



SIGMA

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

KOSOVO (under UNSCR 1244/99)¹

ASSESSMENT MAY 2009

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¹ In accordance with UN Security Council Resolution 1244, since June 1999 Kosovo has been governed by the UN Interim Administration Mission in Kosovo (UNMIK).

Democracy and the Rule of Law

The economic situation and consequent fiscal difficulties may have a negative impact on the timing and feasibility of PAR actions. The authorities may rely more heavily on donor funds to pursue PAR activities, thus making the effectiveness and leadership of donor co-ordination even more crucial.

The shortage of skilled human resources, the scarcity of financial resources, the uncertainty surrounding the responsibility over the Kosovo protectorate, and the role of the international community have a cumulative effect, which hinders the emergence of sustainable, accountable Kosovan institutions.

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

Constitution

On 9 April 2008, the Assembly adopted the Constitution of the Republic of Kosovo, which entered into force on 15 June 2008. The Constitution is based on the Comprehensive Proposal for the Kosovo Status Settlement (CSP). It also provides for the international civilian representative as ultimate supervisory authority, as set out in article 2 of Annex IX of the Comprehensive Proposal for the Kosovo Status Settlement. This international protectorate status undermines the responsibility and accountability of domestic political forces for efforts to build national institutions and the public administration. This also affects the hierarchy of legal norms. The Constitution embeds special rights of “communities”, which departs from the European understanding of democracy based on individual rights.

Parliament

Although, the Constitution provides parliamentary instruments to hold the government accountable, the Assembly has not used them to control politically the government’s performance. The Assembly needs to develop its capacities to fulfil its constitutional oversight role. It also needs to strengthen its role to ensure the quality of the legal order. Strengthening the capacity of parliament secretariats and procedures is required so that the Assembly can fulfil its constitutional tasks.

Government

The policy-making framework and the legislative drafting process are regulated in the government’s Rules of Procedure, which specifies an intergovernmental consultation procedure, quality criteria and impact analysis processes, as well as a final quality check before submission to the government. However, the system has proved ineffective, partly because of the low level of policy professionalisation in ministries and at the centre of government, which results in part from the habit of resolving all issues at the political level. This contributes to the poor quality of policy and law. The political elite will need to understand the complementary roles played by politicians and professionals in policy-making, especially in an EU context, and create the necessary policy expertise within a stabilised civil service.

Rationalisation and simplification of laws and institutions is a challenge for the government. The rule of law would be better served if legislative development were to be limited to the absorption capacity of public institutions. In a context of strategic development, it would be advisable to envisage postponement of implementation (when capacities are not in place), development of transitional provisions (to follow evolution in administrative capacities), setting priorities amongst enacted laws

(which might include the freezing of the enactment of non-essential regulations), and slowing down the development of new legislation. The focus should be on rationalising the legal order, introducing framework laws for administrative decision-making, and reinforcing accountability mechanisms by fostering a culture of responsibility.

Public Administration

The lack of qualified and trained staff in public administration institutions and the weak fiscal basis of Kosovo have placed state-building at risk. The notion of public management – which means skills, authority, responsibility and accountability – is not understood, while the politicisation of public offices is rife. Although a considerable amount of training has been delivered in the last 10 years, high systemic turnover - partly the result of a poorly conceived civil service law - has meant that most of this training has been wasted. It is essential to recruit, develop and retain human resources able to manage state institutions and to create a consistent legal and institutional order. It is also essential that international donors cease to take trained staff from public institutions by enticing them to better-paid jobs in international projects.

The legal framework established for public expenditure management, including public internal financial control, contains many elements that correspond to international standards, mainly due to the efforts of the international community, but there is no evidence showing that this legislation is positively affecting the quality of public financial management. The laws appear to be ahead of the current state of administrative development, and officials do not always appear to understand the purpose of the legal requirements.

Special attention should be paid to the distribution of competences to municipalities and communes so as to guarantee absorption capacity, resources and managerial instruments.

Kosovo (under UNSCR 1244/99) has participated in all steps of the creation of ReSPA since 2006, but the international agreement has not been signed.

Judiciary

The judiciary system (including prosecutors) has been suffering from instability. In spite of some legal improvements, there are concerns about the ongoing politicisation of judges and about political pressures on prosecutors and judges. The power of the President in appointing and dismissing judges raises concerns about the independence of the judiciary, and the President's role in this regard should be revised. A better understanding of the content and relevance of independence and accountability of the judiciary is still needed. The low number of judges and the absence of a rational organisation of the judiciary is not conducive to reliability of the justice system in practice; impartiality and efficiency in delivering justice are not guaranteed. EULEX could support improvements, but co-ordination with the judiciary should be monitored.

Anti-corruption Policy

Corruption in Kosovan institutions appears to be widespread. In recent years the political will, co-operation amongst stakeholders, and measures to combat corruption have been insufficient. Transparency in public life and in the public administration, including access to information, should be increased.

Public awareness is increasing regarding the negative effects of corruption. If not urgently and properly addressed, social problems could emerge fuelled by the financial and economic crisis and by high unemployment.





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Summary

Main Developments since last year

During the period under review, intensive legislative activity has engaged mainly the government and the Assembly of Kosovo. It is supposed that such activity will continue in the coming years so as to put in place a comprehensive and coherent legal framework, aligned with the Constitution and with European and international standards.

The government recently adopted a draft Law on Civil Service and a draft Law on Salaries for Civil Servants. These drafts will now be sent to the Assembly for approval. Their preparation was followed by Sigma and some international donors. After approval by the Assembly, several pieces of secondary legislation will still be needed to implement the regulations of these laws. If the secondary legislation has at least the same quality as the laws adopted by the government and if the whole set of legislation is properly implemented, then one may conclude that reasonable conditions exist for building a professional civil service in Kosovo.

Other basic laws related to the functioning of the government and the organisation of the public administration have been drafted. This is the case, for instance, of the Law on the Organisation and Functioning of the Government (adopted by the government by mid-April) and the Law on the Organisation of Public Administration Institutions. The adoption of these two laws is urgent.

The legal framework related to decentralisation – which is one of the priorities according to the Ahtisaari Plan – has almost been completed and is being implemented. The transfer of responsibilities and resources is being carried out but, in spite of the training, concerns remain about the capacity of ensuring the delivery of similar standards of quality of services to citizens across municipalities.

Main Characteristics (strengths and weaknesses)

The new Constitution provides a sound basis for a democratic system based on the rule of law, protection of human rights and separation of powers. As only a short portion of the Constitution is devoted to setting guidance for the organisation and management of the public administration, ordinary laws on these matters will require special attention from drafters, lawmakers and the international community.

Regarding the distribution of power, the situation in Kosovo is very special due to the presence of some international organisations which, prior to the full implementation of the Comprehensive Proposal for Kosovo Settlement, hold executive powers and share areas of public authority: This is the case of the UN Interim Administration Mission in Kosovo (UNMIK), the EU Rule of Law Mission in Kosovo (EULEX), and the International Civilian Office (ICO). The transitional provisions of the Constitution assign a special role to the ICO as the ultimate authority in Kosovo regarding the civilian aspects of the Kosovo Status Settlement².

Even considering that the situation is tending to improve, for the time being the legal framework in Kosovo is still confusing as three different sources of legislation³ are still in place.

Basic legislation related to the administrative legal framework is being adapted, adopted and developed. The Law on Administrative Procedures was adopted in 2006, but its implementation has been imperfect and unsystematic. Although the law is generally accepted as being of good quality, some amendments are being prepared in order to align it with the new constitutional reality.

² Article 147 [Final Authority of the International Civilian Representative] states that:

“Notwithstanding any provision of this Constitution, the International Civilian Representative shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in Kosovo regarding interpretation of the civilian aspects of the said Comprehensive Proposal. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations referred to in Article 146 and this Article.”

³ The three sources are: 1) Yugoslav laws in force prior to the 1990s war in the Balkans; 2) UNMIK laws, adopted by the Special Representative of the Secretary-General of the United Nations (SRSG); 3) laws adopted by the Assembly of Kosovo.

In the area of justice, the law regulating the organisation and functioning of the State Prosecutor is still the old Yugoslav law of 1976 (which is not considered to be adapted to the new role and needs of the State Prosecutor). The law establishing the Prosecutorial Council (created by the Constitution) is still missing.

The institutional set-up for ensuring the accountability of political and administrative entities is in place. However, misunderstandings regarding its role and relevance persist. For instance, recommendations of the Ombudsperson and of the Auditor-General have had little impact: their reports are not discussed by the Assembly, and there is no feedback regarding their recommendations. Moreover, the failure to appoint an Ombudsperson since this institution was “kosovarised” in 2006 (an acting Ombudsperson has been in charge since then) shows the weak interest of political actors in this relevant institution.

A proper and modern Law on Administrative Disputes (LAD) is also missing. Its preparation should provide an opportunity for discussing the current system of administrative justice, which seems to be ineffective, and to resolve inconsistencies between the current LAD and the Law on Administrative Procedures.

A very important issue concerns the Constitutional Court, which is supposed to be in charge of controlling the constitutionality of laws. The legal basis for the Court was adopted, but it is not yet operational. The procedure for recruiting judges has just started.

The right of access to public information is recognised by the Constitution and regulated by law, but its implementation is recognised as being unsatisfactory.

A Law on Personal Data Protection is expected to be adopted soon and the creation of an independent agency for controlling its implementation is foreseen.

There is an overall problem of implementation of the legislation. Kosovo has special weaknesses in this regard that require special attention. The lack of qualified staff, lack of resources for information campaigns, lack of training, and weak capacity of institutions for monitoring and co-ordination are just some of the difficulties, which are reinforced by the instability of the legal framework and by a dysfunctional public administration. Training as part of the implementation process must always be ensured.

Considering the ongoing complexity and misunderstandings regarding the different roles of political institutions, the poor capacity of the administration in implementing and enforcing legislation, the difficulties linked to the quality of the legislation (in particular those related to the unchecked secondary legislation and the missing assessment of existing capacity for implementing sophisticated laws and systems), along with the ineffectiveness of the judiciary system, one may conclude that the rule of law is not yet a reality in Kosovo.

Recommendations for Reform

Intensive training and monitoring capacity are needed in order to increase awareness of the Law on Administrative Procedures by citizens and public servants and to support its implementation.

Regarding the Law on Civil Service and the Law on Salaries, there are deep concerns regarding the capacity for homogeneous and co-ordinated implementation of these laws due to the weak capacity of the Ministry of Public Services (MPS) and of the human resources management (HRM) units in ministries. Reinforcing the capacities of the MPS (for support and monitoring) and of the HRM units in the various bodies (for implementation) must be a priority. A detailed and funded training programme is of fundamental importance for this purpose.

A Law on the Organisation of Public Administration Institutions (currently being drafted) is also urgently needed in order to create a clear legal background for the creation, abolition and restructuring of bodies to perform administrative activities. The requirements for creating agencies – an issue that requires clarification – is one of the issues that should be addressed in this law.

The government and the Assembly are requested to look at the Ombudsperson and Auditor-General institutions carefully and to establish mechanisms that will ensure an effective follow-up of their

recommendations. The organisation and competences of the Public Prosecutor's Office, as well as the establishment of the Prosecutorial Council, should also be key priorities for the government and the Assembly.

The procedures for the adoption of a new Law on Administrative Disputes (LAD) should be resumed.

It is urgent to create conditions to ensure that the Constitutional Court becomes fully operational. Without a functioning Constitutional Court, the rule of law cannot be improved.

Close monitoring and consistent support (technical and financial) are needed to ensure the success of the decentralisation reform in Kosovo, considering its specific ethnicity structure and ongoing difficulties.

Regarding the right of access to public information, a better balance between free access and confidentiality needs to be achieved.

Legal drafting and procedures related to the approval of legislation require increased attention. In fact, the intense legislative activity and the urgency in approving new legislation are quite often detrimental to its quality. While recognising that the situation in Kosovo is very specific in view of the internal requirements and the international pressure for new pieces of legislation, the weakness (or even absence, in many cases) of effective participation and discussion, along with the poor expert support in parliament, is leading to a situation where many recent laws will need to be amended very soon, thereby increasing difficulties in understanding and implementing the legal framework. Moreover, secondary legislation should also be controlled in terms of its conformity with the Constitution and other laws. Its publicity also needs to be increased.

Introduction

Since the Assembly of Kosovo declared independence on 17 February 2008, a new era has begun for Kosovo and its administration. Along with its continuous struggle for enlarged international recognition as an independent country, Kosovo has been devoting a large part of its efforts to building new institutions – or reshaping some existing institutions – and to adopting a wide range of new legislation. Priority has been given to legislation aimed at implementing the Comprehensive Proposal for Kosovo Settlement (“Ahtisaari’s plan for Kosovo”).

The Constitution of Kosovo, which entered into force on 15 June 2008, is the main piece of legislation adopted since the declaration of independence, and it is naturally having a strong impact on the renewal and completion of the administrative legal framework.

Since the last assessment⁴, therefore, several legislative acts related to the administrative legal framework have been adopted or drafted. This report updates and develops Sigma’s 2008 assessment and is based on information gathered by mid-April 2009.

Principle of Legality

The rule of law is one of the key constitutional values established in the Constitution of Kosovo (article 7), and the principle of legality is mentioned in several articles of the Constitution as well as in numerous ordinary laws or draft laws. This is the case, for instance, of the Law on Administrative Procedures, the draft Law on Civil Service (adopted by the government on 23 April 2009 and submitted to parliament), and of a number of laws related to the management of public finances and financial control at central and municipal levels – Public Procurement Law, Law on Internal Audit, Law on General Auditor, etc.

Other fundamental principles and rights aimed at supporting legality, such as equality before the law, proportionality, right to a fair and impartial trial, and right to legal remedies are also set by the Constitution and developed by laws. Moreover, the Constitution states that Kosovo ensures full respect for internationally recognised fundamental human rights and freedoms.

The right of citizens to receive all information from administrative bodies and the obligation of administrative authorities to act in the transparent way are recognised by the principle of publicity under the Administrative Procedures Law (article 9).

It is worth mentioning that the control of the constitutionality of legal and other acts is the responsibility of the Constitutional Court. The Constitution of Kosovo and Law no. 03/1-121 on the Constitutional Court of Kosovo set the legal basis for the establishment of the Constitutional Court. The selection of judges to be appointed to the Court is currently underway.

Regarding secondary legislation, there are fundamental weaknesses in Kosovo, since legal sub-acts are usually enacted by ministers without any control. Moreover, secondary legislation is not systematically published and it is often in conflict with primary laws, creating confusion for the public administration and citizens and damaging legal security.

Legality is formally ensured by the Constitution and by the law. However, the situation regarding the Constitutional Court, the remaining confusion within the legal system, and some misunderstandings related to the practical implementation of the rule of law⁵, along with the

⁴ See Sigma’s 2008 assessment report on Public Service and the Administrative Framework in Kosovo at: <http://www.sigmaweb.org/dataocd/48/31/41637624.pdf>.

⁵ Recently there have been some interesting developments that indicate the fragility of the rule of law principle and of the general accountability of the government. A few months ago the government proposed to parliament to “suspend” the enforcement of some dispositions of the civil service regulation related to the composition of the Senior Public Appointments Commission (SPAC), to replace international members of SPAC by local ones appointed by the President, and to continue this transitory situation until the new Law on Civil Service is approved. Parliament correctly rejected this proposal, but the government nevertheless continued with the replacement of SPAC members, implicitly changing the law by a decision of the government. Recently the Prime Minister dismissed all acting permanent secretaries in several ministries (seven in total) on the grounds that their appointments were not in compliance with the law. On the other hand, the decision of the Prime Minister does not have a legal basis.

fragile situation of the judiciary and an inefficient public administration, are clear evidence that major improvements are needed in order to ensure the rule of law.

Accountability Institutions

As in all democratic countries with a parliamentary system, the Government of Kosovo is responsible for the implementation of laws and state policies and is subject to parliamentary control (Constitution, article 4.4). Several parliamentary instruments serve to control the work of the government, including interpellations, questions (written and question period), motion of no-confidence, enquiries, etc. So far the general view is that parliament has not been active enough in using those instruments to control the government's work.

In terms of financial control, the **Auditor-General** is the highest institution of economic and financial control. The main principles for the competences and status of the Auditor-General as an independent institution responsible for financial control have been set out by the Constitution. The details on the status, mandate and scope of responsibilities have been regulated by Law no. 03/L-075 on the establishment of the Office of the Auditor-General of Kosovo (OAG) and the Audit Office of Kosovo. Until the end of the international supervision of the implementation of the Comprehensive Proposal for Kosovo Status Settlement dated 26 March 2007, the Auditor-General is to be an international expert appointed by the International Civilian Representative (Constitution, article 157). The OAG audits public institutions and issues reports on any mismanagement of officials, including recommendations for redressing the situation. Unfortunately, there is very little engagement on the part of the government to implement these recommendations or even to sanction responsible officials for breaches identified by the OAG. Parliament as well has not used OAG reports to better supervise the government's activity. The reports of OAG are not discussed, and there is no feedback after their submission⁶.

Internal control is regulated by the Internal Audit Law (IAL), adopted by the Assembly of Kosovo on 6 November 2006 (Law no. 2/L-74). The law aims to ensure greater operational efficiency, budgetary and financial discipline, and legal and regulatory compliance of public sector entities by requiring each entity to subject its operations, records and management, and control systems to regular, systematic and comprehensive internal audits⁷.

A quasi-judicial body – **Procurement Review Body** (PRB) – competent to review administrative decisions issued by central procurement institutions (the Public Procurement Agency – PPA – and the Public Procurement Regulatory Commission – PPRC) was established in 2008 by the new amendments of the Law on Public Procurement. The PRB is responsible for the conduct of review of appeals from bidders in the review procedure⁸.

The Constitution establishes the **State Prosecutor** as an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law. The State Prosecutor is an impartial institution and acts in accordance with the Constitution and the law (Constitution, articles 109.1 and 2). The Constitution establishes the Kosovo Prosecutorial Council as a fully independent institution ensuring that the State Prosecutor is independent, professional and impartial and that he/she reflects the multi-ethnic nature of Kosovo and the principles of gender equality (Constitution, article 110.1).

The organisation and jurisdiction of the Public Prosecutor Offices in Kosovo are still based on the Law of the Public Prosecutor's Office of the Socialist Autonomous Province of Kosovo no. 32/76 and on several amendments that were issued later, since the Law on the State Prosecutor is still being drafted. The Law on Establishment of the Prosecutorial Council is also in the drafting phase. The procedures applicable to judges, which refer to the appointment, dismissal and promotion of judges,

⁶ For further information on this topic, refer to Sigma's 2009 assessment report on External Audit in Kosovo.

⁷ Additional information on the public internal financial control system can be found in Sigma's 2009 assessment report on Public Internal Financial Control (PIFC) in Kosovo.

⁸ Detailed information on this topic can be found in Sigma's 2009 assessment report on Public Procurement in Kosovo.

are also applicable to prosecutors pending the establishment of the Prosecutorial Council. This provisional situation has now lasted for several years and creates a number of problems due to the lack of communication between the Kosovo Judicial Council, the Ministry of Justice and the Prosecutor General. The government is urged to complete this legislation as soon as possible in order to delimitate the functions of the State Prosecutor and to set up proper management mechanisms. All of these will contribute to further increasing the accountability and effectiveness of this institution as well as to controlling legality.

With regard to **judicial power** in Kosovo, it is established as unique, independent, fair, apolitical and impartial, and it ensures equal access to the courts (Constitution, article 102). The Kosovo Judicial Council is to ensure that the courts are independent, professional and impartial and that they fully reflect the multi-ethnic nature of Kosovo and the principles of gender equality (Constitution, article 108 para. 2). However, the judicial system is considered to be very ineffective in performing its functions. This weakness may be derived from the improper legal framework, the unclear situation regarding the responsibility for this important function of the state, the transition of competences from international institutions to domestic institutions, and the lack of capacities, in terms of both numbers and quality of staff. Poor salaries are also mentioned as undermining professionalism and integrity in the judiciary as a whole.

The **Agency on Anti-Corruption (KACA)** is responsible for finding and investigating corruption cases in Kosovo, making efforts to prevent and fight the phenomena of corruption, and helping to build a healthy and advanced society based on law. As part of the Anti-Corruption Strategy, the Assembly of Kosovo adopted the Anti-Corruption Law in April 2005, which was promulgated by the SRSG in May 2005. The law foresees measures against corruption in the area of administrative investigations of public corruption and publicising the most serious violations of the law, nepotism in recruitment, conflict of interest, standards for giving/accepting gifts in the public administration, etc. A draft law amending the Anti-Corruption Law has been prepared and is in the approval procedure. This new law is expected to address several gaps in the current law, including the issue of the Council on Anti-Corruption and its relations with the KACA. This issue was already stressed in the EC's 2008 Progress Report on Kosovo, and the need for its clarification was even highlighted by the disagreements regarding the latest KACA report. The Agency, an independent body reporting to the Assembly, co-operates closely with the government on issues related to anti-corruption strategies and on the search for common ways to combat corruption. It seems that this double relation with the Assembly and the government is raising some concerns about the real accountability lines of the KACA⁹.

The **Ombudsperson institution** in Kosovo, established by UNMIK Regulation no. 2000/38, officially opened its office on 21 November 2000. It is responsible for defending, protecting and monitoring the rights and freedoms of individuals confronted with unlawful or improper acts or failures to act on the part of public authorities. Currently the institution has 41 staff members, including support staff. Since its establishment, the Ombudsperson institution's staff have been multi-ethnic; at present the majority of the staff is of Albanian ethnicity, while the other staff members are of Serbian, Turkish and Roma ethnicity. The Ombudsperson's Office was "kosovarised" as from January 2006. At the same time, the remit of the Office was limited to Kosovan institutions. A Kosovan Ombudsperson has not yet been appointed by the Assembly; the latest attempt by the Kosovo Assembly to appoint a new Ombudsperson failed in February 2009.

