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BULGARIA

PUBLIC SERVICE AND THE ADMINISTRATIVE FRAMEWORK

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Summary

The underlying standards for public service and the administrative framework, as reflected in the baseline questions that serve as the structure for this assessment report, are based on an analysis of EU norms and practices¹.

This report reviews, complements and updates the July 2004 Sigma assessment of the Bulgarian public service system and administrative law framework. No developments affecting the legal framework for the civil service and the administration occurred during the period under review. Several draft laws were nevertheless approved by the Council of Ministers, namely amendments to the Law on Administration and to the Law on Administrative Procedures, but none of these amendments was passed by parliament prior to its dissolution; legislative elections are scheduled for 25 June 2005.

Outstanding problems identified in the 2004 assessment remain. The Bulgarian civil service system requires a few major improvements so that the process of creating the legal basis for building a stable and professional civil service can continue. The current legal framework for the public service is still inappropriate.

The scope of the civil service is a crucial question, which still remains at the government's discretion due to a lack of legal definition in primary law. It is virtually impossible to build a professional and stable civil service if the basic legal elements to prevent discretionary or even arbitrary decisions are not well established. This is unfortunately the case of the current Bulgarian civil service legislation. The definition of the civil service scope is not a conceptual definition based on criteria related to the nature of the civil service and to the general functions subsequently assigned to the civil service. Such a crucial decision for the institution-building process should be adopted by parliament on the basis of a broad political consensus, and not made solely by the government through the Unified Classifier of Civil Service Positions, as is now the case. Ultimate decision-making on the scope and nature of the civil service is currently in the hands of the Council of Ministers, which is not at all in conformity with European practices for building a stable and professional civil service.

The Unified Classifier of Civil Service Positions, which was adopted by government resolution in 2000 and amended in 2004 (Decree no. 47 of 1 March 2004), seems inconsistent with the Civil Servants' Law. This inconsistency should be clarified.

To be credible, recruitment procedures must be objective and merit-based, and they should also be subject to judicial review if contested. The current legal framework explicitly denies such a review, which is against any notion of the rule of law. Conditions for recruitment and promotion should be less discretionary, subject to judicial review, and homogeneously implemented across the public administration. The Regulation/Ordinance on Holding Competitions for Civil Servants, adopted by CoM Ordinance no. 8 of 16 January 2004, does not suffice to ensure a

¹ Several documents in the Sigma Papers series focus on these standards: *Civil Service Legislation: Checklist on Secondary Legislation (and other regulatory instruments)* (Sigma Paper no. 14); *Promoting Performance and Professionalism in the Public Service* (Sigma Paper no. 21); *Preparing Public Administrations for the European Administrative Space* (Sigma Paper no. 23); *Sustainable Institutions for European Union Membership* (Sigma Paper no. 26); *European Principles for Public Administration* (Sigma Paper no. 27).

homogeneous recruitment process throughout the administration. Amendments to the Civil Servants' Law did not provide a sufficient basis for the design of a civil service system that is in keeping with European principles and standards. Judicial review of administrative decisions, including those on recruitment and promotion of civil servants, is one of the basic pillars of the rule of law. Currently excluded from the Bulgarian civil service system, this judicial guarantee should be introduced into the system.

The creation of a professional administration – non-politicized, recruited and promoted on merit, impartial, reliable and credible in the eyes of Bulgarian citizens – will enhance trust in state institutions and contribute to ensuring compliance with the laws that the administration has to enforce. To achieve that goal, clearer selection and career development rules have to be applied in the civil service so as to dispel suspicion of politicization, nepotism and arbitrariness. The creation of such an administration should remain a goal of primary importance.

The difference between civil service and private sector values and methods is not clearly marked by the ways in which the system is managed and procedures are elaborated. Human resources management systems in the private sector can afford more flexibility, since arbitrariness is not an issue. On the other hand, in the public sector and even more so in the core public administration, arbitrariness is extremely damaging, as it goes against the rule of law and democratic principles.

The unification of the civil service system and its management has not yet been achieved, and this step is imperative following the above-mentioned primary goal of creating a professional administration. The unification of the civil service system involves the creation of an inter-ministerial corps of civil servants performing similar functions, having the same qualifications, recruited through the same procedures, and having similar career patterns. If a formal civil service management structure is to develop, guarantees and managerial mechanisms must be in place and responsible institutions set up to ensure that the system performs according to expectations set out in law and in other civil service policies.

Specific Recommendations

A) Civil Service

1. Effective transparent and competitive recruitment mechanisms should be introduced that guarantee both equal access to public employment and quality in recruitment. A further requirement is the organisation of recruitment and competitions for a greater number of civil servants rather than for individual positions. Selected on merit, as attested by qualifications and skills, civil servants would in this way have the opportunity to perform a variety of functions during their careers. This versatility would also result in a significant economy of resources and energy spent on recruitment and promotion. Furthermore, the way in which procedures are conceived and put into effect must ensure transparency and justification for recruitment and promotion decisions, which are prerequisites for effective control. Discretion at this level is easily mistaken for arbitrariness. Judicial review of recruitment decisions should be obligatory.
2. The salary system needs to be reviewed, and in particular basic salaries have to be determined based on objective and transparent evaluations of positions. Performance-related pay is introducing further imbalances and differentiation into a system that still lacks transparency and uniform standards, thereby further distorting the system.
3. A real and effective central capacity for the management of the civil service and for ensuring that homogeneous standards are applied throughout the administration is a necessity. Such an institution could be placed near the Prime Minister and/or under the Minister of State Administration, thus strengthening its horizontal institutional role. Furthermore, the managerial capacity of personnel units in ministries and public agencies need to be strengthened. These units should refer to a central structure that is responsible for the consistent and homogeneous management of the civil service. The task of monitoring the civil service should not be given to the State Labour Inspectorate, which is not concerned primarily with public law, but rather to this central management capacity.
4. The Civil Servants' Law does not provide clear barriers for subjectivity and arbitrariness nor clear remedies for impunity related to corrupt practices. More legal precision is needed in this respect, as well as better regulation of the ethical behaviour required of civil servants and of conflict of interest for public employees. This legislation should be separate from the legislation in this area applying to politicians.

5. The existence of the civil service corps provides the basis for any horizontal mobility, which in turn introduces career possibilities and, consequently, motivation and flexibility into a system that of necessity is highly regulated. Wholesale recruitment by position does not open up career perspectives for the majority of civil servants. Career development usually requires the existence of groups of similar functions distributed among various services and administrative levels, so that mobility is possible vertically (through promotion) as well as horizontally (through mobility). The fragmented nature of the Bulgarian administrative system – both vertically and horizontally – accounts not only for the lack of mobility, but also – which is worse – for the lack of co-operation and transfer of experience between various types of administrative structures.

B) Administrative Legal Framework

1. The Bulgarian public administration needs to develop in two different but interrelated respects if capacities for cross-cutting policy formulation, implementation, monitoring and evaluation are to be improved: a) uniform implementation of civil service legislation and increased mobility between the various administrative structures, and b) increased horizontal communication and co-ordination among these structures.
2. General administrative law has to be reviewed, amended and simplified, in particular the laws regulating administrative structures and procedures. The consistent and uniform implementation of administrative procedures should be closely monitored at all administrative levels. The number of special administrative procedures needs to be reduced to the absolute minimum; the general administrative procedures law needs a complete overhaul to align it with EU standards and principles. The enactment of a consolidated single general law on administrative procedures should be a priority. Exceptions to the general principles of judicial review of administrative decisions and justification of administrative decisions, regardless of the subject matter, need to be urgently reduced to a justified minimum; such exceptions are usually incompatible with a state governed by the rule of law.
3. The administrative inspection function should be strengthened by setting up a horizontal inspection and control function that is endowed with a sufficient degree of functional independence from individual ministers and heads of agencies. This horizontal body is required as current inspectorates – even with their newly increased responsibilities – are still accountable – vertically and personally – only to ministers.
4. Judicial review of the administration needs strengthening through better quality legislation – including respect of the general principle of justification and extended requirements for judicial review of administrative decisions – and improved judicial structures.

1. Legal Status of the Public Service

1.1 Does an appropriate legal basis exist, defining the status of civil servants in a way compatible with prevailing standards in EU Member States?

Constitution

The Constitution (12 July 1991) devotes one article to the public service. Article 116 defines state employees as the executors of the nation's will and interests, and stipulates that in the performance of their duty they shall be guided solely by the law and shall be politically neutral. A law shall establish the conditions for the appointment and dismissal of state employees and the conditions under which they shall be free to belong to political parties and trade unions, as well as to exercise their right to strike. Article 105 of the Constitution stipulates that the Council of Ministers shall exercise overall guidance over the state administration. The principles of legality and political neutrality together constitute the cornerstone of the Bulgarian civil service constitutional model. The respect of these principles represents the sole constitutional demand imposed upon the civil service.

Some amendments to the Constitution were introduced in the first two months of 2005 and published on 25 February 2005, but they do not have a direct impact on this report, as their main purpose is to pave the way for Bulgaria to fully transpose the EU *acquis communautaire* into national domestic law.

Ordinary Legislation

Bulgaria enacted its first Civil Servants' Law in 1921 in order to create a stable state apparatus. A certain degree of stability was attained, but politicization remained high. This law was abolished in 1947. Until 1999 the civil service was regulated by legislation enacted in 1947, by which civil servants were considered as clerical workers at the service of the Bulgarian Communist Party under the Labour Code.

The basic current regulation for the civil service is the Civil Servants' Law, passed by Parliament on 21 July 1999 and amended in 2000, 2001 and 2003. The Unified Classifier of Civil Service Positions, adopted by government resolution in 2000 and amended in 2004 (Decree no. 47 of 1 March 2004), supplements the law. A number of pieces of secondary legislation have been enacted to implement the Civil Servants' Law. Provisions of the Labour Code of 1986 also apply to civil servants on a supplemental basis. The Law on Administration (1998, amended on 7 November 2001) delimits the structural organisation of political and administrative organs in the state and local administrations, their powers, and the requirements for occupying positions in such organs. This law also contains a number of provisions on the civil service.

To understand the Bulgarian civil service system, it is necessary to look at both the Civil Servants' Law and the Law on Administration. Specific statutes regulate the judiciary, police, diplomatic corps, and other special branches of the public administration. As most of these statutes were enacted before the adoption of the Civil Servants' Law, they will need to be adapted to it. All public institutions, including local governments, have to produce their own statutes within the framework of the Law on Administration, in order to regulate, among other issues, specific issues concerning their personnel. This requirement, together with the double regulation of the civil service in primary legislation, poses the risk of creating a flood of normative acts, generating normative complexity, and making the management of the public employment system difficult. The Law on Administration is currently under revision, but the existing draft text falls short in addressing the outstanding organisational and functional problems of the Bulgarian administration.

In addition, there is a lack of harmonisation of the various regulations affecting the civil service, which at times are contradictory in key respects. This is the case of the Labour Code (last amended in 2002), the Code on Mandatory Public Insurance, the Law on Protection of Unemployment, the Law on Local Governments and Administrations, the Law on Responsibilities of the State for Damages caused to Citizens, the Law on Public Education, and the Law on Higher Education, etc.

The Civil Servants' Law is at times difficult to understand, as in some instances the phrasing is obscure, in others there are inconsistencies in terminology. The law requires continual amendments to correct contradictory interpretations. In the course of the implementation process, a number of deviations from the system occurred in regional, municipal and central administrations, in general connected with wrong decisions on position classification (whether under the Civil Servants' Law or labour law). Two of the main technical problems encountered in the application and implementation of the Civil Servants' Law have been its vagueness and its lack of harmonisation with other legislation, in particular with the Law on Administration.

