Detailed recommendations are given in the operational sections of the report. This section makes general, strategic recommendations and suggests priorities.

Bosnia and Herzegovina is the country which suffered most during the wars. The presence of the OHR and SFOR has had, and still has, a stabilising effect, but ethnic tensions remain, and are reinforced by the more nationalistic politicians. The Washington and Dayton Agreements created a dual-level, federal structure in which peace was established essentially through the creation of ethnically homogeneous, geographic jurisdictions. The State was given symbolic democratic, political institutions, where both individual and group rights are, at least in principle, protected. These institutions embody, again in principle, the main characteristics of a Federal State, but had initially low resources to fulfill their, anyway limited, functions. However, over the years with the support of the International Community, the State level has accumulated significantly more powers and, to some extent, developed matching capacities including staff.

The State structure remains complex and unevenly balanced. Despite the increase in the State level's powers, it does not act as a Federal mediator relative to the component entities; one entity, RS, has almost full powers, the other, FBiH, is itself a federation in which powers are essentially held at the Cantonal level. Despite recent efforts to promote convergence, the legal systems of the 14 jurisdictions (State, 2 Entities, 10 Cantons, plus Brčko) are diverging, propelled in part by the donors, and threatening the integrity of the country and its ability to function.

For the first time since the peace, serious consideration is being given to revising the Constitutional settlement. The International Crisis Group and ESI (a think-tank), have suggested that the FBiH level be suppressed in order to rationalise the State architecture, increase accountability and transparency, and reduce cost and complexity. This would leave one large component Republic (RS), containing about 30% of the citizens, and 10 smaller components (the Cantons, which have varied sizes) plus the Brčko district. Such a structural reform would create even greater imbalance. However, it could conceivably be workable if there were a corresponding "cantonisation" of the RS, as well as consolidation of the FBiH Cantons into larger more viable units.

The High Representative plays a key role in the functioning of the country, both for policy making and ensuring regular implementation of policy. The most important issue to be resolved in BiH is how to create and synchronise a process that would simultaneously force State, Entity and Cantonal Governments to take responsibility for making policies and implementing them. For this to happen, the various governments need to develop their policy making, coordination and monitoring capacities, while the international community would have to demonstrate the will to disengage and, at the same time, ensure that policy making is not captured by "special economic" or ethnic interests. The dilemma is that national policy makers and policy making are not trusted by the international community, in part because of concerns about lack of capacity; but unless power is placed in the hands of the national representatives, capacity will not be built up and national politicians will not be held accountable by national voters.

The International Community, through the OHR has a further effect on the emergence of democratic governance: The HR can intervene in Executive, Legislative and Judicial processes, thus contravening basic democratic principles, and is itself subject to weak democratic accountability. As the tenth anniversary of Dayton approaches, it is time for the International Community to consider withdrawing from direct oversight and enforcement of compliance with the treaties and the law. Such responsibilities should be transferred to national oversight mechanisms (Ombudsman, Constitutional Court, general Courts, Supreme Audit Institutions etc) with the IC ready to step in if they are found to be deficient. In preparation for such a move, first priority must be given now to building up these institutions – their competences, resources, skills and enforcement powers.

The level of professionalisation of the civil service, in each of the 14 jurisdictions, is too low to ensure regularity in governance and application of the rule of law. The current projects to raise professionalisation interact with a parallel need -- the requirement for ethnic representativeness. This requirement was written into the State and Entity constitutions, to prevent locking in the gains of ethnic cleansing, but it is only now being seriously implemented. The representativeness requirement refers to the Census to determine representativeness, and uses the last Census of 1991 (i.e. pre-War) as the reference until a new Census is completed and/or Annex VII of Dayton (refugee returns) is deemed to have been implemented. Since Annex VII establishes rights, it cannot be definitively completed; it is a matter of judgement if the necessary institutions have been put in place to protect these rights. Sigma has been informed that the HR has deemed that Annex VII conditions have been met (2004 MIP) and so it would be possible to hold a Census, which, however politically sensitive, would at least allow a more rational targeting of personnel policy and improve the functioning of the democratic system in the new context.

More generally, planning should now be started to move from a democratic system based on group rights, which tends to perpetuate and embed group identification, to one based on individual rights with effectively functioning mechanisms to protect minorities.

Despite the poor quality of services and endemic corruption, Public Administration Reform at the State and Entity level at least has been extremely slow and unconnected across the country, although networks of financial management and control (including the Supreme, Audit Institutions) and the CSAs are being built up. The previous State level Government made serious PAR efforts during its two years of office; it is still not clear whether the current Governments are serious about continuing the reforms. Recently a set of reforms (the "Five Pledges") were initiated by the EU and HR. Although there may have been deficits in consultation and thus ownership, they have been accepted by all Governments in BiH in the hope that they will lead the country closer to the EU and eventually to Membership.