Both UNMIK Regulation no. 2000/38 and UNMIK Regulation no. 2006/06 provide the Ombudsperson with the mandate to accept and investigate complaints from anyone in Kosovo who believes that his/her human rights have been violated by a public authority in Kosovo. The institution conducts investigations, issues reports and provides legal services and public advocacy. The general role and competences, qualification, election, dismissal and reporting requirements of the Ombudsperson institution are set out by the Constitution. During the period 1 July 2007 – 30 June 2008 a total of 523 cases were registered in the Office of the Ombudsperson, 436 of which were

⁹ Additional information on this topic can be found in Sigma's 2009 assessment report on the Public Integrity System in Kosovo.

lodged by Albanians, 64 by Serbs and 23 by other ethnicities. The Ombudsperson during this period examined 684 cases. Based on the subject of complaints, 130 cases concerned access to the courts (civil proceedings); 86 concerned administrative silence and related issues; 58 related to abuse of authority; 53 to economic, social and cultural rights; 49 to employment-related issues; 39 to property-related issues (other than the Kosovo Property Agency, ex UN Housing and Property Directorate); 38 concerned issues related to a fair hearing (criminal proceedings); 35 related to KPA issues; 28 to impunity of authorities; 23 to other rights protected by the European Court of Human Rights (ECHR); 7 concerned the right to liberty; and 6 concerned the failure to investigate a crime.

In cases where the Ombudsperson institution finds that a general practice or situation affecting the public as a whole – not only one person or group of persons – has violated international human rights' standards, it may issue a special report, with recommendations to the Kosovo Assembly. The Ombudsperson provides annual reports to the Assembly and interim reports upon the request of the Assembly. The annual and special reports are also published. Based on the Constitution, the Ombudsperson may refer matters to the Constitutional Court, in accordance with the provisions of the Constitution. Unfortunately, to date the Assembly has never debated the Ombudsperson's reports, and neither the Assembly nor the government has provided feedback to the Ombudsperson on the institution's reports and recommendations.

The **Independent Oversight Board (IOB)** is in charge of overseeing implementation of the legislation related to civil service and mainly of ensuring legality in recruitment and dismissal procedures. It is accountable to the Assembly and is now recognised in the Constitution (article 101, para. 2). During several months in 2008 the IOB performed with only three staff members (out of the seven foreseen) and thus without a quorum for taking decisions. The IOB sends recommendations to the Assembly, which are later forwarded to the government. However, no feedback has been provided regarding its implementation. It remains to be seen whether this institution will be useful and effective within the legal and institutional framework in Kosovo.

The institutional set-up to ensure accountability is being completed, and institutions have, with few exceptions, sufficient powers to fulfil their role. Staffing is also progressing, although slowly. However, the effectiveness of these institutions is a matter of concern and requires full attention. Better co-ordination and mutual support, as well as better understanding of the specific roles and powers of the various entities, are still necessary for achieving a proper and effective system of checks and balances.

Distribution of Competences and Organisation of the Administration

The organisation of the administration in Kosovo and the distribution of power are special compared to other countries and determined by the large presence of international organisations holding executive powers, which is not common in other countries. In Kosovo at the moment three such organisations hold certain segments of public authority, i.e. UNMIK, EULEX and ICO. Recently UNMIK altered the –dimension of its role by transferring a number of competences to Kosovan institutions, while still maintaining some competences. EULEX has large competences in the areas of justice and police. Unfortunately, co-operation with local authorities is not always at the desired levels. (N.B. This observation does not refer to the political dimension.)

The Constitution of Kosovo sets out general principles for the activity and competences of the **government** and other independent bodies. UNMIK Regulation no. 2001/19 (as amended) sets the number and competences of the ministries and of some executive agencies. However, the legal framework does not entirely regulate the organisation of the administration. The existing rules do not cover either the creation of new ministries or executive agencies or the internal organisation of these institutions. In practice no analysis and financial impact assessment are carried out. Also, there is no clear definition of the types of public administration institutions. There is a concern as to how institutions are organised internally, i.e. what are the management levels, the span of control, the units created and the distribution of functions for these units. Furthermore, it is not clear in many cases if agencies are only executive or if they also have a policy-making and co-ordination role. Even if agencies have a clear executive role, in many cases there is no policy support from the ministries to

which these agencies are attached. The current system of reporting directly to the minister in practice isolates the agencies, whose strategic objectives, work plans and achievements are not analysed. In some ministries it is hard to find a policy unit working in the same area of activity, which often results in agencies setting policies instead of ministries. A number of recommendations in this respect were provided by the team of experts engaged in the functional review of the Government of Kosovo (FRIDOM project)¹⁰.

The government has currently drafted two laws, the Law on the Organisation and Functioning of the Government and the Law on the Organisation of Public Administration Institutions. The first draft law sets out provisions on the organisation and functioning of the government, its working methods and decision-making procedures, co-operation between the government and other institutions, and the type of normative acts that are issued by the government and by ministers. It also specifies the competences of the Prime Minister and deputy prime ministers and the rights and obligations of ministers. The second draft law defines the types of public institutions that can be created in Kosovo, the relationship between ministries and their subordinated institutions, the role of independent regulators, and the general framework of functioning for all of these institutions. To date no early draft has been available, and it is therefore not possible to judge the quality of the regulation and the opportunity of its provisions.

General principles for the organisation and operation of **municipalities** in Kosovo are provided by article 123 of the Constitution. The administrative review of the actions of municipalities by central authorities in the area of their own competences is to be limited to ensuring compatibility with the Constitution and with the law (Constitution, article 124.7). The Law on Local Self-Government no. 03/L-040, which is part of the Proposal for the Kosovo Status Settlement, defines the legal status of municipalities, their competences, general principles of municipal finances, organisation and functioning of municipal bodies, intra-municipal arrangements, inter-municipal co-operation, including cross-border co-operation, and the relationship between municipalities and the central government (article 2).

UNMIK Regulation no. 2007/30 increased the responsibilities and competences of municipal mayors, as the highest executive office elected directly by citizens' votes; the approval of this regulation is considered as the first step towards local government reform. A number of competences have been transferred from central to local institutions (13 so far). Recently the competence on providing social services was transferred to local government authorities, including the budget and the current 800 staff. There are some concerns regarding the capacity of municipalities to manage their new responsibilities. To support the implementation phase and ensure the common quality of services provided to citizens, the transfer of competences is being accompanied by training.

The missing laws related to the organisation and functioning of the government and the public administration are of fundamental importance in establishing clear rules for both. The draft laws should take into consideration the recommendations of the functional review of the government (FRIDOM project). The process of decentralisation needs to be closely monitored and strongly supported.

Quality of Legislation

The policy-making framework and the legislative drafting process are regulated in the government's Rules of Procedure (RoP). The RoP foresees a number of stages for the drafting of legislation. It provides for a system of working groups in the sponsoring institution and later on in the process an inter-institutional working group. The latter is the final consultation body before the draft law is sent for approval to the Office for Legal Support Services in the Prime Minister's Office (PMO) and subsequently submitted to the government. This practice has proved to be ineffective, because the institutions usually nominate to the working group civil servants from their legal departments, which

¹⁰ The FRIDOM project report, "Whole of Government Review", can be found at: <http://www.fridomks.org/?page=5&lang=2>.

results in all of the discussions being limited to legal drafting techniques and ignoring policy options and co-ordination issues. This has led to legislation that is inconsistent or even conflicts with policies.

The RoP requires ministries to produce a Regulatory Impact Assessment (RIA), Financial Impact Assessment (FIA), and Declaration of Approximation with the *acquis communautaire* for all legal drafts. The FIA is reviewed by the Ministry of Finance and Economy (MFE), while the Agency for Co-ordination of Development and EU Integration (former Agency for EU Integration) reviews or provides the Declaration of Approximation with the *acquis communautaire*. The capacity to carry out FIA and RIA in ministries is considered to be very low and the quality of these assessments is therefore too poor. In the MFE only one official reviews the FIAs for all draft laws. There is also an overlap between the two impact assessments. Maybe the adoption of soft impact assessment tools instead of sophisticated models that cannot be implemented in Kosovo would be better.

Rules of procedures as well as other related normative acts do not regulate the preparation and approval of secondary legislation approved by ministers. There are no criteria or standards as to which issues should fall within the jurisdiction of the respective ministry and which issues are to be dealt with by the government. This gives ministries the opportunity to decide on important issues without prior consultation with interested or related institutions and without any obligation to publish normative acts in the *Official Gazette*. As a result, many sub-legal acts are in conflict with primary laws or mutually inconsistent. Thus there is a need to draw a line of competences within the government to issue secondary legislation. In 2008 the government established an ad hoc commission to work on the analysis and elimination of the collision of laws. Apart from a few meetings that were held, no outputs have been produced so far by this commission.

There is also a concern about the access of the general public to regulations, laws and other sub-legal acts, although there have been improvements in this area since the creation in April 2006 of the Office for Management and Administration of the *Official Gazette*. However, due to a lack of capacity this office is currently publishing only primary legislation and selected secondary legislation. It is expected that with the approval of the draft Law on Government the situation will be redressed.

The overall quality of legislation must be improved. The various steps in the drafting process (including impact assessments) should be understood as opportunities for improvement, not as bureaucratic obligations. Without improving the quality of the legal system (including secondary legislation) and without ensuring the enlarged public awareness of the legislation in place, it is not possible to say that Kosovo is fully ruled by law.

Administrative Procedures

The general administrative decision-making process is regulated by the Law on Administrative Procedures (LAP), while a number of laws or subsidiary legislation regulate special administrative procedures. The LAP was promulgated by the SRSG (Regulation no. 2006/33 of 13 May 2006), but the SRSG did not sign the Law on Administrative Disputes. The LAP is a general law that regulates the way in which administrative decisions are to be made and the legal relationships between administrative bodies and individuals or legal persons to produce individual administrative acts. In general, the law is a modern instrument and encompasses most of the core administrative law principles (legality, balance between public and private interests, equality before the law, proportionality, objectivity and impartiality, sustainability, predictability and openness).

With regard to specific issues, such as standing rights, all interested persons are entitled to start an administrative procedure or to participate in it either personally or through representation. The right to a hearing in the administrative procedure remains at the discretion of the administrative body conducting the administrative procedure (article 67). However, the hearing may be organised at the request of the interested party (article 68).

The law provides that in the course of exercising its legal competences with the view to fulfilling a public interest, public administrative bodies are to have recourse to means and remedies that are proportional to the goals to be fulfilled (article 6.1).

Interested parties may file an appeal against the administrative act within 30 days of the date on which they were notified of the act. The administration is obliged to examine the appeal and issue a decision within 30 days (article 130).

The philosophy behind the LAP is not understood by administrative bodies or the general public. Its dispositions are therefore sometimes disregarded and in some cases the legal mechanisms are not used.

In the meantime, a draft amending the LAP has been prepared by the government. According to some officials, the main objective of the draft amendment is to align the LAP with the new constitutional situation of Kosovo.

The LAP is generally recognised as being in line with international standards, even if some improvements could be made. The problem is its weak implementation. The absence of a modern law on administrative disputes and the inefficiency of administrative justice (only the Administrative Chamber of the Supreme Court is dealing with these cases) are additional problems.

Freedom of Access to Information

Every person enjoys the right of access to public documents. Documents of public institutions and organs of state authorities are public, except for information that is limited by law due to privacy, business trade secrets or security classification (Constitution, article 41). Citizens' access to official documents is regulated by Law no. 2003/12 on Access to Official Documents. The Ministry of Public Services issued Administrative Instruction no. 2006/03 to implement this important law that guarantees the possibility of access to public documents. The law establishes the rule according to which all official documents are accessible and introduces exceptions. The law defines the processing of applications, the time frame within which institutions are bound to reply to the applicant's request, and the ways in which official documents can be assessed. Furthermore, the law defines the beneficiaries of the right of access to official documents and enumerates the public interests that could constitute exceptions to the rule of accessibility of official documents. The law also contains provisions on the use of language, the establishment of the Inter-Institutional Committee for the examination of best practices on access to official documents, and the obligation of institutions and the government to issue annual reports.

The treatment of sensitive documents is also defined by the law and by the "principles, procedures and classification signs of official documents" set out in Administrative Instruction no. 07/2007 issued by the PMO. The instruction foresees the creation of a commission in each institution to be responsible for drafting and adopting the list of sensitive documents. In a recent "discussion forum" with media representatives, this instruction was very much criticised because it enlarges without reason the scope of the documents considered as confidential. The Ministry of Public Services has foreseen in its work plan for 2009 to amend the Law on Access to Official Documents.

Article 7 of the law specifically states that the applicant can file a complaint to the Ombudsperson institution if his/her request for an official document has been rejected or if no information has been received concerning this request. However, despite the right of access to an official document, the law does not include penalties for the failure to comply; in practice, ministries rarely granted access during the year 2008. The remedy of proceeding to the court is not a suitable way of addressing this issue. There is no law that provides public access to UNMIK official documents and no access to EULEX documents, and in practice the general public has been unable to obtain access to these documents.

The government has prepared a draft Law on Personal Data Protection, which is expected to be approved soon by the Assembly. This draft law foresees the establishment of an independent agency for data protection.

Generally, the practice shows that the large majority of municipal institutions and citizens is not aware of the legislation in this area and does not know how to implement it. In any case, the major

concerns of citizens are related to the absence of a functional public administration, not to having access to public information.

Once again, the problem regarding the right of access to public information is not the law but how it is implemented and the low degree of public awareness of citizens' rights and how to exercise them.

Administrative Liability and Judicial Review of Administrative Acts

According to the Constitution and the Law on Administrative Procedures (LAP), every person has the right to pursue legal remedies against judicial and administrative decisions that infringe on his/her rights or interests, in the manner provided by law. However, there is an inconsistency in the legal framework, because the legislation on administrative disputes, which dates back to the days of former Yugoslavia, does not reflect the current developments in Kosovo and the institutions that have been created. Also, a major obstacle is the lack of a law on the organisation of the courts that would better distribute the competences within the court system. Currently all final administrative acts can only be appealed to the Supreme Court. The administrative cases in the Supreme Court constitute 60% of all court cases¹¹, and the number of available judges cannot deal with the backlog of cases that has accumulated.

The Supreme Court has the right to examine the procedure and the merit of cases but generally it reviews only cases related to procedural issues. The Ombudsperson has observed cases where the complaints of civil servants have been sent backwards and forwards for five years without a final decision being taken by the court. There have also been delays in the course of the review of cases by the Supreme Court. The largest number of cases in the Supreme Court concerns property and privatisation. After a court makes a decision regarding an administrative appeal, it has the power to compel the administrative bodies concerned to act where a legal duty exists. There are no provisions for interim remedies, such as temporary injunctions.

There is an urgent need to regulate the judicial system by reorganising the courts and redistributing their competences. A draft law in this regard has been circulating for a long time, but it has not yet been approved.

To date civil servants have not been liable to pay compensation for any damages they have caused, either by reimbursing the government for the cost of compensating an aggrieved party or by direct liability. The Auditor-General considers this absence of liability as a major drawback in the system. The draft Law on Civil Service recently adopted by the government includes an article on liability for damages.

The weak capacity of administrative justice requires attention, and the organisation of administrative justice must be discussed when drafting a Law on Administrative Disputes.

Recommendations for Assistance

Even considering its very special situation, which is aggravated by the global financial and economic crisis that is diverting attention and resources, Kosovo is trying to complete its administrative legal framework, and some progress has been made.

However, the reform dynamic needs to be strengthened and supported. The Ministry of Public Services (MPS) lacks the power, capacity and resources to drive reforms forward, and it seems that public administration reform is not a political priority because it is not clearly understood as a cornerstone for other reforms. The MPS plays a very important role in completing and improving the administrative legal framework. This role relates not only to the preparation of legislation concerning the civil service but also to other relevant pieces of legislation, such as the Law on Administrative Procedures, the Law on the Organisation of Public Administration Institutions and the Law on Government, as well as to legislation related to various areas such as official statistics, protection of personal data, and organisation of cadastre institutions.

¹¹ Data provided by the Statistical Department of the Kosovo Judicial Council.

Some donors and international organisations (European Commission, World Bank, DFID, Sigma and others) are trying to support reformers in Kosovo, but it seems that, along with better co-ordination, a strong commitment from the European Commission is needed. For instance, in view of the fragile resources and capacities of the MPS, some twinning projects could be envisaged to support the central management unit in the MPS as well as the training school (KIPA).





SIGMA

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

KOSOVO (under UNSCR 1244/99)

EXTERNAL AUDIT

ASSESSMENT MAY 2009

1. Summary

Main Developments since last year

Although there have been some developments since last year, the overall situation has not changed.

The adoption of a new Audit Law by the Assembly of Kosovo in June 2008 significantly changed the legal framework within which the Office of the Auditor General (OAG) operates.

- The OAG is now a Kosovan institution reporting directly to the Assembly. The previous links with UNMIK via Pillar IV are no longer in place.
- Final audit reports are now sent exclusively to the Assembly of the Republic of Kosovo.
- The Auditor General (AG) can propose a budget to the Assembly and not to the Ministry of Economy and Finance (MEF), which provides the OAG with a welcome degree of financial independence. However, in practice, in 2008 the MEF intervened in the budget allocation for the OAG for the 2009 budget.
- The AG will continue for an undefined period to be an international expert appointed by the International Civilian Representative. A new AG was appointed at the beginning of 2009 and took up office on 1 March 2009. The post of Deputy Auditor General (DAG) is now filled by a Kosovan national. The first local DAG was appointed in October 2008.
- In accordance with the law, the OAG submitted its first annual performance report to the Kosovan Assembly in April 2009.

In 2008 the OAG took full responsibility for auditing the Kosovo Consolidated Budget (KCB) financial statements and carried out the audit with only own resources.

Main Characteristics (strengths and weaknesses)

The Office of the Auditor General (OAG) has been developed over the last six years with significant support through donor funds, technical assistance and international management, but it is recognised that the OAG is still operational at only a basic level. The fact that the management of the OAG has since the beginning not been Kosovan but international, although perhaps necessary and advantageous in many respects, has led to a lack of ownership and responsibility within the OAG. In the past, due to the high number of international experts, this small and young institution focused too much on its operational responsibilities rather than on supporting the development of local skills and capacities.

However, basic functions have been set up and the OAG has established a professional audit environment, which includes a functional IT infrastructure, PCs and software for auditors and support staff, a basic library and archives, and an audit manual that is aligned with INTOSAI standards. However, the challenge will be to apply these standards in the Kosovan environment.

It will take a considerable amount of time and effort before a professional and “Kosovarised” supreme audit institution is fully established. The overall audit skills, management ability and capacity are still limited. The OAG also suffers from a considerable turnover of staff due to the unfavourable provision in the Civil Service Law of three-year contracts and to the relatively low salaries in the public sector.

Bringing the staff of this young organisation up to the required level will take several years, not only years of training but above all years of intensive practice to improve their understanding of the environment of the Kosovan public administration and to acquire the necessary experience as professional external auditors.

The OAG has many obstacles to overcome before it can be described as organisationally mature. In the past, a systemic lack of cohesiveness and communication was observed at an institutional level between the OAG executive management and the technical and administrative components of the OAG and at a lower level between audit directorates. The Kosovarisation of the OAG management structure is fundamental for the long-term development, reputation and impact of the Office.

The general situation is improving, although the OAG will still need support in order to continue to grow into its role as a key institution for the people, the Assembly, and the Government of Kosovo. The current management is aware of the challenges and has started activities aimed at meeting them.

Recommendations for Reform

Measures should be taken to ensure the adequate budget of the Office of the Auditor General (OAG).

Further actions to raise awareness among the nearest stakeholders – i.e. the Assembly and the government – regarding the role and function of an audit institution would be useful. This would also pave the way for the full Kosovarisation of the OAG.

In preparation for the forthcoming reform of the Civil Service Law, a review should be carried out to analyse current posts in comparison with job classifications and to determine conditions for attracting and retaining the best staff and ensuring a freer hand in recruitment, together with elaborating a long-term human resources strategy.

It is important to develop and establish the OAG's organisational values and culture (*esprit de corps*). This task is particularly challenging as the duration of staff contracts has until now been for only three years according to the Civil Service Law, but it should be easier after the upcoming reform.

The development of the supreme audit institution in Kosovo should not be undertaken in isolation. Progress in the development of related areas of public internal financial control and notably internal audit should be monitored and co-ordinated. Common development activities should be identified and encouraged in order to use scarce resources in a rational way.

It is equally important for the Assembly Committee on Budget and Finance to take an active role in constructive debates on the execution of the budget. The Auditor General plays an important role in this debate.

1. Introduction

The Office of the Auditor General was established as an independent institution by UNMIK Regulation no. 2002/18. In September 2003 the United Nations Special Representative of the Secretary-General (SRSG) appointed the first Auditor General, who was recruited from an EU Member State and had experience as an auditor general. Pursuant to the legal provisions, the OAG reported directly to the SRSG. The second Auditor General was appointed in January 2006, and her term of office, as well as that of the Deputy Auditor General (DAG), ended on 15 June 2008. The International Civilian Representative appointed the current Auditor General at the beginning of 2009. The new Auditor General took up his duties on 1 March 2009 for a five-year mandate. The first local DAG, who was appointed in October 2008, had previously been the director of one of the five audit departments of the OAG. The appointment of a local DAG may increase the capacity and sustainability of the OAG at senior management level.

The OAG has five audit departments, an administrative department, an IT department and a legal office. The management (AG and DAG) has a secretariat with two assistants. In 2008 the OAG had 85 staff (63 audit staff and 22 support staff). In comparison to 2006, the number of both audit staff (67 in 2006) and support staff (23 in 2006) has slightly decreased, while the number of annual mandatory audits has increased (see 2.2 below).