In October 2003 parliament amended the Civil Servants' Law (*State Gazette* of 28 October 2003) This amendment aimed to remedy some of the above-mentioned shortcomings, at least partially, as well as to resolve some other issues, but doubts remain as to whether these amendments will suffice in addressing key civil service problems, as this report will explain under the relevant headings. The 2003 amendments to the Civil Servants' Law, in particular the delimitation of the civil service scope, have failed to provide a solution to the problem. However, these amendments have introduced mandatory competition for recruitment and promotion as well as pay linked to performance appraisal (article 75); new provisions on conflict of interest have also been included (article 29a).

With regard to primary legislation, on 1 March 2005 minor amendments were introduced to the Law on Administration, adding new competencies and the corresponding new units to some existing central and regional bodies or institutions, in order to complete certain aspects of the delegation and decentralization process. These amendments do not imply any significant change to the previous situation. Concerning secondary legislation, on 11 June 2004 the Council of Ministers approved a decree adopting the Code of Conduct of State Administration Officials (see below in this report).

Scope and Implementation

The whole public sector, funded from public budgets, is about 200,000-strong, including police, army, and public services, such as education, health care, and regional and local administrations. The civil service is divided into two groups (article 2). One group is governed by the Civil Servants' Law. The other group is made up of those public servants governed by special statutes (judiciary, police, diplomatic corps, customs, etc.). Article 3 of the Civil Servants' Law excludes from the civil service those who are members of ministerial political cabinets, deputy regional governors and deputy mayors. Also excluded from the civil service, and subject to the Labour Code, are those carrying out technical (auxiliary) functions in the administration. In regional and municipal administrations, civil servants number 5,129 and labour contractees 17,629².

The scope of the civil service, as regulated by the 1999 law (article 2), is unclear. This law did not provide any criteria for determining the classification of a given position as a civil service one. It left discretion for the government to decide, through the Unified Classifier, which positions were civil service positions. By passing the 1999 law in these terms, parliament abdicated one of its essential responsibilities, which is to determine the general policy on defining the boundaries of the Bulgarian civil service. The amendments to the Civil Servants' Law adopted in 2003 include a new version of article 2, according to which "the civil servant is a person who, by virtue of an administrative act for his or her appointment, occupies a regular paid position on the payroll list in the state administration and assists a body of the state authority during the exercise of its prerogatives". Civil service positions are designated by the Uniform Classifier of Positions adopted by the Council of Ministers. This new version of article 2 furnishes mainly descriptive, financial and status criteria rather than general criteria related to the nature of the duties to be performed.

Primary law still does not provide substantive criteria for determining the scope of the civil service. This lack of criteria would appear to stem from a peculiarly Bulgarian understanding of the civil service. Prevalent political and administrative thinking in Bulgaria on the civil service considers civil servants as mere helping hands for the government, not individuals holding positions which enable them to take administrative decisions impinging on citizens' rights. According to this Bulgarian understanding, the notion of holding public power as a criterion for determining the scope of the civil service is unthinkable, because "public powers are exclusively in the hands of ministers". Unless this way of thinking evolves towards conceptions that are closer to contemporary European principles and standards with regard to the civil service, it will remain extremely difficult for sound regulations on the issue to emerge and develop in Bulgaria.

This absence of substantive legal criteria permitted the government, when modifying the Unified Classifier in March 2004, to convert 8,000 labour law positions into civil service ones. The incumbents of these positions were given civil service status without having undergone any transparent or objective process of recruitment. Only a subjective "screening of suitability" was carried out by the Directorate of State Administration. However, it is understood that this was a one-off exercise.

A clear and worrying consequence of the failure of primary law to define the scope of the civil service is the contradiction that would appear to exist between the Civil Servants' Law and Decree no. 47 of 1 March 2004 on the Adoption of the Ordinance on the Uniform Classifier of Positions in the State Administration (henceforth referred to as "the Ordinance"). Article 5 of the law, focusing on types of civil servants, states in paragraph (1) that

² Source: *Report on the Status of the State Administration in 2004*, approved by the Council of Ministers on 2 June 2005

“depending on the character of the official obligations and the degree of their professional qualification, the civil servants shall be managers and experts”. Moreover, paragraph (3) stipulates that “an expert shall exercise duties in support of the implementation of functions of state power”. The Ordinance, however, seems to reflect only articles 13 and 28 of the Law on Administration, where another set of criteria is set down, and therefore to disregard the Civil Servants’ Law.

In any event, the Ordinance distinguishes (article 3-2) between two kinds of expert positions: those carrying out analytical and/or control functions and those carrying out supporting functions. In apparent opposition to stipulations in the Civil Servants’ Law, the Ordinance continues in paragraph (4) of the same article, to indicate that “expert positions with analytical and/or control functions shall be held by civil servants”, and in paragraph (6) it states that “expert positions with supporting functions shall be held by persons working by virtue of a legal relation based on an employment contract”. Another departure from the Civil Servants’ Law is provided in paragraph (5) of the same article 3 of the Ordinance: “The expert positions with analytical and/or control functions referred to in paragraph 4, subparagraph 2, in the municipal administrations can be held also by virtue of a legal relation based on an employment contract.”

These apparent contradictions provide an example of how the principle of legal certainty can be put at risk by the lack of legal criteria. The Ordinance seems to depart from the civil service classification established in the Civil Servants’ Law, as it goes beyond what has been set out in the law, to which the Ordinance should normally be subordinated. As indicated above, the Ordinance could nevertheless be considered as being within the limits of articles 13 and 28 of the Law on Administration. In summary, the Ordinance not only introduces a new classification that is not the one set down in the Civil Servants’ Law, but it even somehow abrogates this law by establishing new conditions for occupying expert positions in central and local administrations, without clear legal grounds for doing so. These contradictions also ignore the hierarchy of norms principle as well as the principle of internal consistency of the legal order, both of which are essential for a democratic state ruled by law. Consequently, one has to conclude that the legal bases for a stable and professional civil service are not yet well established, as the room for discretionary governmental decision-making is excessive.

As underlined in the 2004 Sigma assessment, the 2003 amendments were nevertheless better aligned with principles prevailing in EU Member States than was the case in the preceding legislation. They introduced mandatory competition for recruitment, but flaws in the implementation process remain, especially concerning the lack of judicial control of administrative decisions on recruitment (see below in this report)³.

The scope of the civil service is a crucial question, which still remains at the government's discretion due to a lack of legal definition in primary law. It is virtually impossible to build a professional and stable civil service if the basic legal elements to prevent discretionary or even arbitrary decisions are not well established. This is unfortunately the case of the current Bulgarian civil service legislation.

2. Professionalism of the Civil Service

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

Recruitment

The general requirements for entering the civil service are established in article 7 of the Civil Servants’ Law. Anyone meeting these requirements may be appointed as a civil servant. Specific regulations of each institution (statutes or internal rules of procedure) may establish additional requirements, such as experience inside or outside the administration or specific educational degrees..

³ Civil Servants’ Law 67/27, July 1999, Art.10c) (4): “The non-admission to participate in the competition is subject to the administrative control of the appointing authority within three days. The complaint shall not fall to the competition procedure. The decision of the appointing authority is not subject to judiciary control.” Art.10e) (2): “The assessment of the committee and the rating of the candidates are not subject to judiciary control.” (3) “The candidates who have been admitted to the competition but have not been rated are entitled to submit an objection to the appointing authority within seven days upon receipt of the minutes of proceeding of the committee. In case the objections are founded, the appointing authority shall terminate the competition procedure and shall set the date for a new competition. The decision of the appointing authority is not subject to judiciary control.”

The Civil Servants' Law as amended in 2003 (*State Gazette* 95/2003) introduced mandatory competition procedures for civil service positions. For recruiting labour contractees, competition continues to be optional. Civil service recruitment competition is based on the professional qualities of the applicants. More specifically, the principle laid down by this amendment reads as follows: "The entry into the civil service in the respective administration shall be preceded by a competition. The appointment to each civil servant position shall be carried out through a competitive procedure based on the professional qualities of applicants" (articles 10-1 and 10-2 of the law and Decree no. 8 of 16 January 2004 on the Regulation for the Competitions).

The basic principles of competitive recruitment are set down in article 10a-f of the amended law. More specifically, this article includes provisions for the announcement of the competition by the appointing authority; the announcement must provide information on the position to be filled, the minimum and specific requirements for holding the position, the competition method, the necessary documents to be submitted, and the deadline (which should imperatively vary between 10 and 14 days from the publication of the announcement). The announcement is published in the Register of Administrative Structures (article 61.1 of the Law on Administration) and in one central or local newspaper, and it is posted on the internet site of the recruiting institution (where the vacancy to be filled is located).

The Competition Committee consists of three to seven members, and its composition is determined by Order of the Appointing Authority. The law provides for three mandatory members from the unit in which the vacant position is located, i.e. the immediate supervisor, a legal officer or lawyer, and a human resources representative. Representatives of trade union organisations of civil servants from the respective administration, as well as external specialists, may also participate in the Competition Committee.

The admission of applicants to competitions is the responsibility of the Competition Committee, after examining the documents submitted by the candidates and the requirements of the vacant position. The committee prepares an agreed list of admitted and rejected applicants, and in the latter case indicates the grounds for non-admission. The lists are placed in freely accessible public places and on the web page of the relevant administration on the seventh day following the expiration of the deadline for submission of applications. This notification also specifies the date and place for the competition (tests and interview), which should take place no earlier than 14 days later.

The decision not to admit a candidate to participate in the competition is subject to review by the appointing authority within three days of publication of the list. The decision of the appointing authority is pronounced within three days, and – by explicit provision (art. 10c.4) – this decision is not subject to judicial control, and it should be according to EU law.

Article 10 (amended) further sets out –among other provisions – the responsibilities of the Competition Committee in assessing the professional and performance qualifications of the candidates. The assessment leads to a rating of the candidates and the establishment of a shortlist, consisting of up to three successful candidates, among whom the appointing authority has the discretion to decide who shall be appointed, without any requirement to give reasons for the decision. Neither the assessment nor the rating is subject to judicial control (articles 10e-2 of the Civil Servants' Law and 34-2 of the Government Ordinance no. 8 of 16 January 2004). An unsuccessful candidate who wishes to contest the decision must submit an objection to the appointing authority within seven days of the notification of the competition results. In the event that this objection is sustained, a new competition must be held. Here as well, the subsequent decision of the appointing authority is not subject to judicial control (article 10e-3 of the law), which is contrary to the rule of law.

There is no doubt that the changes introduced into the recruitment system represent a step in the right direction when compared with the pre-existing regulation. However, the fact that at practically no stage is judicial review of appointment decisions allowed is clearly a violation of the rule of law principle. Procedures in the civil service should not only be open to judicial review but also allow transparency at all stages so that decisions are judged according to precise criteria. In the present state of affairs this is impossible. Furthermore, the Competition Committee is fully designated by the appointing authority itself and disposes of high discretion in the way in which competitions are organised and conducted. Finally, instead of producing a strictly rated list, the committee provides the appointing authority with a shortlist for discretionary appointment among the proposed candidates. This process thus excludes by definition any possibility of control and also weakens the principle of merit in recruitment. As judicial recourse is not allowed, it is no coincidence that the Supreme Administrative Court has not received a single case contesting an appointment decision since the amendment to the law was introduced.

The recruitment procedure therefore cannot constitute an exception to the general principle of coherence, as the administration should act within the rule of law framework, as demanded by articles 4 and 5 of the Constitution. Judicial control of administrative decisions, regardless of the subject, is one of the basic pillars of the rule of law and of EU accession criteria. Moreover, any administrative procedure should be coherent with the Constitution so as to provide citizens with the legal security that is also characteristic of any state ruled by law.