The economic situation of the country remains dire and the gradual reduction of both external funding and international personnel (who represent an important percentage of local economic demand) will cause greater stress, and further constrain reforms. Budgetary space must be provided by the IFIs to permit investment in a professional administration. Economic development is vital and the HR has pushed through a number of measures designed to promote growth. As part of the goal to consolidate the country, it is necessary to ensure in particular economic integration and greater inter-regional equalisation. Initiatives to improve the economic situation will be ineffective unless there are competent administrations, which implement the economic agenda according to the principles of the rule of law and promote harmonisation of legal and administrative systems across the country (in accordance with Constitutional Provision Art. 1, 4)

The International Community's general orientations for the country depend on the European ambitions of most of the population. This provides leverage for change, if used consistently by European Institutions and supported by the other members of the International Community as well as voters. In the discussions

about moving beyond Dayton and creating a sustainable federal system, consideration should be given to:

1. Restructuring the territorial arrangements and creating a more uniform Federation
2. OHR should strengthen national control systems in preparation for withdrawing from direct intervention and ensure that OHR's reserve powers are focussed on ensuring that national control systems work effectively
3. The possibility for framework legislation should be written into a revised Constitution and the State level should be encouraged to use this provision with priority to the promotion of an efficient internal market
4. The revision to the Constitution should move it towards a focus on individual rights and minorities protection, rather than group rights

The discussions on a new Constitutional framework should be inclusive and consideration should be given to creating a joint commission to review the governance structure and the allocation of responsibilities. In addition, planning for a census should start now, for completion in time for use for the next national elections.

Whatever Constitutional settlement is eventually decided, certain changes to administration must be achieved urgently, for effective government and economic growth:

5.1 For the BiH Governments

1. Develop sustainable decision making systems, appropriate for a federal system:

Government policy making systems in all jurisdictions are ineffective, in respect of cross-Ministerial co-ordination, policy development and implementation monitoring. The capacities to co-ordinate across jurisdictions are even weaker. A first priority should be to build professional policy capacities. This is only partly a question of supply. The emergence of professional policy capacities depends also on demand for their services, but politicians presently do not value professional inputs, or do not understand how they fit into the democratic context. It will be necessary to break this vicious circle by acting on both demand and supply sides, with the EU/OHR taking the lead with respect to the politicians. It should be made clear to all concerned that progress towards Europe and eventual integration depends upon the policy system having sufficient professional capacities.

Operational recommendations

- Unify, strengthen and professionalise the general secretariats, widen their mandates and integrate the independent offices
- Create sustainable processes, and secretariats to coordinate between the different levels of government (State, entity, Canton)
- Build policy capacities (including Impact Analysis) in Ministries at the different levels of Government to enable them to participate effectively in Governmental decision making
- Strengthen the functioning of the State and Entity level assemblies, especially to improve their professional ability to analyse and modify legislative drafts.

2. Strengthen professionalism of staff in the administration on all levels. Administrative capacity varies considerably across the administrations in the country as do quality of services. Neither coordination between ministries of one level nor across levels of government is encouraged. The civil

service laws have been harmonised to a great extent, but have not been rigorously implemented and salaries are too low to attract and retain quality staff. The IGTF, created to develop a joint strategy and to implement the pledges, seems to have – for the first time – created fora to harmonise the administrative development. This initiative will need additional support from the international community to make structured and systematic cooperation on the working level sustainable.

Operational recommendations

- Complete the setting up of the CSAs, pursue implementation of the civil service laws, and strengthen the co-operation amongst CSAs to facilitate common standards and HR systems and joint training, including on SAP relevant topics
- Develop a unified pay scheme for at least state and Entity levels to facilitate transfers and exchange, and under merit-based criteria, increase pay levels
- Complete and implement a harmonised system to promote public sector integrity
- Develop and implement coordination and cooperation structures at the working level within the Entities and the Cantons but also between Entities and State Level
- Develop networks of staff in key positions to ensure harmonised approaches

3. Create a reliable expenditure management system (Budget and PIFC), which reduces corruption and supports harmonised development across the country. Budget preparation and execution is of varied quality across the country. Financial control and internal audit is very weak although external control (SAI) is stronger. The difficult economic situation of the country makes it more important to manage public expenditure in a transparent and efficient way. In addition, the uneven economic development of the country hampers the development of adequate infrastructure and economic development. Greater budgetary space must be made available for developing administration, including salaries.

Operational recommendations

- Complete the allocation of fiscal resources to the State level through VAT while providing a viable solution to replace sales tax budget revenues on the lower government levels
- Develop mechanisms for inter-locality transfers (perequation), including for control
- Improve macro economic capacity at least on state and entities level and in the larger cantons
- Develop the capacity to collect and evaluate economic data to improve economic policy
- Develop and implement internal audit and financial control

4. Modernise administrative framework law and administrative justice. The justice system as a whole needs substantive investment. Equal quality of judges is not ensured as universities are under the responsibility of the cantons in FBiH; in RS the responsibility lies with the Entity; country-wide supervisory functions and quality controls do not exist. The procedures in place for administrative decision-making and judicial review of administrative decisions are not in line with EU standards and vary significantly amongst the 14 jurisdictions. This contributes to the weakness of the internal market and reduces economic development potential.

Operational recommendations

- Review, unify and codify administrative procedures across all jurisdictions and across all sectors
- Review, amend and unify the legal framework for judicial review of administrative decisions to bring it in line with EU and CoE requirements

- Review and amend the university curricula for the legal profession and harmonise across the country, ensure comparable quality of university teaching staff
- Strengthen and widen the mandate of the State Supreme Court to ensure equal application of the law throughout the country and ensure appeal and revision of court decisions of first instance
- Provide in-service training to judges to enable them to fulfil their tasks. Screening of existing judges should be considered.