2. Baseline Questions

2.1. *Does the SAI have clear authority to satisfactorily audit all public and statutory funds and resources, bodies and entities, including EU resources?*

The Constitution of the Republic of Kosovo contains three articles that define the status and competencies of the Auditor General (AG) as well as his/her relationship with the Assembly:

- a) The Auditor General audits:
 - the economic activity of public institutions and other state legal persons;
 - the use and safeguarding of public funds by central and local authorities;
 - the economic activity of public enterprises and other legal persons in which the State has shares or the loans, credits and liabilities of which are guaranteed by the State.
- b) He/she addresses the Assembly:
 - to report on the execution of the State budget;
 - to give an opinion on the report of the Government on its expenditures of the previous year before it is adopted by the Assembly;
 - to inform the Assembly on conclusions of audits when requested.
- c) He/she has to submit an annual report on the activities of the Office to the Assembly.

The Law on the Establishment of the Office of the Auditor General of Kosovo and the Audit Office of Kosovo (Law No. 03/L-075) of 5 June 2008 determines the organisation, operation and competencies of the Office of the Auditor General (OAG). According to the law the OAG is to annually conduct a regularity audit of the Kosovo Consolidated Budget (KCB), budget organisations, the Assembly of Kosovo, the Office of the President of Kosovo, each ministry and executive agency, municipalities, independent bodies, the Central Bank of Kosovo (CBK), and other entities that are either more than 50% publicly owned or receive funding from, or provide dividends or other non-taxable revenue to, the Kosovo Consolidated Fund.

The OAG also has the power - but not the obligation - to carry out performance audits of any institution or entity referred to above. The OAG is to report on audits to the auditees and to the Assembly, and these reports are to be made public. The reports should contain recommendations to address the most serious deficiencies that have been identified. The law also provides the OAG with the necessary powers for information-gathering.

The law was developed rather hastily and there is room for improvement, including resolution of the issue of its consistency with other laws that impact on the work of the OAG. It is the intention of the OAG, after implementing the legal framework for one audit season (2009/10), to recommend legal amendments to the Assembly.

The Constitution and the Law on the Establishment of the Office of the Auditor General provide the OAG with clear authority to satisfactorily audit all public and statutory funds and resources, bodies and entities. The auditing of EU resources is not explicitly mentioned in the law.

2.2. Does the type of audit work carried out cover the full range of regularity and performance audit set out in INTOSAI auditing standards (1.0.38-1.0.44)?

The Law on the Establishment of the OAG states that “regularity audit” means the attestation of financial accountability involving examination and evaluation of financial statements and other financial records and expression of opinions on:

- whether the financial statements give a true and fair view of the accounts and financial affairs for the audit period;
- whether the financial records, systems and transactions comply with applicable statutes and regulations;
- the appropriateness of internal control and internal audit functions;
- the probity and propriety of administrative decisions taken within the audited institution or entity; and
- all matters arising from or relating to the audit.

“Performance audit” according to the law means an audit of the economical manner, efficiency and effectiveness with which the audited institution or entity uses and manages its resources in carrying out its responsibilities.

The law thus repeats almost word for word the definition of regularity audit as given in the INTOSAI “Basis Principles in Government Auditing”, and fairly summarises the definition of performance audit.

The Auditor General is to annually conduct a regularity audit of the Kosovo Consolidated Budget (KCB). Between 1999 and 2003, this responsibility was contracted to the Court of Audit of the Netherlands. The Office of the Auditor General (OAG) assumed responsibility for the external audit of KCB financial statements as from the fiscal year 2004, supported by a small team of international experts. In 2008 the OAG took full responsibility for auditing the KCB financial statements and carried out the audit using only its own resources.

According to the requirements of the law, the OAG now has to carry out 109 regularity audits every year. The table in the annex to this report shows the development of mandatory audits and the number of audits carried out by the OAG as well as the audits that have been contracted out.

The number of mandatory audits has increased over the years from 94 in 2006 to 109 in 2008, due to an increase in the number of state public authorities and other budget-users. The OAG carried out 35 audits with own resources during 2008, which is a decrease in comparison to previous years, whereas 19 audits were contracted out. In total these 54 audits covered organisations that together represented 71% of the total expenditures and 86% of the total revenues of the KCB.

The audits carried out have been basic, focusing on the compliance of individual transactions. The number of recommendations made was therefore high, on average around 500 per year in the last three years, but with a rather small individual value. By not addressing the systemic causes of the problems, the OAG does not facilitate the application of preventive measures that would reduce risks in the current systems in an organised way.

As in earlier years, none of the opinions given in 2008 was “unqualified”. Unqualified opinions are only given when the auditors are satisfied that in all material respects:

- the financial statements have been prepared using acceptable accounting bases and policies, which have been consistently applied;
- the statements comply with statutory requirements and relevant regulations;
- the view presented by the financial statements is consistent with the auditor's knowledge of the audited entity; and
- there is adequate disclosure of all material matters relevant to the financial statements.

Qualified opinions indicate severe problems in the financial reporting as well as in the financial management of public budgets.

In 2008 training in performance audit was provided to 25 auditors, and two pilot performance audits were initiated with the support of the ongoing TA project. The subjects of these audits were “Distribution of Medicines from the Essential List” and “Processing and Payment of Handicapped Pensions”. These subjects were chosen after problematic findings in financial audits in the Ministry of Health and the Ministry for Social Welfare and Labour. Draft reports were completed in March 2009.

All staff of the OAG are subject to the civil service legislation, including the salary provisions. Under the current law, civil servants have renewable (but on a totally discretionary basis), three-year contracts. This limited duration of contracts, together with the relatively low salaries in comparison to salaries in the private sector but also in state-owned enterprises and international organisations established in Kosovo, has led to a high turnover of well-trained and experienced staff. Up to the end of 2008, the OAG has lost 22 trained audit staff to other sectors (post and telecommunications, banks, audit firms), where they are paid three times the salary of civil servants. These audit staff represented 30% of all trained OAG staff, which means that one third of all training efforts over the years has been wasted for the OAG.

A considerable amount of budget and time is invested in continuing basic training to help auditors reach a basic professional standard. The main provider of this training is the Society of Certified Accountants and Auditors of Kosovo (SCAAK). The certification scheme targets three groups:

- accounting technicians;
- certified accountants; and
- licensed auditors as the most advanced level.

All in all, it is estimated that on average the core staff is in training for about 30 days per year. This training has been somewhat unstructured and random in the past, and it was not always clearly related to the mandate and tasks of the OAG. The training has not been fully effective and its results cannot be considered sufficient. Measures have already been taken to find more effective and sustainable solutions, but it is also a question of changing the learning culture in the OAG.

Although it is understandable that the OAG, in search of a way of retaining trained staff, would like to obtain a special status and salary system for audit staff, this might not be an ideal solution in the long term. The OAG is part of the Kosovan public administration system, and it is therefore advisable for its employees to also be subject to civil service legislation so as to establish and maintain a unitary and coherent salary and career system for the civil service. A possible (and perhaps necessary) solution would be to explore eventual flexibilities within the general framework provided by the law on civil service and the law on salaries. This also means that – within the framework of the civil service legislation – a special regime for the OAG should be taken into consideration, with the objective of giving more liberty of decision and action to the AG concerning the management of the OAG’s human resources. New laws on civil servants and on salaries are currently in the parliamentary procedure and, if adopted, will bring significant improvements. In addition, the OAG will have to find ways of increasing its attractiveness as an employer by improving the working conditions and the work environment of its employees.

The development of a supreme audit institution takes time, and it will be some years before the OAG will be in a position to undertake the full range of audits envisaged and to contribute to discussions on the execution of the state budget through its findings and recommendations, as published in audit reports and in its annual report. For the future, with a view to developing the necessary capacities, the OAG envisages spending less time on theoretical training and more time on practical activities, including those that provide first-hand knowledge of the context of operations. Building on the platform of existing capacities, the OAG wishes to take a mentoring approach to future support: while the responsibility for activities would remain with the OAG itself, individual auditors would have at their disposal a mentor for new audit tasks and activities to ensure that new skills and new requirements are well implemented in practice. This approach seems to be promising in terms of increasing the ownership and sustainability of development efforts.

The type of audit work of the OAG, as defined by law, covers the full range of regularity audit and performance audit set out in INTOSAI auditing standards. To date the audits carried out have been basic, focusing on the compliance of individual transactions. Gradually, the OAG needs to address systemic causes of problems in order to facilitate the application of preventive measures that would reduce risks in the current system. Performance audit is in a pilot stage and should be developed prudently, employing a step-by-step approach.

The training of auditors has not been fully effective, and its results cannot be considered as sufficient. In addition, there is a high turnover of staff as trained accountants and auditors are rare in Kosovo and auditors from the OAG can therefore easily find much better paid jobs in the private sector or elsewhere in the public sector. As a result, over the years one third of all training efforts have been wasted for the OAG. The OAG is aware of the necessity to find more effective training and sustainable human resources management, and it has started to take measures in this regard.

2.3. Does the SAI have the necessary operational and functional independence required to fulfil its tasks?

According to the new Constitution, the Auditor General of the Republic of Kosovo is the highest institution of economic and financial control. He/she is elected and dismissed by the Assembly by a majority vote of all of its deputies on the proposal of the President of the Republic. The AG is elected for a mandate of five years, with the possibility of re-election for one additional mandate. The Assembly decides on the dismissal of the Auditor General by a two-thirds (2/3) majority of all of its deputies on the proposal of the President or on the proposal of one third (1/3) of all of its deputies.

More details on the reasons for the Assembly to remove the AG from office and on payment arrangements following removal are defined in the Law on the Establishment of the OAG.

According to the law, the AG is to carry out his/her functions independently and is not to be subject to the direction or control of any other person or institution. According to the provisions of the law, the Auditor General is to have complete discretion in the exercise of his/her functions or powers. In particular, the Auditor General is not to be subject to any direction in relation to:

- whether or not a particular audit is to be conducted;
- the way in which a particular audit is to be conducted; or
- the priority to be given to any particular matter.

The legal basis thus sufficiently protects the functional and operational independence of the OAG and in particular the AG. The existence of the OAG, the method of election, and the procedure for removal from office of the AG are regulated in the Constitution.

Until the end of international supervision of the implementation of the Comprehensive Proposal for the Kosovo Status Settlement, dated 26 March 2007, the Auditor General is to be an international expert, appointed by the International Civilian Representative.

The 2008 law has changed the procedure for allocating the annual budget for the OAG. According to the law, the Audit Office, to the extent that it is not funded from other sources, is to be funded from the Kosovo Consolidated Budget (KCB). The Auditor General is to annually prepare and submit to the Assembly the proposed budget of the Audit Office in accordance with requirements, guidelines and arrangements established by the Assembly. The Assembly is to then review this proposed budget within 30 days of the date on which it received the proposal. While reviewing and deciding on the proposed budget, the Assembly is to ensure that sufficient funds from the KCB are allocated to the Audit Office to allow it to carry out its functions and responsibilities fully and independently.

Thus formally the OAG does not negotiate its budget with the Ministry of Finance and Economy (MFE) but with the Assembly. However, due to the fact that the OAG is seen as a budget-spender, in practice the situation is different. In all previous years, the MFE had intervened regarding budget allocations for the OAG. In 2008, following the new procedure of the 2008 law, the OAG agreed on its 2009 budget with the Committee for Budget and Finance in the Assembly and transmitted the resulting agreed budget to the MFE. Since the OAG is regarded as a budget-user, its budget has to be integrated into the draft annual budget of the Republic of Kosovo that is submitted by the government to the Assembly for adoption. The MFE does not seem to have respected the new legal procedure, since the budget line for the OAG that the MFE included in the draft 2009 budget of Kosovo was lower than the budget that had been agreed upon between the OAG and the Assembly's Budget Committee. This was partly due to a miscalculation by the budget department of the MFE. The Assembly subsequently adopted the lower budget. In consequence, the OAG did not have enough funds to pay all of the salaries of its employees during the first month of 2009. This issue is to be corrected with the budget review, planned for June 2009.

The existing legal provisions concerning the OAG's financial independence are not sufficient to protect the OAG from interference by the MFE. With respect to its independent status, the OAG should benefit from special arrangements – within the legal framework – concerning the management of its own budget and its human resources. The Office should be exempt from administrative instructions affecting its independence. The situation whereby the AG needs to obtain permission for management decisions from auditees, such as the Ministry of Finance and Economy or the Ministry of Public Administration, has to be avoided. The OAG will have to seek support from the Assembly to secure the MFE's acceptance of the legal procedure for the annual budget allocation to the OAG.

In 2008, as in previous years, the OAG's financial resources were provided by three different sources: the KCB budget, the UNMIK Pillar IV (replaced by ICO funding in mid-2008) and IPAR (through a TA project). The KCB partly covered the outsourced audits up until 31 December 2007; it fully covered the salaries of the audit and support staff as well as the operational costs of the OAG in 2007. For 2008, the funds in the OAG's budget received from the KCB amounted to 1,204,239 EUR. Of this amount, the OAG used 862,630 EUR or 71.6%. This degree of budget implementation is notably low, especially given the fact that the OAG did not cover its mandate satisfactorily. Moreover, 260,000 EUR was designated for external audits (audits that were contracted out), of which only 60,000 EUR was spent. As a result of this poor budget outcome, this budget post has been drastically reduced for the financial year 2009, and the total budget of the OAG has been reduced to 1,106,963 EUR.

In comparison with 2007, the wages and salaries budget line for 2008 increased by over 21%. The average monthly salary in 2007 was 341 EUR, increasing in 2008 to 423 EUR (i.e. an increase of 24%). The salary increase applied only to audit staff and not to administrative staff.

In 2008 the remuneration of five OAG staff [the AG, the DAG (until end September 2008), one senior audit advisor, one project officer and one audit assistant] was financed by UNMIK Pillar IV for the first part of 2008 and by ICO (ad interim) for the last part. In 2009 only the AG and a personal assistant are financed from this source.

There is a gap between the mandate and the expectations on the one hand and the available human and financial resources on the other. The OAG will have to improve its productivity and introduce better risk-programming in order to fill the gap. Changes in the budget allocation process for the OAG would improve the financial situation, and strategic capacity development as foreseen in the Strategic Development Plan would enhance the OAG's human resources. In the short run it will be crucial for

the OAG to contract out a higher proportion of audits, which will require an enhanced management capacity.

While the legal basis for the operational and functional independence of the OAG is satisfactory, the Office de facto lacks financial independence, as the Ministry of Finance and Economy interferes in the annual budget allocation to the OAG, which leads to under-financing of the Office's activities.

2.4. Are the SAI's annual and other reports prepared in a fair, factual and timely manner?

The OAG law sets clear deadlines for the submission of audit reports: no later than 31 August of the year following the audit period, the Auditor-General is to provide the Assembly with a report on the regularity audit of the Kosovo Consolidated Budget (KCB) and each institution or entity that has to be audited annually. However, this time frame is not consistent with the requirements of the Law on Public Financial Management and Accountability, which states that the Auditor General is to submit the annual report (...) by 31 July following the end of the fiscal year to which the report relates. The OAG has not yet been able to meet either of these deadlines. The annual report of the audits carried out during the budget year 2006 was submitted in January 2008, and the annual report for 2007 in December 2008.

This means that, so far, the report on the regularity audit of the KCB has neither been available to the Assembly for its approval of the previous year's budget execution nor for the Assembly's discussions on the budget of the following fiscal year.

The completion of statutory audits and report publication was apparently the key institutional priority in 2008. The achievement of this priority posed the risk that sacrifices would be made in terms of quality. Since the establishment of the OAG in early 2003, this risk has to a large degree been minimised through the engagement of international expertise tasked to ensure that final audit reports were of an acceptable quality and were prepared in accordance with international standards. However, this arrangement is clearly neither sustainable nor desirable, especially now that the OAG has been fully integrated into the institutional arrangements of the state. Therefore, to reduce its dependence on external resources, the OAG needs to begin to provide evidence that it is starting to take local ownership and responsibility for the management of the audit cycle, which culminates in the production of audit reports to international standards. To achieve this objective, any medium-term technical assistance needs to be targeted at raising developmental and institutional capacities and not at simply providing the current levels of direct operational support. The OAG has understood these shortcomings of the past and will now take a platform-approach by defining the current stage of development as the basis for the next support project.

Concerning fair and factual reporting, the OAG law stipulates that the Auditor General is to provide his/her report to the audited institution or entity; the management of the institution or entity is to have 14 days from the date of receipt of the AG's report to provide the AG with its responses, if any, which are to be attached to the audit report and form a part thereof. Copies of the final version of the Auditor General's report are to be made available to the public.

This regulated contradictory procedure thus gives the audited entity a right to express its opinion on the audit report. These regulations are applied in practice.

A concern is that the auditees only implement a small proportion (around 35%) of the recommendations made in the audit reports. This means that the impact of audit reports is not good enough and suggests that the same problems are repeated over the years. Further analysis is needed, and has been started, to assess the reasons for this situation and to find practical approaches to meeting this challenge. It has already been recognised by the OAG that one of the reasons for this lack of follow-up is the insufficient readability of the reports.

The OAG has not yet been able to prepare its annual report on time. The law requires the preparation of audit reports in a fair and factual manner, with findings based on evidence and subject to a contradictory procedure. However, the reports have little impact, as only 35% of the recommendations are implemented. Since the recommendations concern corrective

measures for individual transactions, their impact on the public financial management system and on financial management practice is small.

2.5. *Is the work of the SAI effectively considered by the Assembly, e.g. by a designated committee that also reports on its own findings?*

According to the Rules of Procedure of the Assembly of Kosovo, the Budget and Finance Committee is responsible for examining the annual reports of the OAG, the audited financial statements of the Kosovo Consolidated Budget (KCB), and other audit reports. The Committee is to submit reports to the Assembly on its findings from time to time, and the Assembly is to find opportunities to debate such reports.

In practice, however, the Assembly in general and the Committee for Budget and Finance in particular do not show much interest in the audit reports or in following-up the OAG's recommendations. This might partly be due to the fact that to date the annual report has been submitted to the Assembly at a moment when the debate on the budget has already finished. The information given in the reports therefore cannot be of immediate use to the Assembly. On the other hand, the OAG suggests that there is a lack of understanding by the members of the Assembly of the role of the OAG in relation to the responsibility of the Assembly itself in the financial oversight of the government.

Further analysis of the reasons for the lack of interest of the Assembly in audit work is needed, and has been started, so as to define measures to overcome this problem. The OAG must become proactive in raising awareness in the Assembly and in supporting especially the Committee for Budget and Finance in developing its capacity to assume its financial oversight responsibilities.

The work of the OAG in Kosovo is not yet sufficiently taken into consideration by the Assembly. The Assembly's designated Committee for Budget and Finance does not report on its findings. The relationship between the OAG and the Assembly needs to be considerably enhanced, and the OAG is invited to proactively support awareness-raising in the Assembly and capacity-development in the Committee for Budget and Finance. Consideration should be given to improving the timeliness and readability of reports, and both need to be adapted to the needs of the Assembly. The OAG is aware of this challenge and has started to address the problem.

2.6. *Has the SAI adopted internationally and generally recognised auditing standards compatible with EU requirements, and how far have they been implemented?*

On 19 December 2005, the professional Code of Ethics for the OAG was endorsed. In 2008 a Code of Professional Conduct was finalised, and key documents, such as the INTOSAI Code of Ethics and Guidance on Internal Control, were translated.

In 2006 the OAG had started – with external help – to draft its own audit manual, suitable for Kosovan circumstances and reflecting the reality of the working environment, including its first experiences with audit work. The OAG is now working in accordance with a draft audit manual covering each of the main stages of the audit process. The manual will be supported by prescribed forms as well as guidelines on internal quality control assurance mechanisms. An OAG Audit Manual Review and Working Group has been established to update the audit manual and to ensure its completeness. These support materials are being developed in the framework of the IPA project, "Further Support to the OAG".

In 2008 the OAG adopted a reporting format that meets the expectations of international standards and good practice. There is continuing evidence that the OAG's corporate style is becoming institutionalised. It is the OAG's intention to proceed in this direction and to ensure that those standards will be used in future audits.

An important gap in the current OAG structure is that, contrary to INTOSAI standards, it has no dedicated institutional mechanism for the systematic review and quality assurance of all OAG audit outputs. This shortcoming extends to all components of the audit cycle – audit planning, audit execution, and assurance that final reports contain an audit opinion based on factual evidence. The development and implementation of a quality assurance strategy might help to overcome this problem

and ensure that measures to improve the quality of audit work are built into the work itself. The OAG has started to prepare such a strategy.

The OAG has started to adopt internationally and generally recognised auditing standards compatible with EU requirements. Together with the current support project, the OAG is working further on this issue, and some progress has been made with the adoption of a standard reporting format, which is used more and more for audit reports. It will take time to adopt internationally recognised standards and to adapt them to the Kosovan reality.

2.7. Is the SAI appropriately aware of the requirements of the EU accession process?

The fact that the Auditor General (AG) has so far been an international expert, most of the time from an EU Member State, ensures that the management of the OAG is appropriately aware of the requirements of the EU accession process. One of the three components of the ongoing TA project is the further approximation to the EU *acquis communautaire* and to INTOSAI standards, with a sub-component to ensure that the current activities of the OAG reflect, or are developed to meet, both the requirements of chapter 32 of the *acquis* and best practice in other European supreme audit institutions. In this context, OAG staff are becoming acquainted with the requirements of the EU accession process.