It is worth noting that compulsory competition applies only to the recruitment of new civil servants. Recruitment remains discretionary for positions under labour contracts. Although some flexibility is necessary, the fact that a whole range of positions and contracts remain outside compulsory competition leaves room for arbitrary recruitment, with no guarantee of application of the merit principle. Furthermore, the possibility of future discretionary changes in the Classifier – transforming yet again labour contract posts into civil service positions (there are no legally established criteria delimiting the scope of the civil service, as indicated above) – may constitute a way of avoiding the obligation of compulsory competition. Under these circumstances, no formal legal conditions and guarantees exist for the development of a professional, depoliticized and impartial civil service. Moreover, given the inconsistency between the two main pieces of legislation, namely the Civil Servants' Law and the Law on Administration, primary law may be easily circumvented.

Competitions for the position of secretary general in the administration are to be held by a special committee set up by the Council of Ministers; the same committee is to have responsibility for organising competitions for senior appointments in newly created administrations. A decision of the Council of Ministers on the creation of this committee was adopted on 12 May 2005 (Decision 434). Administrative secretaries, appointed until recently for five-year terms, have now become permanent officials (art. 8 of the Law on Administration, as amended by art. 73 of the Civil Servants' Law that came into force on 1 January 2004).

Article 11 establishes the formal contents of the administrative act appointing a candidate. Since the 2003 amendments, this act also includes the basic salary and supplementary benefits. A one-year (previously six-month) probationary period is also foreseen for any first-time recruit in the administration (article 12, as amended). Appointment as a paid apprentice is possible (article 13) for participation in theoretical and practical training in the administration, the duration of which is to be determined by the head of the office.

A new article 19a was added to the Law on Administration in November 2001, along with an amendment to article 14 of the same law. Article 19a enables the dismissal of certain high officials and their deputies at the discretion of their appointing authority. Such officials include heads of state agencies, members of state commissions, executive directors of executive agencies, and the heads of any state institution “functioning in connection with the implementation of executive power”. These positions include a wide range of very diverse responsibilities. Some of them are clearly political and based on the trust of any governing majority, but others are clearly professional and should be unambiguously placed under the civil service law protection against discretionary dismissal. The current government enlarged the notion of political appointees in order to remove certain layers of managerial civil servants. Any future government could do the same. This is a way of destabilising the civil service for politically partisan interests.

The above action has negatively affected the credibility of the current government with regard to its pledged commitment towards increasing professionalism in the public service and reducing politicization. According to parliamentary opposition sources, during the first six months of the current majority, more than 1,200 civil servants were removed in the state administration, regions and municipalities, plus some 100 in public agencies, with the objective of replacing them with more politically suitable people. In addition, according to the same sources, 2,000 more civil servants occupying middle-range positions were dismissed during the same period and replaced by others through politically motivated appointments or simply out of patronage. These figures were roughly corroborated by the 2002 Annual Report for the Public Administration (Minister of State Administration, April 2003)⁴.

This situation obviously has damaging effects on the public interest. For example, according to a report of the National Audit Office, only 50% of EU pre-accession funds (mainly ISPA) for the period 2000-2002 could be consolidated. The Deputy Minister for Regional Development, Mr. Hassan Hassan, gave as the main reason for this occurrence the dismissal of some 150 employees in the ministry, most of them heads of office and directors. The ministry was thus deprived of its institutional memory⁵ and of expertise that cannot be easily replaced.

⁴ See 2003 Annual Report for the Public Administration, Minister of State Administration, April 2004.

⁵ Source: TROUD and SEGA (Bulgarian daily newspapers), 25 May 2004

Promotion

An amendment to article 16 stipulates that in the event of a vacant position the appointing authority can propose to a civil servant to do supplementary work, through an internal combination of responsibilities, for a fixed term of up to six months and a supplementary salary of 50% of the basic salary of the vacant position. The risk posed by this kind of arrangement is that it may become a means to ensure additional income for some employees and to promote civil servants de facto, without applying any competition scheme.

A distinction between senior and junior ranks has been introduced, a rank being the expression of professional qualifications (article 73, as amended); each rank is comprised of five levels. The minimum rank for each position is determined in the Uniform Classifier. The promotion scheme has also undergone revision in 2003. It is now open to both incumbent civil servants and external candidates. The revised scheme is based on articles 36, 37 and 73-76 (as amended) of the Civil Servants' Law. The main difference from the previous situation is the provision according to which promotion to the next higher rank is linked to the score in the annual performance appraisal, equally established by this amendment (art. 75-76). The appraisal score is based on the attainment of previously agreed goals, performance of duties, and professional competence of the civil servant. It must rely on objectively established facts and circumstances. Civil servants are informed of the assessment and can express their opinion in writing. The first performance appraisal exercise was carried out in 2003 in some administrations, but not all. Most institutions are preparing to apply the performance appraisal system based on "work plans" agreed with the employees.

Civil servants who have accumulated some official experience can be promoted to a higher rank or position. The length of service necessary to qualify for promotion is three to five years, while the performance assessment is also taken into account (this is one novelty introduced by the 2003 amendments). The period of three to five years may be shortened if the civil servant achieves the highest score in the performance assessment (article 75). Managers may decide to promote a civil servant if the incumbent additionally meets the educational and rank requirements. Even when linked to performance appraisal – and due to the problems of subjectivity inherent in the appraisal itself – promotion schemes are often not transparent. Civil servants' continued dependence on political masters and senior bureaucrats for promotion does not favour the development of a professional civil service.

Termination of Service

An amendment to article 87 (87a) represents a legal guarantee for the civil servant that his/her civil service employment will not be terminated in the event of administrative reorganisations or transfer of competences to a different administration. This amendment potentially restricts arbitrary lay-offs, although it does not apply in cases where services are completely abolished (article 106). Other cases where unilateral termination of the legal relationship of the civil servant is possible are mentioned in article 107-107a, as amended. Dismissal for reasons such as the abolishment of services or positions, refusal to take up the service proposed as a result of labour readjustment, and attainment of the lowest score in performance appraisal leave wide room for abuse, given the absence of criteria for assessment and of control of the processes leading up to such dismissals.

Given the current state of development of the Bulgarian state administration, changes in the division of labour among various administrations and agencies are to be expected and are in fact frequent; these changes may easily result in the abolishment of entire services or a large number of posts, modification of service conditions, and discretionary dismissal of civil servants. These repercussions do in fact occur quite frequently, as the Supreme Administrative Court has been overloaded with such cases⁶. The abolishment of a position, which usually involves the dismissal of its holder, is often followed by the creation of another position under a different name; the end result is that the dismissed person takes the case to court.

The dismissal of a civil servant based on a low score in the performance appraisal, although a possibility, presupposes a sound and elaborate system of job description and assessment criteria. Another problem arises in the case of an unlawfully dismissed civil servant, who is subsequently reinstated in compliance with a revoking administrative order or court decision. Such a reinstatement is imperative, but the problem arises concerning the fairness of the dismissal of the new position-holder – especially if he/she had obtained the position following a

⁶ The new President of the Supreme Administrative Court (SAC), Mr. Pentchev, was quoted as saying to the President of the Republic, on the occasion of proposing amendments to articles 120 and 125 of the Constitution, that legal disputes on dismissals of army and police officers as well as other public employees (all of which had been decided by ministers or prefects) should be adjudicated in the first instance by regional courts, not by the SAC, which has been overloaded with such cases.

competition procedure. In such a situation, the rights of the new position-holder are just as well founded, and the person concerned should not have to suffer the negative consequences of an illegal act committed by the administration. Both trust in the administration and the rights of the position-holders must be preserved, which is not the case under the current legal arrangements.

Disputes concerning the occurrence, content and termination of the official legal relationship as well as disciplinary sanctions are reviewed by county courts or by the Supreme Administrative Court, depending on the body that issued the corresponding act. For these cases, procedures are free of charge. Appeals do not suspend the execution of the administrative decision (article 124).

Classification of the Civil Service

The main functions assigned to positions in the administration are too broad, which makes it difficult to establish a clear classification of the civil service. In addition, the terminology is confusing. Currently the classification of the civil service is provided in several pieces of legislation, which makes it more difficult to understand. The Civil Servants' Law (article 2) states that the Council of Ministers will "determine the names of the positions of civil servants and their distribution in groups and ranks in a Unified Classifier of positions within the administration". This reference was supplemented by Decree no. 35 of 20 March 2000 adopting the Unified Classifier of Positions, now abrogated and replaced by Decree no. 47 of 1 March 2004.

The Civil Servants' Law also refers to a classification of civil servants into ranks and degrees (article 73). The ranks are divided into "junior rank" (with five degrees) and "senior rank" (now also with five degrees, reduced from seven). Along with this classification, it is necessary to look at the Law on Administration to complete the picture. This law divides the institutions, and the positions within each of them, into general administration and specialised administration. General administration positions are those aimed at providing general services to the institution. Article 7 of the Law on Administration lists a number of functions considered as general administration, such as office, financial-economic activities, legal services, property management, human resources, information services, protocol, and public relations. Specialised administration positions are those implementing state powers and assigned to institutions in a relevant policy or management area. The relevant institution's statute determines the specialised administration positions.

Article 13 of the Law on Administration establishes that administrative posts are classified into governing, expert and technical posts. Governing posts⁷ cannot be filled by labour contract employees. Article 28, as amended in November 2001, states that appointed experts in the Prime Minister's Office and in ministries do not perform governing functions and must be appointed under Labour Law, not under the Civil Servants' Law. Article 9 of the Law on Administration states that the leadership of units within the administration shall be ensured by a chief director, director, department chief or sector chief, whereas article 8 stipulates that the administrative management shall be carried out by an administrative secretary.

No clear distinction exists as to the content of these positions and as to whether these positions are civil service or political positions. This classification of administrative posts does not match the classification of civil service positions, which makes the whole picture rather confusing. Moreover, the government can decide to change the Unified Classifier at any moment, enlarging or narrowing the scope of the civil service at its political expediency, as indicated above in this report. Confusing legal arrangements and the government's almost unrestricted discretion in handling the Classifier blur the distinction between politics and administration and also make the system difficult to manage and government classification decisions difficult to challenge before the courts.

As indicated above in this report, a new Unified Classifier was adopted by the Council of Ministers on 1 March 2004 through Decree no. 47, which included the Ordinance on its Application. As a result of the New Classifier, more than 8,000 labour contract positions have been transformed into civil service positions. Transitory provisions stipulated that the persons who were occupying a labour contract position that was subsequently transformed – by the new Unified Classifier – into a civil service position would be appointed to the position if they met the necessary requirements; in that case they would automatically have the rank corresponding to the position according to the new Unified Classifier. The holders of these positions have been integrated into the civil service after examination of the conformity of their qualifications to the requirements of these positions, through an internal procedure and without either competition or publicity.

⁷ The notion of "governing post" is difficult to grasp. A first reading would be that a governing post implies the exercise of public powers. However, civil servants in Bulgaria do not take decisions – only politicians do. This notion therefore remains unclear in terms of the nature of the powers held by the incumbents of such posts.

This transformation of positions is meant to be a one-off procedure resulting from the latest changes to the Unified Classifier. To the extent that the criteria for distinction between the two categories of status (labour contract vs. civil service positions) are not clear and that at any moment a new classification is possible, there is a risk that this process could be repeated and based on personal or political criteria. It is therefore important to further elaborate the legal criteria for defining the civil service scope.