Due to the status of Kosovo, the OAG is not yet entitled to become a member of international organisations, such as INTOSAI or EUROSAI, and it thus does not have the possibility to benefit from any training or networking activities carried out in the framework of these international networks. However, the OAG is a member of the European organisation for regional audit institutions (EURORAI) and participated in some of their events in 2008.

The OAG seems appropriately aware of the requirements of the EU accession process.

3. Capacity to Further Develop the System

The establishment of the Office of the Auditor General has been a project with many challenges.

The EU-funded project, “Support to the Creation and Establishment of a Supreme Audit Institution in Kosovo” (CARDS 2001), managed by the EAR started in May 2003 and was originally set for 44 months – this period expired at the end of October 2006. The project assisted in setting up the Office and in its further development. An audit support unit, comprised of three long-term audit advisors, was also established.

A follow-up EU-funded project, “Office of the Auditor General Audits” (CARDS 2006), started in February 2007 and closed at the end of May 2007. The aim of this project was to support the OAG in carrying out its annual audit plan.

The EAR project, “Further Support to the OAG”, commenced in October 2007. The duration of the project was originally 18 months, with a scheduled completion date of 29 April 2009. However, this project has now been extended as a no-cost extension to 3 July 2009.

This project aims to position the OAG for its anticipated future role, in particular by providing it with a strategic policy direction. The objective is to make the OAG “fit for purpose” in the sense that it is ready to take on a fuller role as an institution, with attributes that are expected in time to be fully in line with those of a supreme audit institution. By means of a capacity-building programme, the project aims to further strengthen the operational and functional capacity of the OAG to perform its mandate. This project is intended to assist the OAG in taking ownership of the documents produced in the previous project and in the further implementation of the Strategic Development Plan. The project has three basic objectives:

- To achieve effective operation of the OAG, including the full mainstreaming of gender and minority issues;

- To improve OAG compliance with the EU *acquis communautaire* and with international standards as defined by the International Organisation of Supreme Audit Institutions (INTOSAI);
- To continue to consolidate the implementation of high quality external audits of the Kosovo Consolidated Budget (KCB), with a view to ensuring the sustainability of the external audit function.

One of the support activities of the project was to develop a Strategic Development Plan (SDP) for the OAG, the objectives of which have generally been welcomed. Since the arrival of the current AG, the SDP has been considerably updated, but it is still in a draft version. The plan consists of four pillars:

- New legal framework;
- Accountability and professional standards;
- Institutional capacity-building;
- Model public organisation.

A twinning project is foreseen to start in 2009. The new Auditor General is currently taking stock of the achievements of the support project as a platform on which the twinning project could be built.

The OAG's first Annual Performance Report, covering 2008, was issued and sent to the Assembly in April 2009; the report indicates the OAG's achievements in 2008 in terms of the following indicators:

- Number of reports produced;
- Audit coverage (own and/or contracted out);
- Timeliness of reports;
- Quality;
- Impact.

The Annual Performance Report gives feedback to the Assembly, thereby holding the Auditor General accountable for the execution of his responsibilities in 2008. At the same time, the report is intended to serve as input to the budget dialogue between the Assembly and the Auditor General for the budget year 2010. In this report the OAG draws a rather self-critical picture and names the main challenges that the Office has to face in order to reach its aim of becoming a public external audit institution that is fully in conformity with internationally recognised auditing standards and with good European practice.

With its first Annual Performance Report, the OAG has shown its ability to critically analyse its performance and to identify areas where there is room for improvement.

For the planned twinning project, it will be crucial to build on the achievements of previous projects and to provide coherent support by ensuring that the path that has already been paved is followed and that time and energy are not wasted on completely new approaches.

ANNEX

Auditees	2008			2007			2006		
	Mandatory Audits	Audited		Mandatory Audits	Audited		Mandatory Audits	Audited	
		OAG	Contracted		OAG	Contracted		OAG	Contracted
KCB	1	1		1	1		1	1	
State Public Authorities	23	16		19	17		19	13	1
Municipalities	33	10	19	31	27		30		30
CBK	1			1			1		
Others ¹²	51	8		50	8	1	43	7	
Total	109	35	19	102	53	1	94	21	31

Source: OAG, Annual Performance Report 2008



¹² The category “others” includes the Prime Minister, KTA, Customs, Police Service of Kosovo, Co-ordinator’s Office of KPC, and public companies and some other agencies with a smaller budget.



SIGMA

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

KOSOVO (under UNSCR 1244/99)

**PUBLIC EXPENDITURE
MANAGEMENT SYSTEM**

ASSESSMENT MAY 2009

1. Summary

Main Developments since last year

In general no fundamental changes have been made since last year, although some developments have certainly taken place. The approval of the new Law on Financial Management and Accountability (LFMA), including the regulation of the Medium-Term Expenditure Framework (MTEF) preparation and approval process, as well as the additional efforts made in terms of donor co-ordination (creation of a new agency responsible for all donor co-ordination) and investment planning are certainly worth highlighting. One has to keep in mind, however, that the implementation of these initiatives and their eventual merits cannot be addressed yet.

Main Characteristics (strengths and weaknesses)

- The legal framework established for public expenditure management in Kosovo contains many elements corresponding to international standards, mainly due to the efforts of the international community. However, the gap between some of the legal requirements and the current administrative capacities seems to be too large to be bridged.
- One of the most important issues affecting reforms in this area is the lack of effective donor co-ordination, which results in an ineffective use of most of the resources provided.
- Development activities in public expenditure management are not logically integrated, and there is no coherent and overall strategy for the development of financial management. Some departments in the Ministry of Finance and Economy (MFE) prepare annual work plans, which include development activities foreseen for the following year, but there are basically no consultation mechanisms set up between departments for the preparation of these plans (sometimes one department was not even aware that another department had a work plan).
- Strategic planning is in its very early stages, thereby limiting the further development of the MTEF.
- The IT systems supporting various steps in public expenditure management are well developed. However, due to the lack of administrative capacity, these systems are not used to the fullest, since the capacity to analyse data in both the budget preparation phase and the execution phase is lacking.

Recommendations for Reform

- National administrations should take stronger ownership of reforms, co-operation mechanisms within the administration should be strengthened, and attempts should be made to co-ordinate the various reforms in a meaningful manner within the context of overall public expenditure management. It would be worthwhile to develop a comprehensive reform agenda (covering the entire public expenditure management cycle). It would be rational to lower ambitions with regard to more sophisticated developments (such as programme-based or results-oriented budgeting or a performance system in local health care); resources should be devoted to getting the basics right first before moving on to further developments.
- It would be worthwhile to carry out an analysis of current legislative acts in the area of public financial management, with the aim of providing an overview of
 - a) regulations that the administration is currently unable to implement and the implementation of which it would be rational to postpone, and
 - b) the functions that are currently exercised but are lacking a legal base. This kind of knowledge would help to diminish the current gap between legislation and actual capacities and reduce the loopholes in the legislation. Each legislative act should have an “owner” in the administration.
 - c) regulations that are incompatible with the overall set-up of laws and institutions and which lead to a lack of real accountability and of real enforcement mechanisms.

- Steps should be taken to achieve the harmonisation of (planning) processes of external and internal funds, create better systems for donor co-ordination, and enhance budget coverage in relation to donor funds.
- The overall analytical capacity for each and every step of the public financial management process should be enhanced substantially. In this regard, additional training is not enough. The problem most probably lies in the motivation and good will of officials in trying to understand the substance of the processes they are responsible for as well as their willingness to develop themselves and the systems and procedures in the areas of their responsibility.

2. Legal Framework

Overall principles for public financial management are established by the new Constitution, which states that public expenditure and the collection of public revenue are to be based on the principles of accountability, effectiveness, efficiency and transparency; that the conduct of fiscal policy at all levels of government is to be compatible with the conditions for low-inflationary and sustainable economic growth and employment creation; and that public borrowing is to be regulated by law and to be compatible with economic stability and fiscal sustainability.

Fiscal matters in Kosovo are mainly regulated by the Law on Financial Management and Accountability (LFMA), Law No. 03/L-048, which governs budget planning and execution, reporting, accounting, auditing and financial control, and defines the officials and institutions involved in public financial management. All provisions of the law also apply to municipalities to the same extent as to any other budget organisation, if not specifically provided otherwise by a provision of the LFMA or by the Law on Local Government Finances (LLGF), Law No 03/L-048). The Internal Audit Law (Law No. 02/L-74), which was published in June 2007, is applicable to all public sector entities, including each and every public authority and public undertaking in Kosovo.

The preparation of the annual budget is regulated in more detail by budget circulars issued annually by the Minister of Finance and Economy. Separate circulars are sent to budget organisations and municipalities. The initial circular provides instructions, a tentative timetable and ceilings for the preparation of the budget proposals; if needed, the first circular is followed by additional circulars during the budget preparation process. The Kosovo Consolidated Budget (including also the budget for municipalities) is passed by the Assembly annually. For budget execution Treasury regulations give more detailed provisions.

The new LFMA, passed in 2008, replaces the LFMA of 2003. One element of the new LFMA which was the regulation of the Medium-Term Expenditure Framework (MTEF) process, which previously occurred without a proper legal base. Other amendments include specifications regarding deadlines within the budget planning process and amendments of the budget and regulations in the event that unexpected activities need to be financed or that changes in the structures of budget organisations and municipalities are made during the budget year.

The annual budget has also gone through some changes, mainly regarding additional provisions with respect to personnel expenditures (the government does not have the right to increase the number of employees in the public service – the Assembly has the relevant prerogative right) and the use of the capital budget (during the budgetary year, less flexible possibilities to make changes in the planned investment envelope).

In overall terms the legislative framework is very strict and detailed, including for municipalities, which leaves municipalities basically no room for independent decision-making (for example, the budget circulars give very itemized instructions for the internal budget preparation process within the municipality as well as setting strict budget and staffing ceilings).

In the past year improvements have been made regarding the comprehensiveness of the legislation (e.g. regarding MTEF, which was mentioned above). However, there is still a need for further improvement, as some matters have remained legally unregulated. For example, according to the MTEF the government has made a decision to create a stabilisation reserve, although the LFMA does not stipulate the creation and use of any kind of fiscal reserves. The issues regarding the possible creation of fiscal reserves and the terms and conditions for using such reserves should be regulated by the LFMA.

In general, the legislative framework contains many elements of good practice and international standards, but in many areas there are aspects that are much too advanced. Those regulations are ahead of the current real state of development, and therefore in many aspects the legislative framework is not understandable to the officials implementing the acts or to the public in general. The main problem therefore lies in implementation, mainly due to the lack of relevant administrative capacity and to the poor understanding of legislative acts (the need for some provisions is not understood). One of the reasons for such a situation is most probably the lack of ownership. Currently

not all of the legislative acts are “owned” by a specific department within the administration – for example, the LFMA was amended without the proper involvement of the related departments. A clear division of responsibilities within the administration should be made in order to ensure the implementation of legislative acts as well as the realisation of future developments. This issue has already been addressed in previous assessment reports, and the situation can also be foreseen to last for the coming years.

It is clear that the international community has not sufficiently co-ordinated its efforts to ensure a coherent style throughout the Kosovan legal framework so as to make it comprehensive, consistent and transparent. Despite all of the previous problems, the legal tradition in Kosovo was based on continental European law; there is now a certain mixture of continental and common law institutions (commissions/agencies, etc.). This situation has – for certain institutions – resulted in a lack of real accountability and of real enforcement mechanisms due to the incompatibility between the different legal systems. It could lead to the subjective interpretation of legislation, while leaving other necessary parts of the legal framework unregulated.

The legal framework established in Kosovo for public expenditure management corresponds to international standards as a result of the efforts of foreign experts, although it contains some inconsistencies and some matters have remained unregulated. The main problem, however, lies in its implementation, mainly due to the lack of relevant administrative capacity and a poor understanding of the rule of law. Furthermore, it can still be said that in many areas the laws are ahead of the current real state of development, and therefore in many respects the legislative framework is not understandable to the officials implementing the acts or to the public in general.

3. Institutional Framework

The Constitution lays down the overall division of fiscal authority between the legislature and the executive, stating that the government proposes the budget of the Republic of Kosovo and that the Assembly approves the budget. In the Assembly the Committee on Budget and Finance, composed of 12 members, is responsible, according to the rules of procedures, for fiscal issues. The main tasks of the committee include:

- discussing budget and finance matters, including the annual budget;
- control of annual reports and financial oversight of the Consolidated Fund of Kosovo associated to the budget;
- setting the possible expenses that can be allocated by each draft law and making recommendations in the relevant functional committee of the Assembly, when appropriate.

The deadlines for the government’s submission of the budget proposal and other related issues are prescribed by the LFMA. The LFMA also provides very detailed responsibilities for specific departments (namely Treasury and Budget Department) of the Ministry of Finance and Economy (MFE) and for specific officials in the administration.

The MFE came into being following the abolition of the Central Fiscal Authority (CFA) at the end of 2002. The MFE (including the tax administration) has 888 employees in 2009, in comparison with 871 in 2007. The main departments of the MFE responsible for public financial management are the Budget Department, the Department of Local Municipalities, and the Treasury. A separate unit in the MFE has been designated to deal with public investments.

The responsibilities of the Budget Department, according to the LFMA, include the following: developing a proposed Kosovo Consolidated Budget, preparing the Medium-Term Expenditure Framework, implementing the Kosovo Consolidated Budget, and assessing requests for changes to appropriations. The head of the Budget Department is supervised by the Secretary General of the MFE.

According to the legislation there is to be one Budget Department with two separate units under it: a central budget unit and a municipal budget unit. In 2007 the MFE upgraded the municipal budget unit

to a department, with the effect that there are now two separate departments – one dealing with central budget issues and the other with municipal budget issues. It should not be concluded, however, that there is a contradiction with the LFMA, as the law states: “The Minister shall have the authority to establish other departments or units within the Ministry, and to reassign responsibilities among the departments and units of the Ministry, as may be reasonably necessary to assist the Ministry in fulfilling its functions and responsibilities under the present law or another law.” The conclusion can nevertheless be drawn that the law is excessively detailed and prescriptive.

As the Budget Department is responsible, according to the LFMA, for the preparation of the budget, and the budget of municipalities is a part of the Kosovo Consolidated Budget, a very clear division of duties and responsibilities between the two departments should be ensured.

The Treasury is responsible for managing the Kosovo Consolidated Fund. The LFMA in a way emphasises the Treasury’s independence, stipulating that the Treasury is to operate with substantial autonomy and be responsible for its own organisation and staffing, including the hiring of its own financial officers. The general director of the Treasury serves a five-year term. The current structure of the MEF places the Treasury directly under the Minister of Finance and Economy.

Donor co-ordination is the responsibility of the Agency for Co-ordination of Development and EU Integration, an agency under the Prime Minister. The functions of the agency were recently enhanced – previously the responsibilities covered EU relations only. The agency is expected to provide an overview of all of the aid received (including all of the projects financed in the various sectors); however, the agency has not yet provided the overview and the division of responsibilities and co-operation with the MFE is therefore not yet in place. In June 2007 a discussion note on aid management in Kosovo was issued. This note indicated clearly the shortcomings in aid management in Kosovo, both between the Kosovan authorities and the donors and between the donors. The creation of a separate agency for donor co-ordination, which may be in the interest of donors, creates the following risks for the Kosovan financial management system:

- lack of co-ordination with the national budget;
- weakened position of the MFE, given the volume of donor funds;
- distortion of political responsibilities.

It should be considered to give more responsibilities for donor funding to the MFE or to move the function entirely to the MFE as it alone has an entire overview of state finances and is able to assess the impacts of foreign aid channeled to the various sectors.

The senior management and staff of the MFE are largely Kosovan, although the number of foreign experts remains relatively high. A high proportion of MFE staff exercises support functions. A project to assess the functions within the administration is underway, which should provide support for optimising the structures of the ministry.

In conclusion, it must be pointed out that currently co-ordination mechanisms between the various structures within the administration are not properly in place and responsibilities have not been clearly set.

3.1 The Scope and Transparency of the Budget and Quality of Budget Documentation

The Kosovo Consolidated Budget is very detailed, setting limitations for each institution by department; the budget allocated to each department is divided into programmes, each of which is structured according to the economic classification of expenditures. The investment envelope itemises investments, including even the purchase of telephones. Together with the annual budget, the number of employees for each department within an institution is also set, leaving basically no room for making necessary management decisions during the year (e.g. moving an employee from one department to another within a ministry).

Even though the budget has programmatic classification, the actual capacity to perform programme budgeting is almost non-existent. Furthermore, the basic understanding of a programme does not seem

to be in place, as programmes are named and determined according to department (for approximately 90% of budget lines there is no difference between a programme and a department). Such an exercise does not contribute to budget transparency and further increases the administrative burden.

According to article 2 of the Law on Financial Management and Accountability – LFMA (which specifies what constitutes public money and indicates the sources of public revenue), one source of revenue is represented by grants and gifts from international organisations and foreign governments, which in fact is not planned in the annual budget. The fact that donor funds are not included in the annual budget decreases the transparency of public expenditure management and does not create favourable conditions for well-advised budgetary decision-making in Kosovo, even though approximately 10% of donor funding flows through the Treasury in budget execution.

More importantly, it is an issue of whether donor funds will be rationally allocated and spent and whether relevant guaranteed national co-financing will take into account financial limitations within the budget framework. The related risks are also increased due to the fact that the lines of responsibility between the various institutions involved in monitoring and co-ordinating foreign aid are not clearly set (as also indicated above). Aid in Kosovo has relatively low government ownership and is generally not well co-ordinated. It is characterised by unmanaged allocations between sectors, relatively high allocations for technical assistance (consultants and advisors), and low allocations for capital investment. Almost all aid is in the form of projects, which do not rely on government procedures and public financial management systems and are not reflected in government budgets.

Even though annual budget expenditures are planned and tightly controlled at a very detailed level, the budget scope is not comprehensive, and some revenues and expenditures are left out of the process.

3.2 The Planning Process

The planning process includes a medium-term focus (with top-down elements), in addition to the annual budget preparation process, but currently the planning of activities and the planning of finances do not interlink properly. The various documents produced within the planning process contain many elements which are required by international standards, but sometimes no consultation and/or negotiation process is behind the approval of these documents. Furthermore, they do not necessarily reflect the reality in the country, and sometimes those responsible for implementing them are not even aware of their existence. In addition, the government does not take responsibility and action in accordance with the approved documents.

3.2.1 Medium-Term Expenditure Framework

A Medium-Term Expenditure Framework (MTEF) was approved by the government for the first time in December 2005. This document, covering the period 2006-2008, provided an overview of recent fiscal trends, forecasted the macroeconomic outlook up to the year 2008, and included budget deficit, revenue and expenditure projections. The MTEF 2008-2010 was issued on 17 September 2007, and the MTEF covering the period 2009-2011 dates from 12 June 2008.

As indicated above, the preparation of the MTEF was regulated in 2008. The LFMA now sets the deadline (30 April each year) for the submission of the MTEF to the Assembly and also sets the requirements for the content of the document. The MTEF covers the next fiscal year and estimates for the two following fiscal years. It contains macroeconomic and fiscal forecasts, an analysis of tendencies in the allocation of financial resources, an analysis of budget expenditures by main economic category, an analysis of capital investment tendencies, and a review of salary policy and other financial information. Information on strategic targets and goals that have been set or any other kind of performance information is not obligatory.

Despite the above, there is no systematic strategic planning system in place, and various strategic documents (for both overall strategies and sectoral or line ministry strategies) do not form a systematic base for budgetary allocation. Furthermore, the budget department currently does not have the responsibility to assess the budgetary impacts of various strategies, which will most probably lead

to a situation where many of the approved strategies will never be implemented due to a lack of budgetary resources. In view of this situation, it is hardly possible to rationally plan a budget in the medium term as there is no overall strategic planning system in place that is linked to budgetary decision-making processes. In the context of the MTEF and programme budgeting, it is not possible to plan a budget for a longer period than that of the planned activities using those funds.

There are no proper consultation and/or negotiation processes behind the approved documents for the Medium-Term Expenditure Framework (MTEF). Furthermore, the government does not take entire responsibility and act in accordance with the approved MTEF. The value-added currently gained from the MTEF is therefore rather questionable.

3.2.2 Annual Budget Process

The annual budget preparation process starts in April when, according to the Law on Financial Management and Accounting (LFMA), the first budget circular is issued. The initial budget circular provides instructions and requirements as well as a tentative timetable for the budget preparation process. According to the LFMA, the date by which municipalities must complete and submit their proposed budgets and appropriation requests is 30 September. For other budget organisations, the deadline for submitting such documents – and also for all other steps in between the initial and final deadlines determined by the law regarding the budget preparation process – are specified annually in the budget circular. In October the final decision on the draft budget is taken by the government. Although the budget preparation process starts early, there is limited time for discussions at parliamentary level as the budget is not submitted to the Assembly before 30 October.

However, it should be noted that the current budget calendar has not yet been followed in practice (the new LFMA came into force in 2008); furthermore, the budget preparation calendar that was initially set has not in the past been entirely followed. In 2008 the MTEF was approved only on 12 June, which caused a delay in the issuing of the first budget circular, which gave budget organisations 17 days to prepare and submit their budget proposals. The Kosovo Consolidated Budget for the year 2008 was only approved on 29 February 2008 due to the November 2007 Kosovo-wide elections and the formation of the new government. Therefore, on 31 December 2007, by means of an administrative direction, the fiscal year 2007 was extended by two months until 29 February 2008.

Although the LFMA in general is rather detailed and sets very explicit requirements for the content of a budget proposal, it does not specify rules and regulations for the budget preparation process. The law gives considerable freedom to the Minister of Finance and Economy in the budget process as it does not determine the roles and responsibilities of the MFE (e.g. there is no requirement for budget negotiations being held nor any requirements for the MFE to assess budget proposals). Furthermore, no comprehensive methodology has been worked out for preparing and assessing budget proposals as well as evaluating the budgetary impacts of legal acts and strategic documents (such an assessment is needed even more now that the number of budget-users and the amount of the annual budget have increased). The focus in reviewing budget proposals is on determining whether various requirements (mainly stemming from the budget circulars) have been fulfilled. The obligation to assess the budgetary impacts of all new pieces of legislation has been set, but this rule is not always followed and does not apply to strategic documents at all.

The law does not regulate the budget process in the Assembly – it is only stated that the Minister of Finance has the right to receive adequate notice of, and participate in, any hearing held by an Assembly committee regarding any aspect of the proposed Kosovo Consolidated Budget or the proposed Appropriations Law.

In overall terms, the capacity to both prepare budget proposals and analyse these proposals is weak. Furthermore, proper impact analysis of new pieces of legislation or of amendments to existing legislation is lacking; also the strategies are prepared without any proper financial impact analysis. This situation creates a risk that, once the legal act has been adopted, additional needs for financing will emerge and cannot be implemented since they had not been planned for in the budget.

3.2.3 Public Investments

According to the LFMA, within the preparation process for the MTEF an analysis should be made of capital investment tendencies financed from the budget as well as an assessment of their volume for the next budget year and the two following years. The budget prepared by the Minister of Finance and Economy has to include a capital programme, setting forth a multi-year capital investment plan that identifies and includes the highest priority needs and proposed capital projects for the upcoming fiscal year, together with estimates of the financial impact of such projects on future years.

Within the 2009 budget preparation process, budget organisations were required to develop and submit their financial proposals for public investment projects based on the strategies that emerged from the priorities set by the Government of Kosovo. Although the requirements for the investment budget proposals are said to have been developed, the budget circular in general gives very few instructions, if any, regarding the planning of investment. As the latest circular does not require any analysis of the investment proposals to be presented to the MFE, it remains unclear how the MFE is able to use the information received through the budget preparation process. In addition, no principles have been set down for the analysis and selection of investments to be financed.

One of the main problems faced in this area has been a very low level of execution of the investment budget (70% in 2006 and in 2007), which also indicates that the planning process has to be reviewed and considerably strengthened.

There is a plan to create a separate body within the MFE that would be responsible for public investment planning. The positive impact of such a structural change would hopefully be a sharper focus on improving the current system. However, such a change would also mean that the procedures for preparing and approving budget proposals for capital expenditures would probably not be fully integrated with those for recurrent expenditure, which in a long-term perspective could be seen as an obstacle to further developments in the area of public expenditure management.

Investment planning capacities are at this stage rather weak, and the fact that viable processes and procedures are not in place does not help. Investment planning processes (also at municipal level) are not properly linked to the entire planning process, including strategic planning initiatives.

3.2.4 Municipal Budgets

According to the LFMA, municipalities should receive Operating Grants, which are divided into a General Grant, a Specific Grant for Education and a Specific Grant for Health. The amount of the General Grant is to be the equivalent of 10% of budgeted central government total revenues, excluding revenues from the sale of assets, other extraordinary revenue, dedicated revenue and proceeds from borrowing. In the future and in the event that donor grants are included in the budget (which could cause remarkable annual changes in the volume of revenues), this provision will most probably not be justified and it will be extremely problematic to implement.

To compensate for the low own-source revenue capacity of smaller municipalities, from the total of the General Grant each municipality is to receive a lump sum of 140,000 EUR per year less 1 EUR for each member of the population or 0 EUR for municipalities with populations equal to or greater than 140,000. The remainder of the General Grant is to be allocated between municipalities in proportion to the size of the total population, the size of the minority population (and in addition if a majority of the population is composed of a national minority or minorities), and the geographical area. Population is to be weighted at 89%, size of the minority population at 3%, municipalities with a majority of the population composed of national minorities at 2%, and the geographical area at 6%. Therefore, according to the Law on Local Government Finance (LLGF), when preparing a budget the Minister of Economy and Finance is obliged to use the above formula when proposing the amounts to be appropriated for municipalities. However, it has to be pointed out that in practice the formula does not work properly, mainly due to the fact that updated reliable population statistics are not available.

In 2009 the Specific Grant for Health included a new financing mechanism that aims to stimulate the performance of health providers and encourage improvements in the quality, effectiveness and

efficiency of health care services. The performance-based payment would be 5% of the total health grant for each municipality. At the time that the system was initiated by the budget circular, the actual implementation of the performance financing system (including the determination of performance targets and measures) had not yet occurred.

The process of the municipal budget preparation and the use of the funds available are regulated in great detail by the central government, as the Minister of Finance and Economy issues a circular for municipalities that sets very detailed requirements. Staffing and wage ceilings as well as performance salary components in health care for each municipality are also set out in the circular. These ceilings are set despite the fact that the LLGF stipulates that municipalities are entitled to receive a General Grant, which they may use in the discharge of any of their municipal competences in accordance with the applicable laws of Kosovo. The steps in the budget preparation process are also determined in a very detailed manner; for example, it is indicated in the MFE circular when and how many internal budget circulars a municipality may issue. Therefore, although the budget preparation process in practice may actually happen as indicated in the circular, municipalities have very little room to make their own management decisions.

In general the financing of local municipalities currently does not work properly, but the issues behind the current situation extend way beyond the problems arising from the financing regulations. Until the borderlines of municipalities' rights and responsibilities in practice have been drawn, it is probably not worthwhile making efforts to promote very sophisticated developments, such as performance financing in the health care system. The basics and the basis for any developments, such as general principles for municipal financing in line with the rights and responsibilities of municipalities and relevant control mechanisms, should be put in place first.

3.3 Budget Execution and Monitoring

Budget execution in Kosovo has been fairly low, mainly due to the limited use of funds foreseen for capital expenditures – approximately 30% of these funds were not used during the budget years 2006 and 2007. As it was not permitted to carry any unused funds over to the next budget year (except for appropriations relating to any unspent own source revenues of a municipality), there is a potential incentive to undertake inefficient spending (with respect to all expenditures, not only investments) towards the end of the year. In addition, this situation necessitates the estimation of funds that will be needed for an investment project that is being implemented but will not be completed by the end of one year, and entering those figures into the budget for the following year.

The reasons for capital budget underspending do not stem from the existing legal and regulatory framework for public investment management and public procurement. Capacities to implement the specified procedures are limited and affect the planning, management and implementation of capital spending programmes. Other factors that contribute to capital budget underspending are the single-year outlook in public investment management, including the operation of the Public Investment Programme (PIP) procedures, the budgeting of the capital spending programme, and the operation of public procurement procedures. In the recent MTEF, steps have been foreseen to improve budget execution figures; the possible results of those actions will be seen in the future.

During the budgetary year the Minister of Finance and Economy may reduce the level of funds allocated in respect of an appropriation that was authorised under an Appropriations Law if such a reduction has been made necessary by a macroeconomic shock resulting in reduced revenue, a natural disaster, or the suspension or cancellation by the government of the programme or project to which the allocation relates, and if the minister has received a written authorisation from the government approving the proposed reduction. If an event occurs that requires an urgent or unforeseen expenditure, a budget organisation may apply to the minister for additional funds to cover such an expenditures (this is one of the recent changes made to the LFMA).

The rules for changing appropriations are as follows:

- without obtaining the approval of the Minister of Finance and Economy, a budget organisation may transfer up to 5% of one of its appropriations to another of its appropriations during any fiscal year, provided that no such transfer is made to wages and salaries;
- the Minister of Finance and Economy may authorise the transfer between appropriations of up to 15% of the negatively affected appropriation;
- the government may change up to 25% of the negatively affected appropriation;
- further amendments to appropriations required the approval of the Assembly.

The possibilities of shifting funds between appropriations are therefore rather wide, which means that in principle there is no need for either a rational explanation or for the Assembly to actually approve the budget at such a detailed level. To increase transparency, it might be worthwhile to consider the creation of a system whereby the Assembly would approve a budget that is less detailed and the government would have the obligation of approving a more detailed budget.

The Treasury within the MFE is responsible for the performance of ex ante control of all payment orders. The Treasury is also responsible for the maintenance of financial software. The FreeBalance accounting system, which was installed with USAID assistance in the MFE and in all budget organisations, is currently operational.

All public money is to be deposited in an official bank account that has been established or designated by the Treasury. However, financial assistance to a municipality from the Republic of Serbia may be deposited in a commercial bank account, as provided for in the LLGF.

Although the annual budget is approved at a very detailed level by parliament, the possibilities for the government to shift funds between budget lines during the year without parliamentary approval are rather wide. To increase transparency and effectiveness, it would be worthwhile to consider amending the current budget system by setting up a multi-level decision-making process. With regard to expenditure control, once internal control arrangements within budget organisations supported by internal audit have developed, it would be rational to loosen some of the controls that the Treasury is currently exercising.

3.4 Accounting and Reporting

According to the LFMA the chart of accounts must be consistent with the IMF General Finance Statistics (GFS). The budget classification system may be modified to meet the specific information needs of the government. Each budget organisation is obliged within 30 days of the conclusion of each fiscal year to provide to the General Director of the Treasury the unaudited financial statements and a confirmation in writing that such financial statements give a true and fair presentation of the finances and financial transactions of the budget organisation. Within 90 days the Treasury should reconcile the financial statements received and provide the financial statements for all budget organisations to the Auditor-General for auditing.

Within one month of receipt by the budget organisation of its audited financial statements, each budget organisation must submit to the MFE an annual report for the previous fiscal year. The MFE presents a consolidated report on each budget organisation to the Assembly and to the government within 30 days of receipt of the budget organisation's report. In addition, no later than 31 March of each calendar year, the Minister of Finance and Economy is to prepare and submit to the government for approval and submission to the Assembly a final budget reconciliation report on the budget for the previous fiscal year and the two prior fiscal years.

Information on budget execution is produced monthly, quarterly and annually, but these reports are not used as inputs to the budget preparation process; one of the main incentives for producing the reports is to comply with relevant international standards and good practices. The same situation applies to audit reports, which are produced but not used, and accordingly no decisions within the budgeting process take audit findings into account.

In general, various reports (including audit reports) are not systematically used as an input to budgetary decision-making. Accounting and reporting systems as well as timing of the reports currently do not meet the needs of the planning process.

4. Capacity to Further Develop the System

The main weakness limiting future developments in public expenditure management is the lack of ownership – for example, no department in the administration takes responsibility for fundamentally important legal acts, such as the LFMA. This situation seems to be derived from the fact that many of the developments initiated by international experts, even while induced by actual local demands or needs, have not been taken over by the Kosovan authorities; furthermore, these developments are not logically sequenced and do not form a systematic entirety (no effective donor co-ordination is in place). As a result, the reforms that have been carried out are not understandable to local officials and therefore these officials are not able to implement them.

Another issue hampering further developments in this area is the generally low administrative capacity, which is very much linked to the low salary levels (and at the same time the rather unbalanced workload of officials), low motivation and high rate of staff leaving the civil service. The last issue is especially true regarding young and relatively well-trained officials, who leave the administration for higher salaries offered by donors or international organisations. Using the budget as a tool, it would be worthwhile to find resources for raising the average salary levels, which would most probably increase the motivation level of officials within the administration.

Another key challenge involves improving co-operation between various departments, including between policy departments and departments responsible for financial management.

Developments in public expenditure management are currently carried forward without sufficient Kosovan ownership of these changes, and therefore the public expenditure management system does not support the actual decision-making process.

Recommendations for Assistance

Currently the main area that would benefit from substantial support (and that also constitutes a prerequisite for the proper functioning of some other components of public expenditure, such as MTEF) is the strategic planning system and related processes and capacities. Another area in which the government would gain from international support the most would be assistance in harmonising various functions of public financial management, with the aim of ensuring that the entire cycle of public finances works logically and that the various functions provide support to each other. Most probably, support would be needed in developing a comprehensive reform agenda for public expenditure management as well.





SIGMA

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

KOSOVO (under UNSCR 1244/99)

PUBLIC INTEGRITY SYSTEM

ASSESSMENT MAY 2009

Summary

Main Developments since last year

Besides some improvements in the legal framework and in the capacity of some institutions, corruption continues to be seen as a very serious problem in Kosovo.

Public awareness is increasing regarding the negative effects of corruption in developing Kosovo and in implementing a full democratic regime, where public institutions should be exclusively guided by public interest. If not urgently and properly addressed, social problems could emerge in Kosovo, fuelled by the financial and economic crisis and by high unemployment.

Trust in public institutions (Assembly, government, presidency, judiciary, public administration in general, public companies) is rather low and even decreasing, and a culture of accountability is almost missing. Conflict of interest seems to be a rather strange concept in Kosovo.

Main Characteristics (strengths and weaknesses)

As the political and institutional situation in Kosovo remains complex, it is difficult to consistently set clear political priorities. Power is still shared with the international community in several areas and in some parts of the territory it is not exercised with uniformity. Apparently, there is a certain degree of political will to change the situation, but initiatives are often not consistently – or at least not properly – implemented due to the fragility of key institutions and the lack of resources. This is the case, for instance, for the fight against corruption, which seems to be high on the political agenda but where in fact changes are few.

Public awareness regarding the problem of corruption and the need for “clean” institutions served by public officials and public servants above suspicion seems to be increasing in Kosovo. However, the situation is still far from acceptable. The common perception is that many of the administrative decisions on individual cases are taken according to political affiliation and family ties. The borderline between politicians, the administration and the judiciary is unclear, and it seems that there is little political will in doing the required clarification. Lack of trust in institutions, including the judiciary, is widespread.

Legislation is being improved but needs to be completed and implemented. The institutional framework is also being consolidated but needs to be made more effective, and institutions require more co-operative efforts. Although a good legal system could support changes, corruption is a problem of development and culture that cannot be resolved solely by laws or institutions. Much more than a legal system is needed in order to design and implement good policies, improve living conditions, reduce the informal economy, expand the rule of law and develop participative and engaged citizenship. Campaigns to inform the general public and training for public servants on ethics and on required standards of quality of services are needed. However, the best and most effective efforts for changing the situation must come from the top political and administrative positions through practical examples of ethical conduct based on sound values and from more active engagement of civil society.

The disproportion in salaries in some key functions needs to be dealt with in order to increase the sense of fairness and to reach a better balance between officials who perform public functions and responsibilities¹³.

Within those institutions that are in charge of improving integrity and preventing and controlling corruption, better co-ordination and increased co-operation is vital. The lack of sufficient and qualified staff and the budgetary constraints reinforce this recommendation. The Kosovo Agency for Anti-Corruption (KACA) is improving its capacity but lacks power and the staff needs better qualifications.

¹³ More information on the salary system is available in Sigma's 2008 report on Public Service and the Administrative Framework in Kosovo (<http://www.sigmaweb.org/dataoecd/48/31/41637624.pdf>).

Formally, the system and mechanisms to ensure political and administrative accountability are either in place or in preparation. Nevertheless, misunderstandings regarding the various roles and failure to respect the autonomy or independence of various bodies are undermining trust in the whole system. In particular, the Assembly and the government need to pay closer attention to the reports of the bodies in charge of controlling the system, support their activities through the implementation of their recommendations, and provide feedback.

The judiciary requires improvements and, as the ultimate guardian of the rule of law, needs to demonstrate that it has the capacity to investigate, decide and implement decisions, irrespective of the status of the parties, thereby showing that it is a trustable institution.

The ongoing decentralisation process could provide an opportunity for improvement – as the accountability lines to citizens would be more direct and visible – but it also constitutes a risk in terms of spreading bad practices and corruption. Therefore, close monitoring and effective control need to be implemented.

Recommendations for Reform

As a first priority, the acceleration of legal and institutional reforms in the judiciary, including the assurance of fair working conditions, is vital for building an independent, effective and trustworthy judiciary that is capable of improving the rule of law in Kosovo.

Better and effective co-operation and co-ordination between the various political and administrative institutions is necessary.

Transparency in public life and in the activity of the public administration, including the provision of relevant information, should be increased. Training should be reinforced in this regard.

Political actors and especially managers should consistently and coherently act according to irreproachable ethical standards.

Since decentralisation is progressing, close monitoring and support to the reform process should be in place in order to avoid contamination from a culture and practices that are lacking in integrity.

Introduction

Kosovo declared its independence on 17 February 2008 and in the first year notable progress was made in establishing the framework of functioning for the state. Following Ahtisaari's Comprehensive Proposal for Kosovo Settlement, the Assembly approved 120 laws. More than 50 laws were approved without any proper consultative procedure in the period between the declaration of independence in February and the entry into force of the new Constitution in June 2008. The new Constitution empowers Kosovo institutions with legislative, executive and judicial power, replacing that of the UN Interim Administration Mission in Kosovo (UNMIK). However, the lack of endorsement by the Security Council of all of those developments has created confusion about the continuing role of UNMIK and the power of the newly established EU Rule of Law Mission in Kosovo (EULEX).

The legislative agenda that was set as a result of the declaration of independence of Kosovo also includes several laws that are related to preventing or combatting corruption and other irregularities and that are meant to ensure the functioning of the public integrity system in Kosovo.

However, despite this agenda, the perception of the public and the assessments of independent organisations show that corruption in Kosovan institutions is highly widespread. In recent years the political will and measures to combat corruption have not been sufficient.

This report assesses the legal framework that has been developed in Kosovo by UNMIK and by Kosovan institutions since 1999 with a view to ensuring the public integrity of elected and established institutions. This framework includes the Kosovo Assembly, the executive, political parties and the judiciary, but does not cover the international institutions that have operated in Kosovo under UN Security Council Resolution 1244. This is the first assessment report on the Public Integrity System in Kosovo in accordance with the baselines established by Sigma. The reported information was gathered by mid-April 2009.

1. Integrity in the Assembly

The Kosovo Assembly was first established, in accordance with the Constitutional framework promulgated by UNMIK Regulation no. 2001/9, as the highest legislative body in Kosovo, with its powers derived from UN Security Council Resolution 1244. However, the highest legislative authority in Kosovo under the UNMIK administration has been the Special Representative of the UN Secretary-General (SRSG). The first elections were held in November 2001 and the latest on 17 November 2007. The legal basis of the Assembly is now set in the Constitution of Kosovo, which entered into force on 15 June 2008. The integrity of Members of Parliament (MPs) is covered by a number of laws and UNMIK regulations, including the Constitution, Provisional Criminal Code as amended, Criminal Procedural Code as amended, Law on Preventing Conflict of Interest in Exercising Public Function, Law on Anti-corruption, Regulation no. 2004/12 on Elections replaced by the new Law on General Election and Law on Municipal Elections, Law on Public Procurement, and Law on Financial Management and Accountability. On 2 November 2007 the Assembly of Kosovo adopted the draft Law on Rights and Responsibilities of Deputies. Since the draft law had not yet been promulgated, partly because it did not include an accurate financial impact statement, it has been returned to the Assembly for further consideration. However, the fact that the draft law is still pending shows a lack of political will to regulate such matters more consistently.

1.1 Immunity of MPs

The MPs enjoy immunity, as provided by the Constitution (article 75). Deputies of the Assembly are immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as deputies. This immunity does not prevent the criminal prosecution of deputies for actions taken outside the scope of their responsibilities as deputies. A member of the Assembly is not to be arrested or otherwise detained while performing her/his duties as an MP without the consent of the majority of all MPs. The Rules of Procedures of the Assembly regulate (but not in detail) the domain of immunity of Assembly members. The request to waive an MP's immunity is to be made by the competent body in charge of the criminal prosecution, while the decision to waive an MP's immunity is taken by the Assembly (with a two-third vote of the deputies present at

the session), following the recommendation of the Committee for Immunities and Privileges of Deputies¹⁴. The MPs whose immunity would be waived are entitled to personally, or through an authorised person, appeal to the Special Chamber of the Supreme Court, which decides on the matter. However, the appeal does not suspend the decision of the Assembly to waive its immunity. In any event, the detention of an MP may be granted, without the prior consent of the Assembly, if he/she is caught in the act of committing a serious crime *in flagranti*, which is punishable by five years or more of imprisonment¹⁵.

Once an MP has been convicted of a criminal offence in Kosovo and sentenced to serve a prison term for a period of six months or more, he/she lose the status of a member of the Assembly¹⁶. The loss of the MP's mandate can also occur if he/she is serving a sentence imposed by the International Criminal Tribunal for Former Yugoslavia or is under indictment by the Tribunal and has failed to comply with an order to appear before it.

The draft Law on Deputies goes further in regulating matters of immunity for MPs. Article 9 sets out the procedure for waiving immunity, which may be considered upon the request of the General Public Prosecutor of Kosovo. If a private suit that is not based on the Criminal Procedural Code is filed against a deputy, the court responsible for the case may file the request to waive the immunity of the accused MP.

In the history of the Kosovo Assembly only once has the mandate of an MP been terminated and consequently the MP's immunity waived as well. The cause was the long absence of the MP from the working sessions of the Assembly. Although it was a simple case, the Committee for Immunities and Privileges of Deputies took a long time to decide on the matter¹⁷. To date not a single request for lifting immunity has been presented to the Assembly.

In general, the immunity of MPs is aligned with common European principles and practices.

1.2 Remuneration of Deputies

The Rules of Procedures of the Assembly clearly specify the right to remuneration of members of the Assembly. Their remuneration must be as a monthly salary and as additional remuneration. After the MP's term of office has terminated normally, he/she is entitled to a monthly salary for 12 months if during this time he/she does not return to the position that he/she held before being elected as an MP or if he/she does not take up other employment. The monthly salary (including work-related expenses) of a deputy is now 2,171 EUR¹⁸. The additional remuneration of an MP consists of compensation for participation in sessions of the Assembly and of its committees, for acting as chairpersons on committees or in parliamentary groups, and for engaging in activities that are not considered as part of the usual activities of the Assembly, in addition to official duty travel and accommodation expenses.