Obligations, Rights and Duties, with special reference to Impartiality

The general values for the civil service and public administration, as mentioned in article 18 of the Civil Servants' Law, are lawfulness, loyalty, responsibility, stability, political neutrality and hierarchical subordination. The values of the administration, as indicated in article 2 of the Law on Administration, are legality, openness, accessibility, responsibility and co-ordination. This illustrates the overlap and confusion that exist between these two laws. For example, is political neutrality not applicable to labour contractees working in the administration? It appears to be applicable only to civil servants. Is impartiality a value for the civil service and for the administration? It is not mentioned in either law.

Furthermore, the above values are not yet totally transposed into clear specific rules concerning civil servants' involvement in politics and economic activities outside the administration. Nor are they fully reflected in the general administrative legal framework, e.g. in administrative procedures and civil service management instructions. If these principles were reflected in the law on administrative procedures, they would constitute not only obligations for civil servants and other state officials, but also rights of citizens, who could invoke them in court. These principles should be clearly reflected and therefore identifiable in any regulation on administrative structures or working procedures, which is still not the case.

The regulations on civil service and administrative values are too vague and general and need to be supplemented and further specified, although this is not always done. For example, article 28 of the Civil Servants' Law states that civil servants are obliged to behave in a way that "does not impair the prestige of the civil service". Civil servants have the right to form – and participate in – professional and non-profit organisations (articles 43-45). They can also be members of political parties (article 42), except if a law specifically prohibits such membership. These are the main regulations dealing with the obligations of impartiality and integrity, and they are clearly insufficient. In addition, the definition of misconduct warranting disciplinary sanctions (article 89) is vague and does not match the obligation of observing general civil service values, thus allowing many cases of inappropriate behaviour to go unpunished.

On 29 December 2000, the Minister of State Administration, encouraged mainly by foreign donors, approved a code of conduct for civil servants. The code was not a binding legal document, and was not sufficiently comprehensive as an instrument to guide the behaviour of civil servants. Other codes of ethics have also been adopted at sectoral levels in the administration. Amendments to the Civil Servants' Law in 2003 recognised the insufficient legal rank of the code of conduct. These amendments therefore provided for the binding nature of the code, stipulating that public officials had to comply with the Code of Conduct of Public Officials in the State Administration and that the code was to be adopted by the Council of Ministers and promulgated in the *Official Gazette* (article 28.1).

The Council of Ministers followed suit and on 11 June 2004 approved a decree by which it adopted the Code of Conduct of State Administration Officials. As the code itself states, its purpose is "to govern the rules for the conduct of state administration officials, with the aim of strengthening citizen confidence in their professionalism and morality and improving the public image of the civil service".

The new code – the Code of Conduct of State Administration Officials – is intended to be a step forward in comparison to the previous code of conduct for public officials adopted by the Minister of State Administration on 29 December 2000. The main improvements consist of the assertion of the code's legal rank and the enlargement of its scope of application. The previous code was a non-normative regulation recommending behavioural standards only to civil servants. The current code has been approved by a decree of the Council of Ministers, which implies greater political support of the government. However, the enlargement of the code's scope is positive on the one hand, as it includes labour contractees, but is not well suited on the other, as it also includes politicians. As politicians face other realities with regard to ethical behaviour, a separate code of conduct should have been specifically designed for them. As a consequence, the new code still displays significant shortcomings.

The Civil Servants' Law stipulates in article 89 that "the civil servant who is guilty of having breached his official obligations shall be punished with the penalties provided in this law", considering as a disciplinary breach the "failure to comply with the rules of the Code of Conduct of Public Officials in the State Administration". Nevertheless, there is no clear definition in the code of conduct of the specific behaviour that is to be considered as being contrary to the Civil Servants' Law. The code only contains a number of articles regulating forbidden behaviour in a very vague way. This vagueness only adds to legal uncertainty.

The situation concerning state officials – i.e. anyone who is paid from the state budget, according to the ruling of the Constitutional Court in Case 3/1993 – is even worse, as there is no means of imposing any sanction on them for non-observance of the code. Article 22 of the Code of Conduct of State Administration Officials stipulates that "in case of failure to observe the behavioural standards stipulated by the present Code, officials shall bear responsibility as prescribed by the Civil Servant Law and the Labour Code". Of course, as these state officials are not civil servants, the Civil Servants' Law does not apply to them. As far as the Labour Code is concerned, its provisions in this respect are very vague, although the punishment for violation of the code of conduct will have to be made according to the Labour Code. Furthermore, the legal nature of the relationship binding a politician to the state is a debatable matter, as it could be correctly argued that the nature of such a relationship is constitutional or political, but not a labour or administrative relationship. Thus a politician could easily escape from the scope of the code of conduct. All of these arrangements require a complex exercise of interpretation of the legislation, and consequently they are likely to create unnecessary interpretative conflicts, which would eventually hamper implementation of the legal provisions.

The most reasonable conclusion is that the legal framework on conflict of interest should be different for politicians and public employees (including civil servants). An amendment to the Civil Servants' Law would be required in order to clarify the conflict of interest situation and ethical behaviour required from civil servants as opposed to those required from politicians and political appointees. These two categories have completely different positions in public organisations, and the exposure of politicians to possible conflicts of interest and influence-peddling usually has rather different repercussions than those experienced by civil servants.

Consequently, for the moment, the code itself and the present Civil Servants' Law do not provide a clear remedy for eliminating subjectivity, arbitrariness and impunity for corrupt practices. In fact, enforcement of the code could have the opposite result, as the public's image of the administration and its officials could be even worse if nothing happened following publication of the code. Such inaction is quite likely, given the fact that the legal bases for disciplinary action have not been well established.⁸

Politicization is high in the administration because civil servants' promotion, salaries and other benefits are dependent on the discretion of managers, who are often political appointees. The distinction between political and administrative positions is unclear. Legal restrictions for civil servants' participation in political activities are neither sufficiently developed nor clearly established. Some incompatibilities, established in article 7 (amended in 2003) of the Civil Servants' Law, impede the appointment as civil servants of the following: owner of a company or enterprise sole trader, unlimited liable partner in a company, manager or executive member of a commercial company, commercial proxy, commercial representative (procurator), liquidator or trustee in bankruptcy. Positions incompatible with the civil service status also include members of parliament, members of managing boards of political parties, or those who are employed elsewhere, except for university lecturers. This provision also forbids members of local government or municipal councils to be appointed as civil servants within the municipal administration. These provisions are clearly insufficient for the enforcement of an incompatibility regime, are easily circumvented in practice, and are often used as weaponry in waging political battles between rival parties, which seems to have been the case after the last general elections.

With the exception of some vague provisions, as mentioned above, no rules were in place on conflict of interest in the administration, apart from a rather ineffective Act on Asset Disclosure by Persons Occupying Senior Positions in the State, adopted in May 2000, which did not apply to officials below the level of minister. The 2003 amendments to the Civil Servants' Law included more precise obligations concerning asset declaration for civil servants and certain rules for reinforcing impartiality. More specifically, article 29a stipulates: " 1) Before the 31 of March of each year, the civil servant shall declare before the appointing authority in writing, according to a form approved by the Minister of State Administration, all commercial, financial, or any other business interests which he/she, or persons related to him/her, may have in connection with the functions of the administration in which the respective civil servant is employed; 2) The civil servant shall be obliged not to participate in the

⁸ See the June 2005 Sigma assessment report on Public Integrity Systems in Bulgaria.

discussion, preparation and making of decisions whenever he/she has relations with the persons concerned that give rise to reasonable suspicions in his/her impartiality; 3) In the cases referred to in the previous paragraph, the civil servant shall notify the appointing authority in writing.” For any civil servant who breaches the obligation of article 29a-2, the only foreseen sanction is dismissal, according to article 91-2 of the Civil Servants’ Law. The absence of a range of sanctions is likely to discourage the application of any sanction whatsoever, as dismissal is a harsh and unpleasant disciplinary action. The implementation of the obligation on asset declaration began in 2004.

The lack of clear rules for administrative decision-making and the very high degree of discretionary powers, along with regulatory complexity (see below in connection with administrative procedures), are deemed to be major sources of corruption. Both the current and preceding governments have been active in adopting measures against corruption, which have started to bear fruit, but a great deal remains to be done.

The Penal Code and the Code of Criminal Proceedings were amended in 1999, and have been in force since 1 January 2000. These two Acts were again amended in 2002 to introduce into the Bulgarian criminal law system major international conventions on combatting corruption (Council of Europe, OECD, etc.).

Clearer links should be established between principles of ethical conduct and legal norms in order to specify the legal definition of undesired behaviour as well as its legal consequences. This in turn would provide more solid legal grounds for the adoption of disciplinary measures to be applied for breaches of rules of conduct. Moreover, this would equip the disciplinary system with adequate legal guarantees for the defence of individual rights, which is a necessity in a state ruled by law. It would be necessary to include in the Civil Servants’ Law a chapter on rights and obligations containing provisions on the above, and to adopt a separate law on conflict of interest for politicians

Moreover, the way in which the public administration has been staffed (at least to date) – without mandatory, merit-based competition for recruitment and with a high degree of discretion in the internal management of the civil service and human resources management in general – does not favour the development of a professional public administration. Recruitment and promotion schemes – even after the 2003 amendments – lack transparency, are still excessively based on managers’ discretion, and are not open to review by the courts. The classification of positions in primary legislation is unclear and, together with the still undefined scope of the civil service, blurs the distinction between political and professional positions.

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

The Civil Servants’ Law (articles 67-72) defines the salary system. The salary components are the basic salary, which is determined by the Council of Ministers in the Unified Classifier, and supplements. The salary supplements in the Civil Servants’ Law of 1999 were for length of service, rank, category (importance) in the administration, and others. Along with these supplements a broad range of allowances was applied. Administrative structures (institutions) are set up hierarchically: A1 (Presidency), A2 (ministries), A3 (state agencies), A4 (executive agencies and regional administration), and A5 (local administration). The salary supplement of “category of the administration” was linked to this institutional hierarchy. Some institutions could pay additional supplements according to a special regulation called “law on additional financial stimulation”. The criteria for awarding these supplements were unclear and were generally decided internally through individual administrative decisions. The category of the institution can be modified by government decision. The promotion of the institution to a higher category represented an automatic salary increase for all of its employees. This mechanism was used frequently with the sole purpose of augmenting salaries. The categorisation of institutions added to a rather dysfunctional salary system, as two individuals with the same job content and rank could be paid differently, depending on the category of the institution.

The 2003 amendments abolished the systems of salaries linked to the category of the administration rather than to individual rank (new wording of article 67). Now it is the Council of Ministers that establishes the minimum and maximum amounts of basic salaries, with the minimum basic salary determined annually by the State Budget Law – but this minimum “shall not be lower than the one of the preceding year” (article 68). Managers are to decide on individual salaries by “taking into account the level (the rank, according to its new definition provided for in article 73) of the position held and the individual assessment score of the most recent performance appraisal exercise. However, the Ordinance adopted by Decree 47 of 1 March 2004 still stipulates, among other things, that the

Unified Classifier will distribute the positions by taking into account the body in which a civil servant works (“in accordance with the body”, as stated in article 1-3 of the Ordinance). This stipulation raises doubts as to whether the old criterion of the institutional category still remains, if not at a legal level at least at an operational level.

Prior to the 2003 amendments, the ranks of positions could also be changed every year. The variation in rank was used to increase the salaries of certain individuals. In some institutions it was used and justified as a sort of performance appraisal. In others, it was only a means of giving a higher salary to selected individuals. Officials were aware that this system of ranks was being abused and that it created unjustified salary disparities among individuals and institutions. The 2003 amendments abolished the ranks in their previous meaning and replaced them with a system of position levels.