¹⁴ Rules of Procedures of the Assembly, Rule 13.

¹⁵ Rules of Procedures of the Assembly, Rule 13.2.

¹⁶ Rules of Procedures of the Assembly, Rule 14.1.

¹⁷ The Assembly Committee for Immunities and Privileges of Deputies was established for the first time during the 3rd legislature of the Assembly on 4 January 2008. The founding meeting of this committee was held on 25 February 2008. To date on the recommendation of the Assembly's Committee for Immunities and Privileges of Deputies, based on the Rules of Procedure of the Assembly, one deputy's mandate has been terminated. According to the Rules of Procedure (Rule 14.3), "If a Member of the Assembly throughout a period of six months attends none of the sessions of the Assembly or of a Committee, of which he/she is a member, and cannot show good cause to the satisfaction of the President of the Assembly, the President shall propose to the Assembly that the Member concerned cease to be a Member."

¹⁸ Following the establishment of the Provisional Institutions of Self-Government (PISG), Administrative Direction no. 2001/23 Implementing UNMIK Regulation no. 2001/9 on a Constitutional Framework set the remuneration rates of the Kosovo Assembly Members. The President of the Assembly receives a monthly salary of DM 1080 (about 540 EUR). In addition, the President of the Assembly is paid a monthly allowance equivalent to 20% of his/her monthly salary to cover expenses related to official duties. Other members of the Assembly each receive a monthly salary of DM 800 (about 400 EUR). In addition, the members of the Assembly are paid a monthly allowance equivalent to 25% of their monthly salary to cover expenses related to official duties.

The authorisation of additional remuneration for an MP requires a special decision by the Presidency of the Assembly.

The salary regulation and the authorisation to set the salary level for MPs are not consistently regulated. The Assembly, benefiting from its sovereign right to decide, took a decision on the salaries of MPs and other Assembly staff without consulting the government and without taking into account the general regulation on salaries and the salary levels in other state institutions. This attitude has created some friction with other institutions and generated similar actions (for example, the President of Kosovo increased the salaries of civil servants in the President's Office without consulting the government). All of these situations are expected to be regulated by the new Law on the Incomes of Public Officials. The salaries of deputies, as for all public officials, are subject to taxation based on the Law on Personal Tax Income (03/L-115).

Looking at the regional context, the general level of salaries in Kosovo, and the salaries of some relevant senior officials¹⁹, the salaries of MPs are very high. Furthermore, additional remuneration for participation in sessions and committees of the Assembly does not seem reasonable, as such participation is part of an MP's usual function. To be paid for a period of 12 months after termination of office is also a supplementary benefit that should be reconsidered.

1.3 Asset Declaration

The obligation for senior officials to declare assets is defined in the Anti-Corruption Law²⁰. Senior officials are obliged, within a month of taking up duty, to declare all personal assets and all assets of close relatives to the Kosovo Agency for Anti-Corruption (KACA)²¹. Senior officials are considered to be the following: President, Prime Minister, deputies of the Prime Minister, President of the Assembly and MPs, ministers, deputy ministers, permanent secretaries and directors of departments. The assets that should be declared by senior officials are as follows: real property, movable property with high values (more than 5000 EUR), shares and securities, cash or bank deposits, debts and other obligations, and annual income.

The KACA is in charge of requesting senior officials to provide all information on their assets and to provide annual reports on any changes in the status of assets by the end of March of each year. If a senior official fails to report on his/her assets, the KACA can set a further deadline to fulfil the obligation. If that deadline is not met, then the KACA is to report to the authority where the senior official is in office. In this case the employing authority is to reduce the official's monthly salary by one-fifth. If within three months the senior official has still not forwarded to the KACA the declaration of assets, the employing authority is to be requested to start the dismissal procedure. The Anti-Corruption agency has developed a specific form for the declaration of assets of senior officials (including members of the Assembly). With regard to MPs and members of the government, there have been no cases where sanctions were taken. Some MPs from Serb minority parties failed to submit the declarations, but the Presidency of the Assembly did not sanction them. The law is also unclear with regard to the sanctions, as MPs cannot be dismissed for an administrative breach; to terminate an MP's mandate, special requirements are in force²².

Based on the Law on Anti-Corruption, the completed declarations have to be submitted to the KACA by 31 March for assets relating to the previous year. From the Kosovo Assembly the KACA received

¹⁹ For instance, the monthly salary of the President of the Supreme Court is 666 EUR. However, salaries of other senior political officials are also relatively high for the region (the monthly salary of the President is around 3100 EUR and the monthly salary of the Prime Minister is around 2670 EUR).

²⁰ The provisions of the Anti-Corruption Law related to the declaration of assets of senior officials will be replaced by the Law on Declaration and Origin of the Property of Public Senior Officials, which is in the approval procedure in the Kosovo Assembly. This draft law provides in greater detail the procedures for declaration and verification of assets, monitoring system, sanctions, etc.

²¹ Anti-Corruption Law, article 40.

²² This is one of the misunderstandings of the current law (the amendment to which is being prepared). Actually, the law treats elected officials as civil servants or as any other public employee, i.e. as if they were also submitted to an employment relationship instead of having a political mandate.

in 2008 97.5% (123) of the completed forms (from 120 deputies and three senior civil servants – 120 declared their assets and three did not)²³.

It is worth mentioning that in 2008 a total of 747 senior officials in Kosovo were obliged to declare their assets to the KACA; 733 of them (98.1%) declared their assets while 14 did not²⁴. The KACA currently has 35 staff members (there were 14 staff one year ago).

After examination of the declarations, it has been found that 280 (37.4%) of the forms were not correctly filled. In 216 (28.9%) of the cases, the annual income was not declared. In 55 (7.3%) of the cases, not enough information was provided about real property, while in 52 (6.9%) of the cases there was a lack of information about cash and movable property or other data.

The legislation on asset declaration follows common European practice (even if there are some misunderstandings related to possible sanctions for elected officials that need to be reviewed). The KACA is improving its capacities for assessing declarations, but it lacks the power to enforce sanctions. Declarations of assets are not available to the public or to the media. If they were made public, the social control could be an additional way of checking the validity of declarations and of improving the effectiveness of this mechanism.

1.4 Conflict of Interest

The Rules of Procedure oblige members of the Assembly to inform the President of the Assembly in writing, within 30 days of the inaugural session of the Assembly, of all the financial interests they or their immediate family may possess and of the financial benefits they may receive from the following: employment, company directorship, consultancy, lecturing and journalism, gifts and hospitality, and financial sponsorship or support received as Assembly candidates or members (other than from the political party to which they belong). The Anti-Corruption Agency is the body responsible for supervising the enforcement of rule and other provisions that are not currently adhered to²⁵.

The Constitution of Kosovo (article 72) stipulates that a member of the Assembly cannot remain in an executive post in the public administration or in a publicly-owned enterprise or exercise any other executive function. Regarding incompatibilities, the Constitution also stipulates (article 73) that MPs at the same time cannot hold the following positions: judges and prosecutors, members of the Kosovo Security Force or of the Kosovo Police, officials of the Customs Service of Kosovo, officers of State Security, heads of independent agencies, diplomatic representatives, and chairpersons or members of the Central Election Commission. Regarding private activities, there are no restrictions. However, the draft Law on Deputies foresees that MPs will also not be able to hold positions as members of a board in a private company, advisors or representatives of a business or company, editors-in-chief or deputy editors-in-chief in any publishing or broadcast media apart from those belonging to political parties, employees in any public or private company, and lawyers or undertake any economic activities that would constitute a conflict of interest with their positions as MPs.

Law no. 02/I-133 on Preventing Conflict of Interest in Exercising Public Functions covers, inter alia, the members of the Kosovo Assembly. The law provides rules, subjects, responsibilities, and competences for identifying, treating, and solving the cases of public and private interests of an official while exercising a public function. It provides principles and limitations in exercising other activities, in addition to exercising the public function, actions that are forbidden to the official, as well as activities that public officials are allowed to exercise while exercising their public functions. The authority responsible for implementing the law is the Anti-Corruption Agency.

²³ KACA, Annual Report 2008.

²⁴ Idem.

²⁵ The KACA Annual Report 2008 indicates that, following an examination of the asset declarations of senior officials, to date the Agency has received information based on the existence of conflict of interest involving 45 senior officials: 29 cases in the government, 12 in the Assembly, and one each in the Presidency, the courts, local government and another institution. In 19 cases the Agency sent letters to the senior public officials requesting them to avoid the conflict of interest. Seven cases are being considered, while 19 others were closed as the Agency concluded that the officials had not breached the Law on Anti-Corruption and the Law on Prevention of Conflict of Interest by Senior Officials.

During the last legislature and now as well a number of public officials have not respected the rule that a public official may receive only two salaries from the Kosovo Budget – the first a full salary and the second only half the value of a full salary.

Despite the progress in setting up the legal and institutional framework, Kosovan institutions are far from displaying what could be defined as integrity. A number of factors – varying from high politicisation, young institutions, incapacity to effectively fight corruption at high levels, fragile rule-of-law practices, poorly paid administration, and lack of capacity and accountability in institutions – have favoured the development of widespread practices based on nepotism and relationships rather than legal practices. Institutions and senior officials are not taking firm action against these practices and are sometimes a part of them. A number of reports issued by the Office of the Auditor-General, international organisations and NGOs have highlighted the lack of accountability. Unfortunately, these reports are not seriously considered by the Assembly or by the government.

2. Political Party and Electoral Campaign Financing

The legal framework for the political party and electoral campaign financing in Kosovo includes the following: UNMIK Regulation no. 2004/12 on Elections for the Assembly of Kosovo amended by UNMIK Regulation no. 2007/26, UNMIK Regulation no. 2004/11 on Political Parties, UNMIK Regulation no. 2004/09 on the Central Election Commission as amended (legal basis set down in the Constitution, article 139), and Electoral Rules on the Campaign Spending Limit and Financial Disclosure issued before each election in Kosovo. In 2008 the Kosovo Assembly approved the Law on General Elections and the Law on Local Elections, which set the new legal basis for future central and local elections in Kosovo. This assessment will be based on the legislation and institutional set-up that were in force during the last elections in Kosovo; however, the new legislation will be mentioned whenever relevant.

2.1 Expenditures

When discussing the topic of expenditures we should take into account the special complex situation in Kosovo, with the combination of international institutions and the recent involvement of Kosovan institutions. The political financing issue was meant to be addressed in 2001 with the adoption of the Electoral Rule of October 2001 on “Campaign Financial Disclosure and Spending Limits”. The Electoral Rule required political entities to disclose all campaign income and expenditures and the value of owned assets. Section 4 of the rule established the OSCE Political Finance Audit Office and gave it the authority to inspect the financial records of any political entity.

A number of regulations²⁶ set out the campaign financial disclosure requirements for those political entities contesting the 2007 Kosovo elections. The Central Elections Commission (CEC) is in charge of establishing by electoral rule a limit on the campaign expenditures of certified political entities, which are to be expressed as an amount per registered voter no later than 40 days before the date of the election. For the last elections for the Kosovo Assembly held on 17 November 2007, the campaign spending limit was 500 EUR per 1000 registered voters²⁷. Therefore, based on the total number of registered voters in Kosovo, the campaign spending limit was 726,000 EUR²⁸.

For the 2007 elections the following conclusions were highlighted by the OSCE²⁹:

- The Political Party Registration Office found no evidence that any of the political entities taking part in the elections had exceeded the spending limit for the campaign period. This was

²⁶ Regulation no. 2007/26 amending UNMIK Regulation no. 2004/12 on Elections for the Assembly of Kosovo, UNMIK Regulation no. 2007/27 on Municipal Elections in Kosovo, UNMIK Regulation no. 2004/11 on the Registration and Operation of Political Parties in Kosovo, and the Central Election Commission Electoral Rule no. 10/2007 on Campaign Spending Limits and Financial Disclosure.

²⁷ CEC Electoral Rule no. 10/2007 on the Campaign Spending Limit and Financial Disclosure.

²⁸ CEC decision of 11 October 2007.

²⁹ Report on Political Entity Campaign Financial Disclosures for 2007 Kosovo Elections, page 7.

due to the fact that the spending limit was cumulative for all elections in which the political entity had participated³⁰.

- Many of the political entities have still not fully complied with the requirements of financial disclosure (76 complaints were filed against the entities that had failed to meet the requirements for disclosure, which were mainly related to failure to disclose sources of income). The Political Party Registration Office was concerned by the continued resistance, in particular by some larger political parties, to the disclosure of financial records. This resistance was particularly disturbing as the elected representatives of these parties were increasingly responsible at both municipal and central levels for levying taxes, awarding contracts, budgeting, and spending of public funds.

2.2 Reporting and Control

Each political entity that is certified to participate in elections is obliged to submit a Campaign Financial Disclosure Report for the Entity (Regulation no. 2004/12, article 26.1). Political entities are also obliged to appoint a person who will serve as their financial representative. The Central Election Commission, acting through the Registration Office of Political Parties, may audit any Campaign Finance Disclosure Report or Candidate Financial Disclosure Form.

Besides reporting on electoral campaign expenses, political parties are obliged to provide regular reports on their income and expenditures every six months. These reports must be submitted to the Registration Office of Political Parties at OSCE³¹. The Auditor-General, in the Audit Report of 2006 to the Kosovo Assembly, indicated that nine political parties had delivered their financial report for the year 2006, two political parties had delivered their report only for one period of the year 2006, six political parties had not delivered any reports for the year 2006. The Audit Report on the reports submitted included the amount of revenue provided by the Kosovo Consolidated Budget and by donors³².

Although this is the fourth year that the Political Party Registration Office auditors have performed this audit, several political entities and the persons responsible for their financial management experienced auditing for the first time in 2008. This would explain why the audited records and documentation are of a lower quality than required and may contain an undesirable audit risk (OSCE report 2008).

Individual candidates who are members of political parties or independent candidates are also required to provide information on their personal assets through the forms Candidate Personal Income and Asset Statements (CPIAS), which were first introduced by the CEC.

In 2002 the OSCE made copies of the CPIAS available for public scrutiny. Access was granted through the OSCE headquarters in Pristina and in each municipality. For the 2004 Kosovo Assembly elections, all candidates were required to submit a completed Candidate Financial Disclosure Form. Completed forms were available for public access on the OSCE website. The same procedure was followed for the elections of 17 November 2007 at central and municipal levels, when information on candidates' assets were published on the OSCE website. No complaints were made following this disclosure.

2.3 Sanctions

The CEC may charge administrative fees of not more than 500 EUR³³, in accordance with a schedule set out in the relevant electoral rule, to political entities that submit Campaign Financial Disclosure

³⁰ For example, a political entity running for the Kosovo Assembly had a spending limit of 726,000 EUR and if the same entity were running in the municipal elections the spending limit for that entity would be increased for the amount of spending-limit established in each municipality. Therefore, for large parties running for the Kosovo Assembly and in many municipalities, the spending-limit was almost doubled.

³¹ Section 19 of Regulation no. 2004/11.

³² OAG report on political parties for 2005.

³³ Regulation no. 2004/12, article 30.1.

Reports or Candidate Financial Disclosure Forms after the applicable deadlines. A political entity may appeal a decision of the CEC imposing such a fine to the Election Complaints and Appeals Commission³⁴.

The Political Parties Registration Office will impose administrative fees for late submission of the Campaign Financial Disclosure Reports based on the Rules on Campaign Spending Limits, as follows:

- 1-5 days' delay: 100 EUR per political party, citizens' initiative or coalition and 20 EUR per independent candidate;
- 6-10 days' delay: 200 EUR per political party, citizens' initiative or coalition and 30 EUR per independent candidate;
- 10-15 days' delay: 300 EUR per political party, citizens' initiative or coalition and 50 EUR per independent candidate (article 6 of the Central Election Commission Rule no. 10/2007).

The Political Parties Registration Office or any certified political entity may file a complaint with the Election Complaint and Appeals Commission if a political entity fails to submit a Campaign Financial Disclosure Report or if it is incomplete or inaccurate³⁵.

For the 2007 elections some political entities did not fully comply with the requirements for financial disclosure. So far, complaints have been filed against 49 political entities for the pre-campaign period, 22 political entities for the campaign period, and five political entities for the campaign period related to the second round of the municipal elections. The fines are decided upon by the Election Complaints and Appeals Commission, and the maximum fine that can be imposed is 200,000 EUR.

In total 168,750 EUR was the amount of fines imposed by the Complaints Commission for the 2007 elections on various political parties and individuals. However, it was not possible to confirm whether or not these fines had been paid.

2.4 Financial Sources

Generally a political party may not receive any funding except for contributions from individuals of no more than 20,000 EUR per calendar year per individual, provided that contributions in cash meet the requirements as provided by the Regulation on the Deterrence of Money-Laundering and Related Criminal Offences³⁶. Political parties can also receive membership fees or dues from members of the party in accordance with the party statute as well as funding and other support from the Kosovo Consolidated Budget. In any event, the contributor to the political party should provide his/her personal details, address, personal document number (ID, passport if he/she is a foreigner, driving license, etc.)³⁷.

If a registered political party receives a contribution that is not allowed by the applicable regulation, the president of the party is required to return the contribution to the contributor within two weeks of being informed of the contribution³⁸. A registered political party may accept direct funding and other support from the Kosovo Consolidated Budget, provided that such funding or support is: (a) specifically authorised in the applicable law; (b) allocated among recipients based on criteria formalized by the Assembly of Kosovo; and c) allocated in a manner that does not distinguish between those seats set aside for non-Albanian Kosovo communities and the remaining seats in the Assembly³⁹. Access by political entities to public funds is in proportion to the seats held in the Kosovo Assembly. The annual budget for the political parties with seats in the Assembly is 1,901,793 EUR.

³⁴ Regulation no. 2004/12, article 30.3.

³⁵ Electoral Rule no. 10/2007.

³⁶ UNMIK Regulation no. 2004/2 of 5 February 2004, as amended; a new law covering this area was approved by the Kosovo Assembly in 2008.

³⁷ Regulation no. 2004/11.

³⁸ Regulation no. 2004/11, section 16.7.

³⁹ Regulation no. 2004/11, section 17.1.

The Political Party Registration and Certification Office, recently transferred from the OSCE to the CEC, is responsible for maintaining the registry of political parties, certification of all political entities to be included on a ballot, and the campaign spending-limit and financial disclosure articles of the Law on General Elections (Law no. 03/L073 of 5 June 2008). The proper use of funds allocated for elections and donations is controlled by the Auditor-General of Kosovo.

The Political Party Registration and Certification Office establishes and maintains a public information file containing current copies of the register of donors, indicating personal details of the contributor, the value of the contribution (if it exceeds 100 EUR per year), and the date on which the contribution was made (Law on General Elections).

So far the political parties in Kosovo have neglected rules related to their funding and the funding of electoral campaigns, and the institutions set up to enforce these rules have not been able to do so. It is not clear if any fines were imposed on the parties in this regard. Given the fragile democracy in Kosovo, it is still too early to expect clear reporting from political parties and voluntary enforcement of the sanctions.

3. Integrity of the Government

3.1 *Government's and Ministers' Responsibility before Parliament*

The government is accountable to the Assembly of Kosovo regarding its work. The Prime Minister, deputy prime minister(s) and ministers are jointly accountable for the decisions made by the government and individually accountable for decisions made in their areas of responsibility (Constitution, article 97.1,2). A motion of no confidence may be presented against the government on the proposal of one-third of all of the deputies of the Assembly (Constitution, article 100).

The Assembly elects simultaneously a new Prime Minister together with a list of ministers that he/she has proposed. Following the election of the Prime Minister, he/she may replace any minister without the consent of the Assembly. However, upon the resignation of the Prime Minister, the entire government is obliged to resign, and the government then continues in a caretaker capacity until the election of a new Prime Minister. Since the creation of the Assembly, there has not been any motion of no confidence against the government. However, in 2008 three parliamentary motions called by the MPs gave a new impetus to the work of the Assembly⁴⁰.

In accordance with policies set by the government, each minister is to be accountable to the Assembly for matters concerning his/her ministry, including the use of funds, through periodic reporting to the Assembly and reporting at the request of the Assembly. Since the adoption of the Constitution, a member of the government cannot also be at the same time a member of the Assembly [article 70.3(3)]. However, the transitional provisions of the Constitution allow government members to keep their positions deputies for the existing mandate until new elections take place.

As in most legislatures, the Assembly of Kosovo possesses a mix of mechanisms guaranteed by the Constitution and by Rules of Procedure that allow for oversight of the executive branch. These mechanisms include the question period, questions for written answers, interpellations, investigative committees, budgetary oversight mechanisms, oversight by parliamentary committee, and motion of no confidence.

3.2 *Interpellations and Parliamentary Questions*

Interpellation as an oversight mechanism is not used very often in the Assembly. The Rules of Procedures of the Assembly provide clear procedures that could be used.

Any member of the Assembly may ask a question, to be answered by any member of the government during the question period, provided that such a question is tabled in writing at the Table Office no less than 48 hours prior to the session. The Prime Minister has the discretion to defer the question to

⁴⁰ The motion of the Foreign Affairs Minister Skënder Hyseni with the request of the Parliamentary Group AKR, the motion of the Minister of Health Alush Gashi with the request of the Parliamentary Group LDD, and the motion of Prime Minister Hashim Thaçi with the request of the Parliamentary Group of AAK.

one of his/her ministers⁴¹. In the legislatures of the Kosovo Assembly covering the period 2004-2007 a total of 16 interpellations were requested and 196 parliamentary questions were submitted. Most of the written questions that were submitted by Assembly deputies were answered by the respective ministers to whom the questions were addressed, while 14 unanswered questions were published in the *Information Bulletin* of the Kosovo Assembly. In 2008 (the most recent legislature), Assembly members did not request any interpellation, while parliamentary questions were the main instrument used by deputies for executive oversight. Based on information provided by publications of the Kosovo Democratic Institute, deputies of the Kosovo Assembly raised 250 parliamentary questions in 2008. The questions are considered to be probably the most effective oversight mechanism in the Assembly. However, many of the answers were considered to be inadequate and in some cases the answers were missing. In many cases ministers who had to answer were absent from the Assembly sessions.