In 2003, articles 67 and 76 of the Civil Servants’ Law were amended to include performance appraisal, which had already been introduced into the system through Government Ordinance no. 105 of 21 May 2002. Performance appraisal affects two elements: promotions and salary increases. The results of the most recent performance appraisal are to be taken into account in determining individual minimum and maximum salary increases and promotions from one rank to another. Given the weak managerial capacities for properly handling a performance-related pay scheme, the introduction of such a scheme should have been postponed, however. Of the appraisals carried out in 2003, only 53% were deemed to be objective and fair. The remaining 47% were affected by different types of dysfunctional problems (bias, leniency, retaliation by managers, and so forth), according to the 2003 Annual Report of the Minister of State Administration. This report also points out that certain aspects of the system are too complicated or weak (complex rating scale, lack of clear and measurable appraisal criteria, unclear performance benchmarks, etc.). Managers are currently being trained in carrying out the performance appraisal procedure and implementing the performance-related pay scheme. The report concludes with some recommendations, including the following: the ratings scale should be simplified; clear and measurable criteria should be used; additional instructions should be provided; clear performance benchmarks should be introduced; and the system should be more flexible and less time-consuming. These recommendations reveal the difficulties encountered in implementing the performance appraisal scheme, difficulties which are equally known to all countries using such systems.

Application of the performance-related pay scheme began in 2004. Decree 48/2004 of 1 March 2004, which entered into force on 1 July 2004, regulates the matter. It established an across-the-board increase of 8.5%. Best performers may see their salaries increased by as much as 12%. Worst performers may receive a 0% salary increase (i.e. not even the 8.5% would be applicable to them). The appraisal is to be based on the job description, the individual work plan, and individual competence.

As this process started in 2004, in its previous assessment report Sigma expressed reservations about the scheme’s appropriateness in view of the state of development of the Bulgarian administration and the possibility – according to the scheme – that low performance could lead to dismissal. Sigma recommended strengthening certain guarantees, since uniform treatment, impartiality and objectivity had not yet been firmly established in many areas of civil service management. Moreover, the introduction of further discretion constituted a new risk, as it could lead to increased arbitrariness. Additional guarantees within the scheme were therefore deemed necessary. Training managers in applying the scheme was a necessity, but it would not provide a sufficient guarantee.

The introduction of performance-related pay in 2004 has effectively created new difficulties, mostly related to the qualitative appraisal of the achievement of set goals. It is difficult to both obtain an objective individual appraisal and assess the real impact of performance-related pay on organisational performance. The portion of the pay linked to performance is in fact very limited and does not help increase personal motivation. The overlapping of salary scales and discretionary decision margins introduce more subjectivity – and even arbitrariness – into the system. On the other hand, the budget may not be sufficient to cover the cost of implementing performance-related-pay in 2005 and beyond. To extend this operating margin, the temptation might be to not fill vacancies so as to have a greater spending margin for salary increases for current staff. Up until 2004 unspent vacancy funds were not used for raising salaries in some institutions, but in others they were used to pay bonuses. It would be advisable to halt the performance-related pay scheme until the administration is better prepared to manage it and has the funds to pay for it.

The salary system is still complicated, dysfunctional and arbitrary in many respects. Salaries are still rather low. The premature establishment of a performance-related pay scheme should have been avoided. A uniform, basic salary scheme set up according to qualifications and hierarchical level would have been more appropriate. It would have rationalised the current situation which, among other drawbacks, promotes rigidity and blocks

horizontality. As the system remains vulnerable to personal and political pressures, it could result in arbitrariness and further demotivate public employees.

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

Articles 82-87 of the Civil Servants' Law regulate the transfers of civil servants. Under these provisions, horizontal mobility is conceived as exclusively in the interest of the service, not as a voluntary initiative of a civil servant to enrich his professional career. The major reason for this is that the structure of the system is based on the functional, vertical specialisation of administrative organs, and not on horizontal co-ordination between institutions. Horizontal mobility is therefore not seen as a necessity within the current administrative framework. Moreover, pronounced salary differences between institutions do not encourage horizontal mobility. Consequently, voluntary horizontal mobility as a potential means of motivation is not used for the time being.

Human resources management rules have improved recently, but they still require guarantees of fairness and objectivity. This weakness increases the risk of politicization and patronage in human resources management and adds to demotivation in the civil service. This shortcoming may be overcome in the future as a result of the implementation of the recent amendments to the Civil Servants' Law, which – as indicated above - introduce a performance appraisal scheme. A Decree of the Council of Ministers (105/2002) regulated the performance appraisal scheme. This appraisal process started in 2003 (see above).

Training activities are continuing to develop and represent an incentive for civil servants. Training responsibilities fall mainly on the Institute of Public Administration and European Integration (IPAEI). One of IPAEI's main occupations at the moment is the development of training activities in public procurement, in co-ordination with the Public Procurement Agency (PPA). Some training modules in the programme related to anti-corruption issues are still missing but will soon be developed, at the demand of the business sector. The partnership of IPAEI with the PPA is also oriented towards extending public procurement training to other targets – private companies and NGOs – and to regional and local levels.

In the IPAEI's 2005 catalogue, all levels of civil servants are targeted at central, regional, local and agency levels. IPAEI has received 240 applications for public procurement courses, which is significant considering that only about 1,000 officials in the public administration have some connection to the subject. These courses aim to contribute to systematizing implementation practices. IPAEI also works in collaboration with other training institutions in Bulgaria, such as the Public Finance School, Diplomatic Academy, and Institute of the Magistracy.

With regard to training needs assessments, IPAEI (through its training managers) works in connection with the human resources management departments in ministries and other bodies, and it also meets with key groups of civil servants.

IPAEI is still confronted with some problems, such as the scarcity of financial and staff resources to properly meet all training requirements, especially if training becomes a major force for strengthening administrative reform. Its current premises do not appear to be adequate.

The Bulgarian civil service is relatively attractive to young people, in spite of the fact that salaries are low and the system appears to be politicized. This attractiveness is mainly due to the currently harsh economic conditions and high unemployment (about 20%) in Bulgaria and to the opportunities offered by the civil service in terms of useful professional contacts and free-of-charge training.

Training is developing well and represents an incentive for civil servants. IPAEI, as the only horizontal body responsible for training in the state administration, nevertheless faces some important management problems that need to be resolved in order to ensure the quantity and quality of training that is required.

Motivating elements within the Bulgarian civil service are still weak. The performance-related pay scheme presents some subjectivity problems, as explained above. Moreover, the budgetary allocation for the variable increases linked to the results of performance appraisals is insufficient; as this allocation is dependent on budgetary affordability, its payment is uncertain. Private companies continue to be much more attractive as employers than the public administration.

3. Management of the Civil Service

3.1 *Have systems for personnel management and a cross-government structure been established so as to ensure the application of homogeneous standards across the administration?*

The post of Minister of State Administration was created at the end of 2001 to take over responsibility for civil service and administrative reform, which had previously been direct responsibilities of the Council of Ministers (CoM). The minister is responsible, along with the Minister of Foreign Affairs, for strengthening Bulgarian administrative capacity for joining the EU. Two directorates within the CoM deal with these issues: European Integration and State Administration. The Directorate of European Integration co-ordinates a horizontal working group (referred to as “Working Group 31”), which is responsible for implementing a modernisation strategy called “From Negotiations to Membership”. Civil service reform and administrative reform are its main tasks. The CoM adopted this strategy at the beginning of 2003 and created the Council for the Modernisation of the Administration, which is chaired by a deputy prime minister and composed of several key ministers. The Minister of State Administration serves as the council’s vice-chairman. In early 2005 the CoM adopted a White Paper on Administrative Reform, to be used as a sort of “roadmap” for further reforms.

The Council has set up four working groups specialised in different areas: state administration, local and regional administrations, public services for citizens and business, and e-government. A task assigned to the Council is the examination of all requests from different institutions for staff and budget increases. It thus serves as a filter preparing the decisions of the CoM. Given the fact that almost half of all ministers participate in the Modernisation Council, its approval increases significantly the probability of the issue being examined and adopted by the CoM. This procedure represents a step forward, since the CoM previously had to decide on these issues without any preparation.

According to the *Strategy for Modernization of the Public Administration – from Accession to Integration: 2003-2006*, the control and co-ordination of the implementation of objectives laid down in the strategy are ensured by: the Chairman of the Council for Modernization of the Public Administration for the complete implementation process of the strategy; the Minister of State Administration with regard to strengthening the capacity of the public administration; and the Minister on European Issues and the Minister of Finance with regard to strengthening administrative capacity for the implementation of obligations related to EU membership and Bulgaria’s participation in the Structural and Cohesion Funds. Working group 31 on Administrative Capacity Issues assists the Minister on European Issues by identifying the gaps and weaknesses related to strengthening the capacity for implementation of obligations related to EU membership, formulating proposals for the improvement of mechanisms, and developing proposals for projects and programmes funded by the EU and international financial institutions and through bilateral agreements.

The Directorate for Public Administration, under the authority of the Minister of State Administration since the end of 2001 (Decree 209/2001), has been given an enhanced policy-making role. It also fulfils, to a limited extent, the task of co-ordinating the management of civil servants and preparing legislation issued by the Council of Ministers. In addition, the directorate prepares an annual synthesis report for the CoM on the development of the civil service, based on information gathered from all state institutions. Five reports, corresponding to the years 2000-2005, have been issued so far. These reports basically refer to the situation of three issues, namely: the development of administrative structures, i.e. how many institutions have adopted their statutes in the course of the year; civil service; and relations with citizens (access to public information by citizens and IT development or e-government). Since 2002 these reports have been better structured and contain more information on developments at the state administration level.

The directorate manages the Register of Administrative Structures, which contains organisational charters, normative acts, statutes, job positions, etc. It also contains all licensing procedures and requirements established by each institution (referred to as the “regimes”). The directorate also manages the Register of Civil Servants.

However, the directorate does not perform as a central capacity that sets common standards for civil service management. The recent amendments to the Civil Servants’ Law did not provide a solution to this problem, and most probably civil service management will continue to be fragmented and uneven. Each institution is the appointing authority for all civil service positions, including at the highest level, for which appointment decrees are issued by the CoM. It is difficult for the directorate to impose homogeneous civil service management standards, as it lacks the necessary legal powers to do so.

Job descriptions and evaluation are almost non-existent, although the Unified Classifier provides for certain elements in the form of requirements for occupying civil service positions. Personnel units in ministries are generally weak and understaffed. Each institution produces a quarterly report on its personnel for the Minister of State Administration. These reports indicate the number of employees and vacancies, and include an assessment of staff size in comparison to workload. Statutes, rules of procedure, and staff ceilings can be modified on the basis of these reports. Minor disciplinary violations are dealt with at the institutional level. With regard to serious disciplinary actions, a disciplinary commission is to be established in each institution and should intervene. The management of the disciplinary system seems to be flawed in many respects, due to uncertain legislation – as indicated above in this report – and erratic practices.

Secretaries general are the key persons for the management of the civil service at ministerial level. They are guided and co-ordinated in this task by the Directorate for Public Administration under the guidance of the Secretary General (SG) of the Council of Ministers (CoM). The SG of the CoM regularly meets the secretaries general of ministries in order to put into operation the decisions of the CoM, monitors their implementation, deals with misunderstandings and reviews the agenda of the CoM. The SG of the CoM therefore plays a co-ordinating role. Among others, this co-ordination aims to speed up the negotiation process in line with the European Integration Strategy and to strengthen the capacity of individual ministries to adopt necessary EU regulations. The SG of the CoM also presides over the Council of Directors, which is held weekly to discuss problems that arise and to transmit assignments given by the Prime Minister's Office. This co-ordinating role of the SG could even be institutionalised so as to improve governing capacity – including personnel – at the centre of government.

In this connection, in 2004 a human resources division was created within the Council of Ministers, placed directly under the authority of the Secretary General, and was given an advisory role to the SG. This division deals with personnel issues for the administration of the Council of Ministers only. This development is interesting as an indication of increased attention being given to personnel management issues. The creation of this division is also seen as a way of setting an example for other structures and of sharing best practice.

Although overall responsibility for the homogenous application of civil service rules is a function assigned to the Minister of State Administration, no special directorate or other service is responsible for the elaboration and monitoring of such rules throughout the public administration. Such a structure is nevertheless clearly needed across the entire Bulgarian administration⁹. Rules and practices have to be standardised and applied equally to all ministries and agencies. The lack of a central capacity capable of ensuring homogeneous management of the civil service – due to fragmentation, variety of rules, etc. – remains an unresolved issue.

In Chapter 10 of the new Civil Servants' Law, as amended in 2003 under the title "Control over the Observance of the Civil Servant Statute", responsibility for overall control is entrusted to the Council of Ministers. Specialised control activities ensuring the respect of the civil service status are to be carried out by the State Labour Inspectorate, which is an executive agency. It will have to carry out not only planned inspections (co-ordinated by the Minister of State Administration) but also inspections in response to denunciations received from trade unions and heads of inspectorates and complaints of civil servants (article 128). The inspectors can obtain information and consult documents from the administration and from civil servants. Following the investigation they can issue obligatory instructions to appointing authorities to rectify violations of the civil service status; they can also refer to the Prosecutor any cases where criminal offences have been identified. Non-compliance with obligatory instructions is to be followed by administrative sanctions (fines).

The inspectorate, with 28 offices distributed across the country, is an autonomous body reporting to the Council of Ministers, although the head of the Inspectorate is appointed by the Minister of Labour. Decisions of the inspectorate can only be redressed by courts, not by the government. Such decisions are administrative in nature

⁹ The abolished State Administrative Commission was intended to somehow play this role. The State Administrative Commission, established in August 2000, began its operations in January 2001. The 2003 amendments to the Civil Servants' Act (article 31) abolished this commission. The Commission had been dependent on the Directorate for Public Administration. It was responsible for monitoring the implementation of the Civil Servants' Law and the decrees issued in relation to that law. Its main tasks were to provide guidance in interpreting the Civil Servants' Law and its secondary legislation and to protect the status of civil servants. The Commission played a role in unifying the interpretation of the Civil Servants' Law, although its statements/opinions were mainly of an advisory nature. With the abolition of the Commission by the 2003 amendments, its monitoring role over the civil service was entrusted to the State Labour Inspectorate (articles 127-134).

and are subject to review by the administrative sections of district courts in the first instance and by the Supreme Administrative Court in the second and last instances.

This option, put into effect by the 2003 amendments, of designating the State Labour Inspectorate as the monitoring body over civil service management is inadequate, as labour inspectors should in principle be concerned only with social and labour rights of workers and safe working conditions, not with civil service issues, which belong to another field of law, i.e. public law. Perhaps the administrative culture and legal knowledge of labour inspectorates are not best suited for ensuring compliance with civil service legislation. It is also unclear whether the intervention of the State Labour Inspectorate will be effective in terms of the implementation of civil service legislation. On the other hand, labour inspectors may intervene only when the labour relationship (the civil service relationship in this case) has been established, not before. The inspectorate will most probably not be concerned with respect for the principle of equal access to the civil service, or with fair competition and transparency of recruitment and promotion processes or other civil service-specific legal concerns.

At parliamentary level, no commission deals specifically with public administration, although the mandate of its Legal Commission includes parliamentary overview of the civil service and public administration. There is a risk that matters concerning the civil service and public administration will be crowded out amidst other general legislative issues or submerged in the accumulation of different issues that this parliamentary commission has to deal with.

Management structures are fairly weak, and there is little capacity for ensuring a degree of uniformity in civil service management and a homogeneous application of civil service legislation and management standards across all administrative settings. This shortcoming is likely to be more acute concerning agencies at state level and in regional and municipal governments. The solution adopted by the amendments to the Civil Servants' Law is not adequate: the State Labour Inspectorate is not the correct institution for overseeing the application of civil service legislation. Instead, an institution capable of strengthening the civil service as a structure serving the public interest – among other tasks – would have been more appropriate.

3.2 *Are staff numbers and personnel costs controlled and published?*

The Council of Ministers, in accordance with the Unified Classifier, defines civil service positions. The statutes of each institution define staff ceilings. Information on each position, including current vacancies, is available on the government web site, although it does not yet include all administrative structures. Personnel costs and expenditure of funds provided by the budget are centrally controlled. The Ministry of Finance manages an integrated accounting system. The Civil Service Register includes weekly updated information and can be consulted on the Internet. If the need for extra staff or more budgetary funds arises, a proposal must be made to the Council of Ministers, which is the sole instance empowered to reallocate funds during the budget execution process, and a positive decision on this issue requires a favourable opinion from the Ministry of Finance.

Secretaries general in ministries must prepare an annual report on the situation of the administration, including the civil service. This report is taken into account to determine modifications of staffing ceilings and budgetary allocations. However, there is no internal mechanism sufficiently developed or payroll software compatible among institutions, which would allow for better monitoring of the system.

Personnel costs and staffing ceilings are made public, but internal controls on personnel expenditure need to be strengthened.

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

According to the Civil Servants' Law, civil servants have the right to strike (article 47). Among the amendments to the law is the new article 63a, by which paid leave of absence of up to 25 working hours per year may be granted to civil servants who have integrated trade union leadership bodies.

However, unions are still not appropriately involved in discussions on working conditions. As civil service status represents a special submissive relationship of civil servants to the administration, there is no scope for negotiation or representation. The Civil Servants' Law (articles 43-46) allows civil servants to form and participate in professional associations for the defense of civil servants' interests before state bodies, but only in connection with

giving opinions on draft legislation and internal regulations. State bodies are nevertheless required to facilitate the work of these professional organisations by providing free-of-charge premises and other material means for accomplishing their functions.

Labour contractees of course have more scope for negotiation as they are governed by the Labour Code.

Although trade unions' participation in policy-making or management decisions is recognised in legislation, in practice unions do not play any role in this regard.

4. Legality and Accountability

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

Constitution

The Constitution sets out a number of basic principles. Bulgaria is a state governed by law (article 4), and all authorities shall apply the Constitution directly (article 5). All citizens are equal before the law (article 60). The state shall be held liable for any damages caused by illegitimate rulings or acts on the part of its agencies and officials (article 7). Citizens are entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them (article 41). Citizens have the right to lodge complaints, proposals and petitions with the state authorities (article 45). Anyone has a right to legal assistance when appearing before an agency of the state (article 56). Articles 114 and 115 establish the hierarchy of legal acts issued by the government, ranging from decrees to ministerial orders. Articles 119, 120 and 125 establish the right to judicial redress of administrative decisions, and the establishment of the Supreme Administrative Court to oversee the precise and equal application of the law. The Constitution (article 127) confers on the Prosecutor the supervision of legality by taking part in civil and administrative lawsuits wherever required to do so by law.

Administrative Procedures

The first Bulgarian Administrative Procedures Act (APA), enacted in 1970, has been amended several times, including a major amendment in 1999. A separate Act on Administrative Offences and Sanctions (AOSA) was enacted in 1969 and has also been amended, most recently in 2002. The APA introduced a general set of procedures to be followed by administrative bodies in relation to individualised actions. It also reintroduced the review by ordinary civil courts of administrative decisions, which had been abolished in 1947. A Law on the Administrative Servicing of Individuals and Corporate Bodies was enacted in 1999. A Law on Administration (mentioned above) enacted in 1998 has had several amendments, the latest in 2001. These four pieces of legislation, as amended, together shape the current basic administrative, organisational and decision-making system.

Article 1 of the APA provides for the establishment of specific procedures. As a result, in the course of time a proliferation of special administrative procedures (known as “regimes”) has developed, which in 2003 numbered more than 350 according to the government’s estimates (between 450 and 526 according to other sources), concerning licensing, permits, and specific registers¹⁰. This situation has engendered a procedural intricacy, with many possible procedures applicable in a given situation. State authorities may create licensing regimes by ordinance and maintain them even when the law enabling the ordinance is abrogated. Not only ordinary citizens find this difficult to understand, but also legal experts, civil servants and judges who interpret and apply the legislation. The government established, through its Decision of 12 March 2002, an inter-ministerial working group to deal with the simplification of licensing procedures, with the aim of simplifying some 120 and abolishing another 74 procedures. One of the expressed goals of the working group was to prepare a new law dealing only with licensing.

In this connection, a Law on Restriction of Administrative Regulations and Administrative Control over the Economic Activity, passed by parliament and published in the *State Gazette* of 17 June 2003, entered into force on 18 December 2003. The law was amended before entering into force (*State Gazette* of 9 December 2003). This law

¹⁰ Several primary pieces of legislation contain particular administrative procedures and ways to appeal, e.g. Veterinary Medical Practice Act, Wine and Spirits Act, Carriage by Road Act, Animal Breeding Act, and Spatial Development Act.

introduces more transparency in administrative decision-making as well as positive administrative silence¹¹ in some limited cases. In the Bulgarian legal wording, “regimes” represent the different legal procedures applicable for obtaining different licences and permits, such as business authorisation and building permits. By Decision of the Council of Ministers 392 of 7 June 2003, these “regimes” and application forms are available on the Internet. However, this law will have no significant impact on the general legislation on administrative procedures, as it deals only with special regimes for licensing. This initiative, which has been mainly sponsored by the Ministry of Economy with the sole purpose of easing the establishment of enterprises, incurs the risk of further complicating the situation. Moreover, the government is not scrupulous in respecting this law, as evidenced by the adoption of a Decree on Waste Management on 26 March 2004. A revision of the current APA and a single, consolidated legal text on administrative procedures would have been more appropriate.

Most basic procedural principles for the protection of citizens’ rights and interests are recognised in a dispersed way throughout these pieces of legislation. The principles of fair and impartial procedures, hearing of interested parties, giving reasons, timeliness, legality, transparency, accessibility, efficiency, accountability, co-ordination and legal jurisdiction of administrative bodies are recognised in legislation. The principle of proportionality is not mentioned. The right to appeal to a superior administrative body is recognised, as well as an appeal to the court. Administrative acts are broadly defined, including not only administrative decisions but also administrative actions. The refusal to decide and administrative silence are usually considered as administrative acts, analogous to rejection. All administrative acts are subject to administrative and judicial review through appeal. The imposition of administrative penalties resulting from violation of administrative law is subject to the Act on Administrative Offences and Sanctions (AOSA) and to the Criminal Proceedings Law as a supplemental law, but not to the APA.

These legal guarantees are weakened, however, by the legislation itself. For example, the Law on the Administrative Servicing of Individuals and Corporate Bodies of 1999, while recognising some of the above-mentioned principles, states that procedures for providing administrative services are governed by the specific rules of organisation and procedure of each administrative body. Issues not covered by these rules are to be dealt with in “internal regulations approved by the competent administrative secretary”, which are not published. The lack of public and known rules creates a situation where there is no *lex certa*, i.e. procedural guarantees for citizens when dealing with the administration are very much dependent on arbitrary decisions of the intervening administrative authority or are made in an impromptu way by front-desk clerks. Such intervention can either complicate or facilitate at will the procedures to be followed. The feeling is that “it is impossible not to breach the law”¹². Procedures for the same license may vary extensively, especially at the municipal level. There is often different treatment and different understandings of the regulations while the lack of inter-ministerial co-ordination multiplies the requirements from companies and individuals.