3.3 *Parliamentary Enquiry*

When specific issues are raised, the Assembly may establish an ad hoc committee, which has all of the powers of investigation of a functional committee. Whenever the Assembly decides to establish such an ad hoc committee, its decision includes the establishment of the composition of the committee, in accordance with the relevant provisions of the Rules of Procedure. The Assembly may ask any citizen of Kosovo to testify to the committee and also determines the procedures, time frame for the committee and the funds to be provided for its work⁴². However, investigative committees have also been used very rarely by the Assembly. So far, only two investigative committees have been established⁴³.

3.4 *Criminal and Legal Accountability*

Members of the government are to be immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as members of the government (Constitution, article 98). No waiver of immunity of a member of the government has been requested to date by the Assembly. Actually, it is not clear whether the Rules of Procedure of the Assembly also apply to members of the government as long as they maintain their positions as deputies.

In 2008, in 37 cases (or 25% of the total number of cases submitted to the KACA) government officials were denounced to the KACA for corrupt acts. Of these, 15 were closed by the Agency and 16 were transmitted to the Prosecutor's Office, while six other cases are still pending in the KACA⁴⁴. To date no other information has been provided by the prosecutors on the results of the investigations. On the other hand, the Prosecutor General has confirmed receipt of cases from the KACA, but has complained about the quality of the information and of the evidence collected. In cases where prosecutors had interrogated victims of corruption, they denied the case and gave other explanations. The Prosecutor's Office has been obliged to close a number of cases for lack of evidence⁴⁵.

3.5 *Conflict of Interest*

Law no. 02/I-133 on Preventing Conflict of Interest in Exercising a Public Function covers, inter alia, the members of the Kosovo Government. The competent authority responsible for implementation of this law is the Anti-Corruption Agency (article 18).

⁴¹ Rules of Procedure of the Assembly, rule 27.

⁴² Rules of Procedure of the Assembly, rule 50.

⁴³ The first enquiry committee was established by the first Assembly legislature, but it was not functionalised. The only functional enquiry committee of the Assembly, established in November 2006, concerned financial breaches made by the former President of the Assembly and by the Ministry of Economy and Finance. This committee concluded on 23 February 2007 with a report, although no further measures were taken.

⁴⁴ New Mandate, New Opportunities: Evaluation of the work of the Assembly of Kosovo and recommendations for further development (October 2008), Joint Report of National Democratic Institute and USAID, co-financed by OSCE, page 16.

⁴⁵ Information provided by the Head Prosecutor to the Sigma team on 8 April 2009.

According to its Annual Report of 2008, the KACA has received information on 29 cases of conflict of interest of government officials. In 16 of those cases the conflict of interest has been avoided, four other cases are still in procedure, and nine cases were closed by the KACA due to a lack of evidence. The KACA has not reported any case of conflict of interest of senior level politicians. It is not considered to be a conflict of interest for ministers and other politically appointed officials to lecture in universities.

The draft Law on Government specifies that ministers cannot exercise any other full-time function. With the approval of the government, they can fulfil some unpaid honorific functions. The government will issue a specific regulation on this topic. No restrictions are foreseen regarding post-employment activities.

3.6 Declaration of Assets

The Anti-Corruption Agency is the body that supervises the asset declarations of “senior official persons” (including ministers, deputy ministers and members of the Assembly) based on the Anti-Corruption Law and other applicable legislation. If an official has still failed to submit the asset declaration three months after the deadline, the agency is to notify the body responsible for initiating the procedure for termination of office. In 2008 all government officials declared their assets, although in some cases with delays. However, the KACA has no mechanisms to oblige institutions to undertake measures against officials who do not comply with the rules on declaration of assets.

3.7 Gifts

According to the Law on Anti-Corruption, an official is not to accept gifts or other benefits except for formal gifts and occasional gifts of small value. All gifts received and their corresponding value must be recorded by the official in the catalogue of gifts kept by the institution in which the official performs his/her functions. If the Anti-Corruption Agency determines that the official is in breach of the rules, it must inform the institution in which the official holds his/her position⁴⁶.

3.8 Remuneration of Government Members

The applicable legislation does not prohibit deputies who are appointed as ministers from keeping both positions. This is allowed until the current mandate of the Assembly terminates. However, they must choose to receive the salary for only one of the positions. In former governments ministers who were also deputies kept both positions, and even the rules that set out the obligation regarding the primary and secondary salaries was generally not respected. To address this issue, the government issued on 12 February 2008 Administrative Instruction no. 02/2008 on the Wages of Political Appointees Staff, which stipulates that when political appointees also hold the political function of representatives of the Kosovo Assembly, they are entitled to only one salary. Political appointees cannot benefit from double wages if they are members of the board of any public enterprise based on law. The political appointees covered by the instruction are the Prime Minister, deputy prime ministers, ministers, deputy ministers and political advisors.

Currently the Prime Minister’s monthly salary is around 2670 EUR and ministers are paid around 1200 EUR per month. Additional remuneration has also been foreseen for ministers, which was mainly related to remuneration for their participation in boards of public companies. Last year the government nevertheless issued a decision that forbids ministers from participating in such boards.

The salaries and other additional income of all public officials and members of legislative, executive, and judicial bodies are subject to taxes based on the Law on Personal Tax Income (Law no. 03/L-115), as are all public employees in the public sector.

During the second mandate and especially after changes in leadership and the initiation of institutional reform, the use of oversight mechanisms by the Assembly over the government has increased. Despite considerable progress, the effectiveness of oversight mechanisms can still be

⁴⁶ Administrative Instruction on the Registration of Gifts in Kosovo Institutions.

improved through supplements to the Rules of Procedure and through more active MPs and better-supported opposition proposals⁴⁷.

Rules governing integrity in the government are improving and seem to be adequate. However, the implementation of these rules remains a problem.

4. Integrity in the Judicial System

4.1 Independence of Judges

The judiciary was an exclusive competence of UNMIK until late 2005, when these powers were transferred to the Ministry of Justice. The final power in justice was nevertheless subject to the final authority of the SRSG until the new Kosovo Constitution came into force in June 2008. With the approval of the new Constitution, the power to appoint, reappoint and dismiss judges was transferred to the President of Kosovo, upon the recommendation of the Kosovo Judicial Council (KJC).

The judicial power is legally described as unique, independent, fair, apolitical and impartial and ensures equal access to the courts (Constitution, article 102, para. 2). According to the Constitution and the law, judges are independent and impartial. They are not allowed to hold any other public office. Judges of all courts in Kosovo must be distinguished jurists of the highest moral character and must have adequate qualifications. The membership of the judiciary should reflect the diversity of the people of Kosovo. The immunity of judges is guaranteed by the Constitution.

In view of the special situation in Kosovo, apart from Kosovan judges there are also international judges and prosecutors who serve within the judicial system. The UNMIK judges and prosecutors have now been replaced by EULEX judges and prosecutors. They are meant to work with the applicable law under the Constitution. However, there is currently a dualism in the application of legislation due to the confusion created after the deployment of EULEX, particularly in the northern area of Kosovo where the authority of Kosovan institutions has not yet been exercised. This situation creates an ambiguity in terms of the application of different legislation in different parts of the territory of Kosovo.

4.2 Appointment and Dismissal of Judges

After the deployment of UNMIK, judges and prosecutors were appointed promoted, transferred and dismissed by the SRSG from the lists of candidates proposed and recommended by the Kosovo Judicial and Prosecutorial Council and endorsed by the Kosovo Assembly.

Since the beginning of 2006 the management and supervision of the justice system has been assured by the Kosovo Judicial Council (KJC), established by UNMIK Regulation no. 2005/52. The KJC is an independent professional body composed of local and international judges and a number of experts who are not judges from the executive and legislative branches and from academia. The President of Kosovo now appoints, reappoints and dismisses judges upon the proposal of the KJC. The KJC is also responsible for prosecutors, pending the establishment of the Kosovo Prosecutorial Council.

A transition from the current membership of the KJC to the new membership is foreseen in the transitional provisions of the Constitution. The KJC under the new Constitution will be composed of 13 members for a term of five years: five members are to be judges elected by the members of the judiciary; four members are to be elected by deputies of the Assembly holding seats attributed in the general distribution of seats, with at least two of the four being judges and one a member of the Kosovo Chamber of Advocates; two members are to be elected by the deputies of the Assembly holding reserved or guaranteed seats for the Kosovo Serb community, with at least one of the two being a judge; and finally, two members are to be elected by the deputies of the Assembly holding reserved or guaranteed seats for other communities, with at least one of the two being a judge.

⁴⁷ New Mandate, New Opportunities: Evaluation of the work of the Assembly of Kosovo and recommendations for further development (October 2008), Joint Report of National Democratic Institute and USAID, co-financed by OSCE, page 16.

The KJC is responsible for developing policies, setting regulations and guidelines, and providing administrative oversight of the judiciary and the courts. It is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office. The KJC is also responsible for the transfer of judges and disciplinary proceedings concerning them. It determines the criteria and procedures for reappointing judges. In addition, the KJC is responsible for conducting judicial inspections, judicial administration, developing court rules in accordance with the law, hiring and supervising court administrators, developing and overseeing the budget of the judiciary, determining the number of judges in each jurisdiction, and making recommendations for the establishment of new courts.

The Kosovo Judicial Council is a fully independent institution in the performance of its functions.

To be appointed as a judge in Kosovo, an applicant must satisfy the minimum criteria, as follows: be a habitual resident of Kosovo, of high moral integrity, capable of performing full-time duties and work, possess a law degree that is valid in accordance with Kosovo law, have passed the Kosovo Bar Examination or currently be a member of the Bar, have passed the Judicial Entry Examination for judges, have attended and completed the training required by law and other applicable rules, and have a minimum of three years of legal experience.

Applicants for service as lay judges must satisfy the following minimum criteria: have been a habitual resident of Kosovo for five years, be at least 25 years of age at the date of submission of the application for the post, be of high moral integrity and not have been engaged in discriminatory practices, as defined by law and judicial rules and procedures⁴⁸.

The structure of the courts is to be regulated by law. Pending approval of the Law on the Courts, the current structure is regulated by the constitutional framework, based mainly on the system established by the old legislation, when Kosovo was part of Yugoslavia. The court system consists of the Supreme Court, district courts, municipal courts, minor offence courts, and the High Court of Minor Offences. The Constitution determines the basis for the Constitutional Court, which is an independent body protecting constitutionality; it is the final interpreter of the Constitution (Constitution, article 4, paras. 5, 6). The Law on the Establishment of the Constitutional Court has been approved, while the process of establishment of the court is currently underway. A draft Law on Courts has been in preparation for many years now, but has not yet been adopted. Actually 1770 employees are engaged by the KJC, including 302 judges and 89 prosecutors; additional positions have been made available in the 2008 budget to increase these numbers to 392 judges and 92 prosecutors. Support staff currently number 1313, of whom 66 are engaged in the KJC secretariat. EULEX judges will have competences to monitor the judicial system as well as to deal directly with cases (Law no. 03/I-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo).

The review of the suitability of all applicants for permanent appointment as judges and prosecutors (after the initial mandate of three years, in accordance with article 105 of the Constitution) is carried out by the Independent Judicial and Prosecutorial Commission (IJPC), which is an autonomous body of the Kosovo Judicial Council established by UNMIK Administrative Direction no. 2008/2. In the first phase, the IJPC is staffed by international judges and prosecutors and financed by donors. In subsequent phases, local judges and prosecutors will also serve on the IJPC.

4.3 Remuneration of Judges

The monthly salaries of judges at the different levels of the judiciary range between 420 EUR for minor offense court judges and 666 EUR for the President of the Supreme Court. Municipal court judges receive 471 EUR per month, while at the district court level, the judicial salary is 549 EUR per month, and Supreme Court judges are paid 627 EUR per month. Court presidents at each level receive a slightly higher salary. The take-home pay is lower due to income tax and pension deductions. The same remuneration is applied for prosecutors.

Judges are prohibited by the Judicial Code of Ethics from receiving compensation in addition to their salary, except for a small fee for lecturing, if approved by the Kosovo Judicial Council. Judges receive

⁴⁸ UNMIK Regulation no. 2005/52.

no benefits in addition to salary. UNMIK Administrative Direction no. 2007/6 stipulates the honorarium to be paid to local members of the KJC. The KJC members attending council or committee meetings are paid at the rate at 50 EUR per meeting, up to a monthly amount of 200 EUR. The President of the KJC is paid 200 EUR per month. It is generally considered that the insufficient remuneration received by local judges continues to be a problem and is often the fundamental cause for their acceptance of bribes and succumbing to threats and other forms of corruption. The general deterioration in the standard of living resulting from Kosovo's low salaries and high prices is often cited as a justification for the corrupt practices of some judges.

4.4 Accountability of Judges

The Kosovo Judicial Council (KJC) is responsible for establishing the Judicial Disciplinary Committee (JDC), which initiates and resolves first-instance issues of alleged misconduct of judges and lay judges and determines appropriate sanctions in the event of findings of misconduct. The JDC is composed of the Vice-Chair of the KJC, who serves as chairman of the committee and two members of the KJC, who are appointed to terms of one year on rotation, with no possibility of consecutive appointment. Complaints are to be referred to the Judicial Inspection Unit (JIU) for investigation. Once the JIU completes its investigation, it determines whether charges should be filed with the JDC. The JDC then decides on any disciplinary sanctions other than the removal of judges and lay judges from office; it may recommend their removal but must present any such recommendation, including its rationale, to the KJC in writing. Throughout the disciplinary proceedings the judge or lay judge has the right to represent himself/herself or to be represented by legal counsel, and both the judge/lay judge and his/her legal counsel are to be granted access to the entire disciplinary file.

The JDC may impose sanctions, such as reprimand and warning, suspension from office without pay for up to six months, recommendation of removal from office, or recommendation of removal from the function of lay judge. Judges can be dismissed from their positions in the event of physical or mental incapacity, serious misconduct, or failure to duly execute the office of judge.

Decisions of the Judicial Disciplinary Committee may be appealed directly to the KJC, excluding the Vice-Chair of the KJC and the KJC members who had been part of the original proceeding. The final decision for the dismissal of judges on the proposal of the KJC remains the responsibility of the President of Kosovo. Until the Prosecutorial Council is established and operational, the procedure applied for judges will be applied *mutatis mutandis* for prosecutors as well.

There are two judicial ethics codes in Kosovo, the Code of Ethics and Professional Conduct for Judges and the Code of Ethics and Conduct for Lay Judges. These new codes were adopted by the Kosovo Judicial Council (KJC) in 2006. The Provisional Criminal Code of Kosovo as amended in 2008 includes provisions for dealing with corrupt judges. A judge who has the intent to obtain an unlawful material benefit for himself/herself or another person or to cause damage to another person or who issues an unlawful decision will be punished by imprisonment of six months to five years.

The Ombudsperson Institution has reported several complaints and allegations of corrupt practices within the judiciary. These allegations are usually impossible to prove, so that even if a person complains to the competent Judicial Inspection Unit within the UNMIK Department of Justice, the complaint rarely leads to disciplinary measures or to the removal from office of a judge⁴⁹. In 2007-2008 the Ombudsperson Institution continued to receive complaints alleging widespread practices of corruption within the judiciary. The existing corruption prevention mechanisms do not appear to have improved the public's confidence in local courts.

Four judges were dismissed by the KJC following corruption cases and another five were suspended and placed under investigation procedures for the same reasons.

⁴⁹ Ombudsperson Institution, Annual Report 2008.

In 2008 a total of 33 cases concerned denouncements to the KACA for corruptive acts by judges. The KACA sent 11 of these cases to the Prosecutor's Office, 21 cases were closed for lack of evidence, and one case is still in the procedure of the KACA⁵⁰.

4.5 Status of Prosecutors

The highest authority for the appointment of prosecutors in Kosovo, as for judges, is the President of Kosovo. The Constitution calls for an independent Kosovo Prosecutorial Council (KPC), but until it is established and operational all of the procedures applying to judges will be applied to prosecutors as well. A draft Law on the Prosecutorial Council as well as a draft Law on the Organisation of Prosecutors' Offices are in the legislative procedure.

Due to the lack of a new law, the organisation and jurisdiction of the Public Prosecutors' Offices in Kosovo are based on the Law of the Public Prosecutor's Office of the Socialist Autonomous Province of Kosovo no. 32/76 and several amendments to that law. The Public Prosecutor is responsible for investigations in criminal matters, economic procedures and minor offence procedures, as required by law. The Public Prosecutor can also take actions for which he/she is authorised by law in the civil procedure, extra-judicial procedure, executive procedure, administrative procedure and special procedure⁵¹.

The Chief State Prosecutor is to be appointed and dismissed by the President of Kosovo upon the proposal of the Kosovo Prosecutorial Council. The mandate of the Chief State Prosecutor is for seven years, without the possibility of reappointment. Based on the law he/she can give to public prosecutors obligatory instructions for work in his/her domain and can also take over tasks from the competences of the lower Public Prosecutors' Offices. The Public Prosecutors' Offices are represented by a public prosecutor. In 2001 the Kosovo Judicial and Prosecutorial Council approved the Code of Ethics and Professional Conduct for Prosecutors. This code, which remains applicable, was updated in 2006.

Law no. 03/L-052 on the Special Prosecution Office of Kosovo provides for the establishment of a permanent and specialised prosecutorial office operating within the Office of the State Prosecutor of Kosovo and composed of Kosovan prosecutors; five additional prosecutors from the EULEX team are also appointed to the Special Prosecution Office and operate under the established EULEX rules. This office is responsible for dealing with cases related to terrorism, organised crime, war crimes, intimidation during criminal proceedings for organised crime, etc.

It is assessed that the Public Prosecutors' Offices are not effective enough in carrying out the anti-corruption activities provided by law. There are a variety of reasons for the ineffectiveness of the Offices. Mention should be made of the lack of specialised prosecutors dealing with specific crimes. Another issue relates to the problems inherited from UNMIK, which acted totally separately from the Kosovan prosecutorial authorities. Co-operation with the investigative police, which is part of the executive, and the financial dependence on the Ministry of Justice have also hampered the effectiveness of the State Prosecutor's work. The State Prosecutor has indicated the ineffectiveness and lack of willingness of the justice system to consider cases related to corruption. The KJC has reported the suspension of two prosecutors following corruption cases. However, the State Prosecutor's reports indicated that approximately 10% of all prosecutors are being investigated in corruption cases⁵². The KACA reports five cases related to prosecutors in 2008, two of which were reported to the Prosecutor's Office for further investigation.

The judiciary system in Kosovo (including prosecutors) has until now suffered from instability. In spite of some legal improvements, there are concerns about the ongoing politicisation of judges and about political pressures on prosecutors and judges in some cases. This situation is expected to change with the new draft Law on the Organisation of the Judiciary, but the delays in approving that draft law are prejudicing the system. The continuing role of the President of

⁵⁰ KACA, Annual Report 2008.

⁵¹ Law of the Public Prosecutor's Office of the Socialist Autonomous Province of Kosovo no. 32/76, article 12.

⁵² Interview of Sigma team with State Prosecutor on 8 April 2009.

Kosovo in appointing and dismissing judges raises concerns and must be abolished. Although the nomination process would seem to guarantee the independence of the judiciary, this process contradicts the principle of separation of the three branches of power – executive, legislative and judiciary – and is an obstacle to the establishment of an independent judiciary in Kosovo (Ombudsperson Institution’s report of 2008). A better understanding of the content and relevance of an independent judiciary that is coherently assumed and implemented is still needed.

Another issue is related to the number of judges. Although the cases presented in the courts have increased on average at the rate of 25% every year since 2001, the number of judges has not increased at the same pace. This situation creates a large backlog of cases and results in huge delays in solving cases. From these delays derives the dissatisfaction of the general public with the judiciary. Also the allocation of cases to various courts creates problems in terms of workload. The Supreme Court is overloaded with administrative cases (about 38% of the cases) and should be examining those cases on merit, not only procedurally. However, the large number of cases and the low number of judges do not enable the Supreme Court to enter into the merits of the cases examined⁵³.

The salaries of judges and prosecutors are low when compared to those of officials belonging to the executive and legislative branches of power. Low salaries are reported as a reason for the unattractiveness, high turnover and corruption in the judiciary. A better balanced level of remuneration must be achieved.

The legal framework related to the organisation of the judiciary needs to be completed and implemented. The capacity of the judiciary to fight corruption and organised crime requires close attention and may need specialised support.

5. Anti-Corruption Policies and Strategies

5.1 Anti-Corruption Strategy and Action Plan

The Government of Kosovo has set as one of its priorities the fight against corruption. The government has the difficult task of establishing integrity in the public sector and improving the image given by the state to the public, both internally and externally.

The previous anti-corruption strategy, which covered the period 2006-2007, had set as objectives new legislation, law enforcement, public awareness and civil society involvement. The Office of Good Governance in the Prime Minister’s Office was the central policy co-ordination institution and oversaw the process of implementation of the strategy and action plan. In the meantime, a chapter of the current PAR Strategy focuses on anti-corruption measures. A special working group co-ordinates all of the efforts of the concerned institutions and reports to the Ministry of Public Services, the body responsible for overseeing the implementation of the strategy.

Recently, under the lead of the KACA, the National Strategy on Anti-Corruption was drafted, approved by the government and proceeded to the Assembly for approval. The Assembly returned the draft strategy to the KACA for revision; one of the justifications for this action was that the draft strategy was not accompanied by an action plan. The KACA is now drafting the action plan, which will accompany the draft strategy in the next round. The strategy was drafted in co-operation with the Office of Good Governance and other public institutions, with the support of international organisations.