The basic right to legal certainty and equality before the law are severely jeopardized in such circumstances, and the situation as a whole creates an atmosphere where corruption is likely to thrive¹³. Bulgaria needs a single, integrated, systematised and consolidated administrative procedures law, which would incorporate most of the provisions scattered among the four laws in force as well as in the numerous special procedures. Such a law should include detailed provisions for the procedure and strict legal constraints aimed at reducing discretionary *ad hoc* decisions by officials and authorities. These provisions would simplify the current procedural entanglement. They would also relieve officials and the courts of the need to adapt general principles to different administrative contexts, and reduce the discretion, at times wide and unjustified, conferred on them.

It is also necessary to build restrictive legal barriers for creating special procedures, and ensure that no future special procedure deviates from the general procedures established in law. In addition, newly established procedures should not have retroactive effects, as is frequently the case now¹⁴. Such a legislative effort is necessary in order to clarify the rules that officials and citizens should follow, reduce legal uncertainty, and simplify the numerous administrative procedures now in place.

¹¹ Positive administrative silence means that the absence of a reaction by the administration is legally considered as agreement with the petition of the interested party.

¹² Interview of Sigma with representatives of the Bulgarian International Business Association (BIBA), Sofia, 4 June 2004. BIBA considers that one of the main problems for Bulgaria’s economic development is the administrative “procedural jungle”.

¹³ See, as an illustration, Hristo Nikolov in SEGA of 6 May 2004 on the scandal surrounding the development of the Belene Nuclear Power Station. “Nobody in Bulgaria is able to precise the criteria and rules applicable”.

¹⁴ Interview of Sigma with representatives of the Bulgarian Chamber of Commerce and Industry, held in Sofia on 3 June 2004: The Chamber is preparing a request to the authorities, including one point asking them to “strongly limit the retroactive effects of regulations”.

Organisation of the Administration

The Law on Administration of 1998, as amended, is aimed at unifying the organisational model of any Bulgarian administrative structure at central, regional or municipal level and sets out conditions for occupying positions in such structures. These conditions are sometimes contradictory with certain provisions of the civil service legislation. The Law on Administration contains instructions on how to organise internally administrative structures, including ministries and municipalities, but to such an excessive level of detail that it is impossible to restructure any administrative unit, even at a mere technical level. This legislative set-up in fact impedes the swift adaptation of organisational structures in the administration to necessary changes, often including changes of internal working procedures. However, in the eyes of most Bulgarian legal experts, this approach is necessary, because otherwise each new government would be able to cut down or suppress at will administrative structures, which would entail a subsequent downsizing of the workforce. These experts consider that a less rigid approach would jeopardize administrative predictability and stability. This Bulgarian conception of predictability – as a direct result of rigidity and immutability – will make it difficult to reform the current legal set-up. Nevertheless, efforts are continuing in the streamlining of administrative structures.

The Law on Administration of 1998 was intended to address the issues of co-ordination, accountability and control. However, ministries continue to be managed in all aspects by ministers and their cabinets of political appointees, including vice-ministers, to the detriment of the administrative management, which is entrusted, in principle, to the secretaries general (civil servants). Delegation of administrative responsibilities on the civil service is not utilised, as every decision, whether small or large, remains in the hands of politicians. Everything has to be signed by the minister or his/her deputy. There are no standardised procedures accompanied by a delegation of signatures either. This political centralisation of administrative decision-making and administrative operations not only creates unnecessary bottlenecks but also weakens the civil service. This set-up overburdens ministers with administrative micromanagement and results in an administration that is organised more by political preferences than by professional criteria according to law.

The current inspectorates – staffed by civil servants – exercise control mainly in administrative fields, and they report directly – and only – to ministers, usually on a confidential basis. Inspectorates are outside the hierarchical administrative structure of the ministry, and therefore the Secretary General does not have any say on the performance of inspectorates. Their responsibilities are not well described in the law (article 46), but rather in the internal rulebooks of ministries. The justification given for this is that the responsibilities of inspectorates should not be fixed and limited by legislation, and that the minister should have the power to change the responsibilities assigned to inspectorates according to changing circumstances. Nevertheless, the new draft text for article 46 provides a list of responsibilities and powers entrusted to inspectorates. Current inspectorates are generally reputed to be working well, although they may easily be perceived as a sort of “political commissar”.

The current Law on Administration provides a weak and ineffective framework for the protection of legality and accountability. This drawback is coupled with a limited understanding of the concepts and structures that are required to develop an effective framework for the protection of legality, accountability and control in a democratic state, from both legal and managerial standpoints. The new draft law on administration does not properly address these problems. It is concerned with introducing managerial values rather than rule-of-law-based requirements into the functioning of the administration, thus giving way to a risky bias in favour of managerial discretion, to the detriment of regularity and legal certainty.

The four basic pieces of legislation mentioned above are short, comprised of between 44 and 63 articles. The virtue of this concise approach is that the important and permanent principles are stated clearly and simply, and can be moulded to fit different contexts. There are major drawbacks, however, in the current Bulgarian legal framework for administrative decision-making. In the first place, the idea of stating general principles, and then leaving it to the courts and to officials to interpret and apply them, is an approach that neither finds a natural home in Bulgarian legal traditions¹⁵ nor suits the particular needs of the current situation. The country is striving for — and needs — clear rules that foster legal certainty and predictability in administrative decision-making.

The Council for the Modernisation of the Administration considered in May 2005 a decentralization strategy, which envisages giving enhanced powers to district governors, together with related budgetary allocations. According to the strategy, district governors would be entitled to implement EU projects and programmes focused

¹⁵ The administrative legal tradition of Bulgaria, dating from 1878, has been modelled on various continental European administrative law systems, including Austria, France, Germany, Hungary, Italy and, after 1947, the Soviet Union. The European continental tradition was recuperated in 1998.

on concrete regional problems. Thus both responsibility and accountability would be delegated to a lower level. An implementation programme for the strategy for 2006-2010 is to be submitted to the Council of Ministers by 31 March 2006. In this connection, an operational programme for strengthening administrative capacity for the management of EU structural funds is to be established by late 2005.

Administrative Justice

The Law of 19 December 1997 established the Supreme Administrative Court (SAC). In the absence of a separate system of administrative courts, the SAC is the second instance and cassation court for reviewing rulings on administrative matters issued by inferior ordinary regional courts (now numbering 28). The SAC, staffed by 58 judges, is a first instance court which reviews administrative acts issued by the Council of Ministers and individual ministers, as well as decisions of the Supreme Judicial Council. The enforcement of court rulings is problematic for two reasons. First, the only remedy is prosecuting the responsible administrative authority for contempt of court, but this is possible only in the event that the authority fails completely to execute the judicial ruling after several requests. Second, the court can under no circumstances impose an administrative act, because this is understood as being the jurisdiction of the administrative authority. For example, the court can only declare that the denial of a permit is illegal, but the judicial ruling does not constitute a valid permit; such a permit must be issued by the administration. This set-up compromises the effective judicial protection of individual rights and the interests of a party. It also makes the procedure very lengthy, although, within the Supreme Administrative Court, the process leading up to the sentence is relatively rapid (some two months). SAC rulings which repeal decisions of the Council of Ministers and individual ministers are published in the *State Gazette*. The full collection of SAC rulings is published and available to any interested party.

The SAC can request any file from the administration, but the latter hardly ever respects the prescribed deadline (three days). For example, when access to the file is denied, SAC can impose sanctions on the administration (head of service or person to whom this task has been assigned). However, the name of the responsible person cannot be revealed to the SAC. Furthermore, one of the weakest links in the legality chain is the non-compliance with court decisions and requirements – as previously mentioned. The above example shows the limited awareness within the civil service of the obligation to conform to the rule of law and the requirements or rulings of sitting judges. This continues to be an area where a great deal has to be done before the requirements of democratic and rule-of-law principles are firmly in place.

There is no unified act regulating administrative justice. Provisions for judicial review of administrative acts are found in: the APA; Civil Procedural Code; Judicial System Act (1994) with regard to the powers of prosecutors; AOSA; and Criminal Proceedings Law. In addition, special procedures may establish other procedural regulations and further complicate the situation, making the system very complex. This means that the courts need to follow at least two separate sets of norms when adjudicating. One set of norms reviews individual administrative acts with regard to licences and permits. In this set, an internal administrative appeal may be obligatory in some cases and optional in others before going to the regional court (first instance) and then to the Supreme Administrative Court (last instance). Another set of norms affects the challenging of administrative penalties, for which the regional court is the first instance and the SAC the definitive instance. For this set of norms, no previous internal administrative recourse is needed. For the time being, no free legal assistance is provided by the state¹⁶, which is in contrast to the constitutional principle of equal access to justice. The increase in administrative disputes, especially concerning regulatory acts, is noticeable, as citizens are becoming more aware of their rights in a democracy and more willing to exercise them. The current system of administrative justice will hardly meet these aspirations of Bulgarian citizens.

The general time limit for filing a complaint in court against an administrative act is 14 days from the day on which the act was notified. This deadline seems extremely short, according to European standards, as the interested person needs to realise the consequences of the act, consider available alternatives, and prepare and submit his/her arguments. It is true that in a number of cases, the interested person can act without a lawyer and only needs to announce a recourse, which can then be completed later on; this possibility, in addition to the fact that the court examines *ex officio* a number of parameters, is considered to provide adequate compensation for the short time allowed. However, the fact remains that according to European standards this deadline seems very short. It is important to note the increase in administrative disputes, especially concerning regulatory acts.

The jurisdiction of courts over certain administrative acts has been curtailed, particularly on issues concerning privatisation, and on licensing of banks and insurance companies without any convincing justification. In 2000

¹⁶ However, the Bar Association may provide free legal advice under certain circumstances.

parliament adopted an interpretative law depriving the SAC of jurisdiction in a case pending before it. As the proceedings for this case, which concerned the deportation of certain individuals for reasons of national security, had to be discontinued, parliament decided that any past court judgements on the issue were null and void. The Constitutional Court partly repealed this interpretative law (judgement of 29 May 2001), deciding that parliament had acted as a judicial organ in breach of constitutional principles of the rule of law, separation of powers, and independence of the judiciary. Amendments to legislation on administrative court proceedings are being prepared by the Ministry of Justice, with the aim of enlarging the jurisdiction of courts *ratione materiae*. However, these amendments have encountered a number of difficulties. For example, the President vetoed in December 2002 the Law on Financial Control because this law, passed by parliament, was deemed to “encourage an unacceptable legislative trend of limiting judicial control over administrative acts”. The veto was also based on the consideration that “Bulgaria would not be governed by the rule of law if every parliamentary majority ... denied judicial appeal of acts of the executive branch of government with every new law”¹⁷.

The Ministry of Justice is very involved in the court management system. Although without voting rights, the Minister of Justice presides over the Supreme Judicial Council of 25 members (11 appointed by parliament, six elected by judges, three by prosecutors and two by investigators), and the ministerial staff serves as the council’s secretariat. The procedural rules of the council are unclear. The Minister of Justice is empowered to initiate proposals before the council. He can draw a judge’s attention to failures in handling cases and report them to the council, as well as initiating disciplinary proceedings against any judge (article 171 of the Judicial System Act, as amended in 2000). In 2001 the council decided to support a draft law eliminating judges’ right to appeal against disciplinary punishments imposed on them (20 to 30 per cent of appealed disciplinary cases had been repealed by the SAC). The Venice Commission’s Opinion¹⁸ on the 2003 Constitutional Amendments Reforming the Judicial System in Bulgaria states that these amendments, while increasing the powers of the Supreme Judicial Council, fail to depoliticize the composition of that body.

The above arrangements compromise the independence of the judiciary. However, the Constitutional Court (rulings of 14 and 22 January 1999) declared that the involvement of the Minister of Justice as a non-voting member of the Council did not violate the principle of separation of powers. The court thus departed from its previous rulings (3 April 1992 and 3 October 1995), in which it had defended judicial independence. The judiciary is perceived (as reported by opinion polls) as being slow in its proceedings, ineffective in the execution of court judgements, and corrupt, particularly when it comes to the prosecution branch of the magistracy, less so concerning judges themselves¹⁹.

The current set-up for judicial control of the administration neither satisfactorily guarantees the rule of law nor abides by very basic principles of administrative law. The defective judicial review of administrative acts and the obscurity of the administrative decision-making system are the two main stumbling blocks in the development of a democratic legal framework for public administration in Bulgaria.

Ombudsman

A Law on the Ombudsman was adopted by parliament on 8 May 2003 and entered into force on 1 January 2004. Article 2 of this law sets up the remit of the Ombudsman as intercession where, by action or omission, citizens’ rights and liberties have been offended or violated by state or municipal bodies and their administrations as well as by persons who provide public services. The Ombudsman can issue recommendations to the relevant bodies and to parliament on ways to redress unlawful situations and can lodge lawsuits in the Constitutional Court for an interpretation of the Constitution or a declaration of the unconstitutionality of a given piece of legislation. The Ombudsman is obliged to urge the relevant bodies to prosecute crimes noticed while performing his activity. The Ombudsman is to report to parliament but is independent, and his reports are made public. The law also regulates the procedures for lodging complaints with the Ombudsman, which are flexible and easily accessible. All institutions under the remit of the Ombudsman are obliged to disclose to him any relevant information, and several administrative penalties are provided in the case of officials obstructing or concealing information. According to the law, parliament was to appoint an Ombudsman by 31 March 2004. The parliamentary procedure did not begin, however, until April 2004; it concluded in April 2005 with the appointment of an Ombudsman. This delay was due to the persistent disagreements and protracted political manoeuvring on the person to be designated. In the meantime, several municipalities have created municipal ombudsmen.

¹⁷ Quotations from the presidential veto reasoning, as reported by BTA Press Agency

¹⁸ Council of Europe, European Commission for Democracy through Law (Venice Commission): Opinion no. 246/2003 of 24 October 2003, adopted by the Venice Commission at its 56th Plenary Session held in Venice on 17-18 October 2003

¹⁹ See Sigma Assessment Report on Integrity Systems in Bulgaria

Transparency in Public Administration

Transparency of public administration operations is not yet guaranteed, mainly due to the obscure administrative decision-making procedures, which still foster an administrative culture based on secrecy and opaqueness. Traditionally, the legislative framework in this domain has been weak, too general and difficult to apply. The basic general legal provision was article 12 of the Administrative Procedures Act, which stated that the administration was obliged, in accordance with the terms decided by the administrative organ, to provide documents, information, explanations and opinions. The legislative framework was also very restrictive, as it was based on a decree of 1950, revised by Decree 31 of 1990, on Lists of Facts, Information and Objects which Represent State Secrets. The Decree on State Secrets was superseded by the Law on Protecting Classified Information of 30 April 2002. By combining this legislation with the Law on Access to Public Information (see below), it is obvious that transparency in public administration, although slowly improving, remains to be achieved.

The Law on Access to Public Information was promulgated in 2000 and amended in 2002 to increase transparency in public administration. A new amendment to this law, which passed the first reading in parliament on 8 May 2003²⁰, intends to “redefine the term ‘public information’ in conformity with legislative models of EU Member States and the United States aimed at overcoming the excessive subjectivism and reducing the opportunities for discretionary judgements of the persons responsible for ensuring access to public information”²¹. The law designates which bodies are obliged to disclose information. Besides all public bodies at central and local levels, it includes “the mass media and what is related to the transparency of their activities”; this provision concerns transparency in the mass media and does not belong in a law aimed at improving transparency in the administration. The information connected with “administrative servicing” is excluded from the scope of this law, as is the information stored in the State Archive Fund. The procedures established in the law for obtaining information are lengthy and complicated. Finally, the judiciary tends to be restrictive with regard to adjudicating on denials of information, particularly concerning the so-called “implied denial”.

In conclusion, even if the Law for Access to Public Information is a step in the right direction, its effective implementation and usefulness for citizens is rather limited due to regulatory and administrative constraints. This law will most probably have little impact on improving transparency in public administration unless the envisaged amendments are passed and other legal provisions contained in different laws are put into line with the objective of a transparent administration.

The government is making a considerable effort to implant e-administration so as to provide information to citizens and facilitate compliance with legal duties. A strategy on e-government adopted by the Council of Ministers contains an investment project referred to as the Information System of the Public Administration. This strategy represents a positive development in principle, but it is liable to fail if the basic legal arrangements for transparency and accountability in the administration are not streamlined and enforced.

Personal Data Protection

The Law on Personal Data Protection was adopted in 2001 and entered into force on 1 January 2002. Implementation of this law has now begun, as the Commission on Personal Data Protection required by the law has been established.

Quality of Legislation

The quality of legislation is generally poor. A Law on Normative Acts of 3 April 1973, as amended in 1995, regulates the way in which legislation should be prepared, and requires post-implementation impact assessment, not forecast impact assessment. This regulation is fragmentary and obsolete, and does not stipulate detailed procedures for the subordinate legislative process. There is a recognised need to consult more with civil society so that ministries and working groups can prepare drafts that are easier to implement. The Institute of Public Administration and European Integration (IPA EI) provides training on impact assessment and law drafting, as this is recognised in Bulgaria as a major requirement for improving the quality of legislation.

To date, many laws arrive in parliament without any serious consideration of their impact on the economy. The Law on the Restriction of Administrative Regulations and Control over Economic Activity, which entered into force in December 2003, sets up, among others, an assessment of the impact on business of introducing new

²⁰ This amendment was not passed by parliament prior to its dissolution (legislative elections on 25 June 2005).

²¹ Statement of Reasons by the MPs presenting the amendment to parliament (not passed at the time of writing).

regulations and procedures (article 3), with a view to further restricting the proliferation of the various “regimes”. The Directorate for Economic Policy (Ministry of the Economy) is responsible for carrying out this impact assessment.

However, current arrangements do not yet guarantee a good quality of legislation. Representatives of the business community²² have pointed out that consultation processes should be more formalised, but at the same time more informal, less constrained and less bureaucratic. Frequently, regulations are simply transposed from EU Member States and other countries, without adapting their design to the Bulgarian reality and implementing capacity.

Concerning licensing procedures, the low speed at which various procedures are adopted and the insufficient consultation with interested parties lead to unclear rules, mistakes, ambiguities, and so forth, and this is most visible in their impact on the development of economic activities. One example is the decree on waste management of 26 March 2004 and the licensing procedure for packaging (see above). Although in principle consultation with professional and economic chambers, the business sector and NGOs is provided for, it is insufficient due to the extremely limited time available to them to study the draft and present their comments. Consultation would be more useful at an earlier stage of the decision-making process.

The interpretative leeway given to implementing authorities is either too broad or too narrow, creating legal uncertainty and red tape. Little legal and policy analysis expertise is available. The Council of Ministers has limited resources to carry out more rigorous legislative quality-checking, and the Minister of Justice has so far not developed a consistent approach to ensure that regulations are harmonised with EU legislation. Confusion in understanding new legislation has become a problem, particularly in property registration and titling, registration of new enterprises, tax declaration procedures and requirements, and so forth. In the area of administrative law, there is still only a limited understanding of general legal administrative principles as the driving notions for drafting administrative legislation. The government is aware of these problems and is attempting to strengthen policy analysis capacities by delivering extensive training.

Protection of Legality by Civil Servants

The main control mechanism over the civil service is hierarchical subordination. Article 24 of the Civil Servants’ Law obliges civil servants to refuse compliance with an unlawful order, except if the order is repeated in writing. Article 41 of the same law stipulates that civil servants, when implementing official obligations, have the right to freely disclose opinions about the lawfulness and expedience of the orders given to them, and to propose more appropriate solutions. The fact of disclosing such opinions shall not affect the civil servant’s status. The balance between obedience to superiors and standing up against unlawful instructions seems well struck in this law, and represents an acceptable means of strengthening the legality of administrative action. However, several indirect means of pressure in the hands of superiors and political appointees diminish the effectiveness of this provision; promotion, salaries and transfers largely depend on the discretion of superiors (see below). This drawback is aggravated by administrative legislation that is fragmented, contradictory, and imprecise and of poor quality, which makes it difficult and almost impossible to ascertain the lawfulness of a given administrative instruction.

The fact that liability for administrative decisions and actions and the associated obligation to compensate aggrieved citizens are institutional and not personal to the civil servant is positive. This institutional liability may help promote loyalty to the law on the part of civil servants, should they become involved in decision-making in the future.

As indicated above, within the structure of each ministry and state agency, an inspectorate is established directly under the authority of the minister or the agency’s head, without clearly and legally defined responsibilities. The inspectorate’s responsibilities in the draft text amending the Law on Administration include the control of legality over the ministry’s staff, its territorial units, and the executive agencies attached to the ministry (article 46 of the Law on Administration). The specific functions of the inspectorates are described in the procedural rulebook of each ministry. In the Ministry of Agriculture, for example, control activities include budget expenditure, public procurement procedures, and administrative services, but also the examination of requests and complaints of citizens. The inspectorates do not have the legal capacity to impose sanctions but submit proposals to the minister, who decides as to the measures to be taken (sanctions included). It is equally the minister who may decide to address the Prosecutor in cases where criminal offences appear to have been committed. The inspectorates may carry out joint controls with other bodies (police, anti-corruption bodies, etc.) that might have a direct competence to investigate and refer a case to the Prosecutor. However, changes are underway: the Law on Administration is to

²² Bulgarian Chamber of Commerce and Industry and the Bulgarian International Business Association (BIBA)

be amended in order to provide for legal powers that are currently set out only in the internal regulations of the ministry, increase the functions of inspectorates, and provide for the possibility of carrying out efficiency and effectiveness controls. However, these isolated positive aspects may easily dissolve in an administrative law context that does not support legality and accountability in an appropriate way.

While the recent increase in responsibility of inspectorates signifies an interest in monitoring the activities of various administrative units, the inspection and control function remains limited within the Bulgarian administration. The fact that inspectorates report to the minister and are tied to a specific ministry inevitably sets limits on their inspection capacity. Their functions could become politicized in the context of the Bulgarian civil service system, thus resulting in a loss of the inspectorate's credibility. Besides, and more generally speaking, control mechanisms appear to be fragmented, dispersed in every administrative structure (since every administration, even at regional and municipal levels, has to create an inspectorate, which in some cases consists of a single person). Stronger independence and horizontality are important prerequisites for effective control – not to mention the significant economy in terms of expertise. In short, although inspectorates may be useful for the internal monitoring of the operations of a ministry or agency, a horizontal corps of inspectors would be more appropriate in terms of independence. Such a corps could be one way of introducing the horizontality that is visibly lacking in the Bulgarian administrative system.

The current legal framework and practices for the protection of legality and accountability in administrative action are still inappropriate. Administrative procedures are obscure and too entangled. Judicial review is weak and rather ineffective. The legislative process and the quality of legislation need improvement. The basic right to legal certainty and equality before the law are severely jeopardized in such circumstances, and the situation as a whole creates an atmosphere where corruption is likely to thrive.