5.2 Anti-Corruption as Part of Public Administration Reform in Kosovo

The Strategy and Action Plan for Public Administration Reform incorporates in a separate chapter measures and activities to combat corruption in the public administration in Kosovo. A sub-working group on anti-corruption in the public administration has been established. This group, chaired by the Office of Good Governance in the Prime Minister’s Office, is responsible for co-ordinating activities and measures set out in the section on anti-corruption in the Strategy and Action Plan for Public

⁵³ All data was obtained from the KJC Statistics Department.

Administration Reform. This sub-working group will report directly to the Working Group for the Co-ordination of Public Administration Reform, chaired by the Ministry of Public Services. However, apart from undertaking several legislative and other measures, the PAR Strategy has not been effectively implemented by the government. The anti-corruption portion of the PAR Strategy has had the same outcome. Currently, as part of the functional review of the government programme, a team of experts has started to assess the anti-corruption system and will provide recommendations for improvement by mid-2009.

5.3 Anti-Corruption Legislative Measures and Institutional Framework

As part of the previous anti-corruption strategy, the Assembly of Kosovo adopted the Anti-Corruption Law in April 2005, which was promulgated by the SRSG in May 2005. The law foresees measures to fight corruption in the area of administrative investigations of public corruption and the publicising of the most serious violations of the law, nepotism in recruitment, conflict of interest, standards on giving and accepting gifts in the public administration, etc. The draft Law on Amending the Anti-Corruption Law has been prepared and is in the approval procedure. This law is expected to address several gaps in the current law, including the issue of the Anti-Corruption Council and its relations with the KACA.

Many pieces of legislation have important relevance for anti-corruption efforts. This legislation includes the following: Criminal Code as amended and new Criminal Procedure Code, both of which entered into force on 1 April 2004; Law on Access to Official Documents; Law on Foreign Investment; Law on Payment Transactions; Law on Standards for Financial Reporting; and Law on Liquidation and Reorganisation of Legal Persons in Bankruptcy. A draft Law on Whistle-blowing and Protection of Witnesses is being prepared. As many allegations of corruption are connected with the procurement procedure, the government has adopted a comprehensive legal package in this area, with a number of institutions in charge of ensuring the correctness of the procedure, i.e. the Public Procurement Regulatory Commission (PPRC) and the Procurement Review Body (PRB). However, it looks as though the actors in procurement procedures are rather clever, as the Prosecutor's Office has declared that in the cases they investigated for corruption the paperwork had been done correctly and no irregularity could be found. Therefore, it seems that more sophisticated tools and methods are needed for investigating suspicious cases.

The Financial Intelligence Centre (FIC) is mandated to combat money-laundering and the financing of terrorism. The FIC has been established pursuant to the provisions of UNMIK Regulation no. 2004/2 as amended, "On the deterrence of money-laundering and related criminal offences", promulgated on 6 February 2004.

The establishment of the FIC is directed at enhancing law enforcement capacities, particularly in information-gathering and analysis, to deter money-laundering, terrorist-financing and related criminal offences through greater transparency in financial transactions.

The FIC receives and analyses the required reports, ensures compliance and co-operates with its international counterparts and law enforcement agencies in tracing illicit money outside and inside Kosovo. Actually the FIC is run by internationals, but its status has not yet been defined. The FIC has issued a number of administrative directives that set the rules and procedures of the work related to the fight and prevention of corruption or other illegal activities, such as procedures and obligations for electronic fund transfers, lists of persons or entities suspected to be involved in the financing of terrorist activities, money-laundering, etc.

The KACA and the Public Prosecutor's Office complain that the co-operation with FIC is not at the desired level, as they do not receive information in due time and they are sometimes not given access to information.

In the Prime Minister's Office functions the **Office of Good Governance**. While this office was the first anti-corruption structure created by the government, it now has a complex role and a mission varying from human rights' protection to gender equality. The office is nevertheless still the focal

point of the government in anti-corruption policies, although with the creation of other institutions its role has narrowed and many of its competences have been transferred.

The most important institution in this area is the **Kosovo Anti-Corruption Agency (KACA)**, which was established in 2006 and started its operations in February 2007 with a very modest budget and number of staff. The director is selected by the Assembly of Kosovo and submits an annual report to the Assembly. The KACA currently has with the number of staff foreseen in the budget plan (35 officials). However, a problem remains, as the staff are inexperienced in the area of anti-corruption and the salaries are very low⁵⁴. The Agency's scope of competences focuses mainly on the fight against corruption, the prevention of corruption, and the education of citizens and officials in the area of anti-corruption.

The work of the KACA is overseen by the **Council on Anti-Corruption**. The Assembly of Kosovo, in its session of 23 February 2006 and in conformity with article 19.2 of the Law on Anti-Corruption, made a Decision (no. 02-946-1/06) on the appointment of the members of the Anti-Corruption Council, which was given a two-year mandate. The Council consists of nine members, three of whom are appointed by the Assembly and one member each by the President's Office, the Prime Minister, the Supreme Court, the Office of the Public Prosecutor, Local Authorities and Civil Society. The Council scrutinises the work of the KACA on a regular and comprehensive basis and oversees the assets of the officials working for the Agency. The Director of the Agency reports to the Council every six months about Agency findings related to corruption, conflict of interest, completed enquiries and other issues related to its mandate, as provided by law.

However, it is not clear to what extent the Council has the right to interfere in the work of the Agency. Recently there have been debates between the Agency and the Council on the issue of the annual report that the Agency has prepared for submission to the Assembly. The fact that the functioning of the Anti-Corruption Council is scrutinised closely by one of the committees of the Assembly has created a long reporting line between the Agency and the Assembly. It is expected that these divergences will be resolved by the amendments to the law that have already been prepared.

Another obstacle to success in the work of the Agency is the lack of co-operation with other responsible institutions. The Agency reported that of the 250 documents received concerning corruption cases, 1/3 of these documents were forwarded to the Prosecutor's Office. Very few documents were returned to the Agency from the Prosecutor's Office. Also, no cases or information on cases has proceeded to the court. The Agency's mechanisms for imposing their recommendations when it has identified any breach of law are very weak. This weakness is shown in cases where the Agency found conflicts of interest or where senior public officials failed to declare their assets. The investigations carried out by the Agency cannot be considered as evidence and the risk of overlapping with the competences of the Prosecutor's Office is high. In general, the Agency is weak in enforcing the administrative sanctions foreseen in the law.

As a general remark, officials dealing with corruption and integrity in general benefit from a large amount of training. As the increase of professionalism in key institutions is considered as a prerequisite for effective results in the long-term battle against corruption, the government is investing considerably in capacity increases. A number of institutions operate in this area, i.e. the Kosovo Judicial Institute, in charge of training for judges and prosecutors, the Police Training Centre in Vushtri, which offers specialised training for police, FIC officials and others, and the Kosovo Institute of Public Administration. On the other hand, in a number of institutions deficiencies have been observed – the lack of staff in the judicial and prosecutorial system, the low level of salaries in these sectors, instability in job positions and the obsolete regulation on the judiciary are all factors that implicitly influence negatively the work in these sectors and the satisfaction of the public with the services provided.

The public administration is perceived by citizens as being very permissive with regard to corruption. The government tried to serve as an example in fighting corruption by suspending a number of officials in the last two years. Although these actions represent a step forward, they

⁵⁴ 250 EUR is the average monthly salary of investigators in the Agency.

do not suffice because the investigations are delayed and sometimes abandoned completely, there are no concrete sanctions against the accused officials, and the public considers that the real actors and beneficiaries of corruption are not punished. This situation prejudices the image of the government in the eyes of the public and the general accountability that the government should have to show as an example.

In addition, along with more effective justice (investigation capacity, courts, qualified staff, procedures, etc.), more effective tools to punish perpetrators in corruption cases – confiscation of assets, for instance – are required.

6. Kosovo Police Service

After its 1999 deployment in Kosovo, UNMIK had to develop its security forces from scratch. The main responsibility for setting up and developing the police structure in Kosovo was UNMIK Pillar I on Police and Justice, while OSCE was responsible for the training of police officers. The first generation of candidates for members of the Kosovo Police Service (KPS) began training on 6 September 1999.

The budget for police services in Kosovo is provided by the combined funds of the Kosovo Consolidated Budget and the financial donations and technical assistance of international donors. The Kosovo Consolidated Budget allocated 39.9 million EUR to the KPS in 2003, which was increased to 56.85 million EUR in 2006 and 60.9 million EUR in 2008; this does not include the funds provided by international donors and other contributions. In terms of day-to-day work, operational responsibility in many police stations and regional commands has been transferred from CIVPOL to the KPS. In addition, in early 2006, UNMIK Pillar I was downsized to a co-ordination office, and administrative, financial and technical responsibilities for the KPS were transferred to the Ministry of Internal Affairs.

UNMIK Regulation no. 2005/54 on the Framework and Guiding Principles of the Kosovo Police Service and UNMIK Administrative Direction no. 2006/9 provides for the establishment of the Kosovo Police Inspectorate (KPI) as an executive agency within the Ministry of Internal Affairs, responsible for exercising independent oversight over the KPS. The responsibilities of the KPI are as follows: conduct audits and inspections of the KPS and report on its performance and efficiency in meeting objectives; investigate allegations that police officers or civilian members of the KPS have committed serious disciplinary offences; and recommend to the Senior Police Appointment and Discipline Committee (SPADC)⁵⁵ any disciplinary sanctions that should be imposed. The KPI is composed of an executive director and a group of inspectors who are totally independent from the KPS. It forwards complaints against police officers to either the Prosecutor's Office (if the complaints include criminal allegations) or the Professional Standards Unit. If a complaint concerns a serious violation, including corruptive, the KPI will forward the complaint to the SPADC. The Law on the Police Inspectorate was approved by the Assembly in February 2008.

Within the KPS now there are also permanent units specialised in dealing with organised crime and cases of corruption. The KPS' Directorate of Serious Crimes, under the direct authority of the local Deputy Police Commissioner, has two relevant units in this area: an Anti-Corruption Unit and a Unit for Economic Offences.

The Kosovo Police report indicates that in 2008, internal investigations of 609 cases took place; 170 complaints were filed against the decisions made in those cases and as a result 133 decisions were changed.

The report of the KPI indicates that in 2006 the following disciplinary measures were undertaken against police officers: 48 police officers were dismissed, 87 were suspended with payment, five were

⁵⁵ The SPADC is foreseen to be independent of the KPS, and its membership consists of all of the permanent secretaries of ministries and one person nominated by each municipal assembly. Section 22 of UNMIK Regulation no. 2001/36 of 22 December 2001 applies *mutatis mutandis* to the SPADC.

downgraded, and 13 were transferred. The report also indicates that 91 other measures and a higher number of complaints had no legal basis, remained pending or had been returned to the local level⁵⁶.

7. International Co-operation to Combat Corruption

The international legal status of Kosovo has been very special since 1999 with the establishment of the United Nations Interim Administration in Kosovo (UNMIK). Despite the establishment of Kosovan institutions, international relations and co-operation up until the declaration of independence in February 2008 was the responsibility of UNMIK. Although the capacity of UNMIK to be a party to international instruments has been limited, many international instruments – mainly on human rights – are directly applicable in Kosovo. International legal remedies and mechanisms are not available to Kosovo due to the fact that Kosovo is not yet a member of any international organisation or mechanism. Thus in the context of combatting corruption and other similar irregularities Kosovo has not legally been able to sign any international convention. In general, Kosovo's participation in regional initiatives related to anti-corruption is still weak. However, the Kosovan and UNMIK institutions have co-operated in several international and mainly regional initiatives. In this context, Kosovo has been involved in the PACO impact project implemented by the Council of Europe and funded by SIDA. Since the beginning, the Kosovo Government has participated in all meetings and activities organised for South East Europe by PACO-IMPACT and also was supported by this project in the establishment of institutional mechanisms and activities related to anti-corruption reforms in Kosovo.

However, several other regional engagements between UNMIK and neighbouring countries were signed to strengthen co-operation on justice and the fight against criminality:

- Interim Protocol on Police Co-operation between UNMIK and Macedonia, 27 November 2002;
- Memorandum of Understanding between the International Criminal Police, Organisation-Interpol and UNMIK on Co-operation in Crime Prevention and Criminal Justice, 20 December 2002;
- Memorandum of Understanding on Police Co-operation between UNMIK and Albania, 9 September 2002;
- Protocol on Police Co-operation between UNMIK and Former Republic of Yugoslavia (Serbia and Montenegro), 31 May 2002.

Recommendations for Assistance

Considering that reforms in the judiciary are a key issue for improving integrity in Kosovo, this sector should be the first priority for assistance.

The training of civil servants also requires further assistance. First of all, the operational qualifications of the KACA staff need to be enhanced. Second, training should be provided to civil servants on administrative procedures, transparency, citizens' right to better quality service delivery, etc.

The strengthening of civil society, support to public campaigns to inform citizens of their rights, as well as the development of mechanisms to ensure their protection, are other areas for assistance.



⁵⁶ The report of KPI for 2007 is available at: www.mpb-ks.org.



SIGMA

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

KOSOVO (under UNSCR 1244/99)

**PUBLIC INTERNAL
FINANCIAL CONTROL**

ASSESSMENT MAY 2009

1. Summary

Main Developments since last year

Kosovo appears to be making every effort to comply with the European Commission's legal requirements for PIFC. A number of technical changes have been made since last year to existing laws, which had to be changed to reflect the Constitution of Kosovo. However, the legal basis, while complying formally with EU requirements, does not always seem to comply with the needs and administrative capacity of the country.

A new Internal Audit Law was drafted and is currently going through the parliamentary process. This new law will modify previous requirements for setting up internal audit units in all budget organisations in a way that should result in greater efficiency in the use of audit resources and likewise rationalise the requirements for the introduction of audit committees.

The Central Harmonisation Unit for Internal Audit became operational in 2008 and now has seven staff. The development of an audit manual and of a reporting system to the CHU by internal auditors demonstrates that a coherent internal audit approach is emerging. The establishment of a CHU for financial management and control (FMC) was envisaged in the Law on Public Financial Management and Accountability approved in March 2008, but it has not yet been put in place.

Other legal changes associated with the decentralisation proposals of the Ahtisaari Plan involve the reform of the local government system, which could also impact on the PIFC and public expenditure management (PEM) systems.

Main Characteristics (strengths and weaknesses)

While progress has been made in introducing legal structures, hard evidence showing that these structures are having a significant effect on the quality of public financial management is difficult to find. For a functioning PIFC system, it is critical that the legal framework is wholly embraced by the management at all levels as a day-to-day aid in securing the efficient and effective utilisation of public resources in Kosovo and that it is not viewed as an "add-on" that exists only because of European Union requirements. There is little evidence that this is the case. While financial management and control systems are being put in place and internal audit is being implemented, the levels of understanding of the technical concepts and requirements and of the standards of application generally appear to be limited. There is also some evidence that not all managers are familiar with the specific requirements of the law.

In fact, the laws appear to be ahead of the current real state of development of PIFC, and officials do not always appear to appreciate the real purpose of the legislative requirements. This situation and the lack of relevant administrative capacity also mean that the legislative requirements are not always fully implemented. Another factor that has to be taken into account is a lack of ownership due to the fact that most legislation has been developed by external advisers. However, the CHU/IA now seems to have taken over the responsibility for further developing internal audit legislation in Kosovo. The CHU/FMC is not yet operational, and this means that local ownership of the development of FMC has yet to emerge other than where it is connected to the control of expenditure within the Treasury system. This situation is of some concern, as internal audit can only develop at the same pace as financial management and control are developing. In addition, the strategic document envisaging the establishment of the CHU/FMC reflects a limited perception of the role of the CHU/FMC. Consequently, there is a risk that "financial management" is perceived as somehow separate from management rather than an integral part of it.

It is clear that the international community has not sufficiently focused on increasing the understanding of, and developing the capacity for, the basic requirements for a sound financial management and control system, which should be in place before more sophisticated concepts can add value. Much more attention should be given also to systemic weaknesses, which include the lack of qualified staff, lack of resources, and overall a poor control environment caused by a lack of management appreciation of the objectives of PIFC.

A number of reforms are underway or under discussion that could make the development of the system more difficult, such as the proposed delegation of current Treasury control activity to budget organisations (which is welcomed but increases risk unless competency in those budget organisations can be assured) and proposals for the devolution of budgetary responsibilities to schools and clinics.

Recommendations for Reform

In the short term, the following actions would be beneficial:

- Undertake an assessment of management's understanding of PIFC and how it integrates with general management;
- Ensure that FMC legislation and the regulations implementing such legislation actually facilitate improvements in the quality of public expenditure (This would mean that the CHU/FMC should broaden its remit beyond ensuring the effective functioning of the Kosovo Financial Management Information System (KFMIS).].
- Improve the quality of the human resources and training approach with regard to the present cadre of internal auditors and introduce professional training (as opposed to just short-course training) for future internal auditors; develop networking between internal auditors; encourage the development of systems audit and in general develop quality control;
- Improve co-operation between the Auditor General's Office and internal audit;
- Address the PIFC issues that will arise from the delegation of budgets and ensure that other proposed legislative changes take PIFC implications fully into account;
- Develop a co-ordinated needs assessment and human resources development process for internal audit and FMC staff.

2. Baseline Questions

2.1 *Is a coherent and comprehensive statutory base in place, defining systems, principles and functioning of financial control?*

In principle, a coherent and comprehensive statutory base is in place, defining the systems, principles and functioning of the financial control system. This base rests on the Constitution as well as on a number of specific laws.

The Constitution of Kosovo (which came into force in June 2008) specifies in article 120 that:

- Public expenditure and the collection of public revenue shall be based on the principles of accountability, effectiveness, efficiency and transparency.
- The conduct of fiscal policy at all levels of government shall be compatible with the conditions for low-inflationary and sustainable economic growth and employment creation.
- Public borrowing shall be regulated by law and shall be compatible with economic stability and fiscal sustainability.

The most significant law in Kosovo affecting public internal financial control is the Law on Public Financial Management and Accountability (Law No. 03/L-048). This law covers the arrangements for the development of the budget and the processes for its approval, including parliamentary processes, as well as the arrangements for transfers and for reporting on budget outcomes. The law also defines “public money”, the organisation of the Ministry of Finance and Economy and appointment of key officials, capital and operating expenditure, financial management, accounting, budget accountability, and financial reporting systems for public authorities and public undertakings in Kosovo; it prescribes the powers and duties of the Minister of Finance and Economy and other public authorities concerned with these matters.

The law prescribes the administrative structure that budget organisations of all types are to establish to ensure appropriate financial management arrangements. This structure includes a chief administrative officer (who is the chief official), an internal auditor, a chief financial officer, a procurement officer, and a certifying officer. The law also specifies the arrangements for the receipt and expenditure of public money for accounts within the Kosovo Consolidated Fund. Part VIII of the law sets out the requirements for reporting, accounting, auditing and financial control, including a requirement for the Ministry of Finance and Economy to prepare a budget classification system and chart of accounts using applicable standards prepared by the International Federation of Accountants (IFAC). However, the current reference is to the IFAC public sector cash standard, and this chart of accounts has to be compatible with the IMF General Finance Statistics (GFS).

In addition, the Law on Public Financial Management and Accountability also prescribes the accounting arrangements that require the Minister of Finance and Economy to maintain, at a minimum, accounting records for each budget organisation, showing aggregate information for each of the following categories:

- receipts;
- outstanding liabilities;
- assets;
- appropriations;
- adjustments to appropriations;
- appropriations made available to the budget organisation by means of allocated funds;
- extent to which allocated funds have been recorded as committed funds; and
- actual expenditures.

This law specifies that the chief financial officer of a budget organisation is to record transactions and maintain accounting records in accordance with the FMC Rules as described below and to provide copies of the accounting records to the Minister of Finance and Economy when requested. The chief financial officer of a budget organisation and the organisation's chief administrative officer are also required to provide unaudited financial statements within 30 days of the end of each fiscal year.

According to this law the Auditor General has to provide a report on the financial statements to the Assembly by 31 July following the end of the financial year.

The Law on Public Financial Management and Accountability is supported by secondary legislation, which includes the following:

- Treasury Financial Rule – Number 01 – PIFC (February 2006): This rule has been developed to further define the accountability chain and the minimum requirements for internal control. It applies to all public administration, which includes ministries, municipalities and reserved power organisations. Its coverage includes regulatory bodies but does not extend to designated entities.
- Treasury Guidelines and Financial Rule – Number 02 – Expenditure of Public Money (June 2006 and as amended November 2006): In the past, the Treasury had developed administrative instructions, which addressed many aspects of the expenditure and internal control issues regarding public monies. This Treasury document updates and consolidates these instructions in a single document. The previous administrative instructions continue to apply unless they differ with the instructions in this guideline document, in which case the instructions set out in this 2006 document are to apply.
- An administrative instruction is currently being developed (March 2009) concerning the delegation of expenditure management to budget organisations.

The Government of Kosovo publishes each year an annual Budget Law (the most recent law is for 2009 – Law No. 03/L-105, Budget of Republic of Kosovo for Year 2009). This law sets out the way in which public funds are to be used and the limits that are to apply to both expenditure and staff numbers. The law applies to all ministries, municipalities and agencies that receive budget appropriations. It also prescribes restrictions on the transfers of money from one budget heading to another and between financial years. Thus resources made available for goods and services cannot be transferred for the payment of employees. The annual Budget Law also defines expenditure on capital investment and sets out the circumstances in which line ministries, municipalities and other organisations are to consult the Ministry of Finance and Economy. This law also ensures the effective cash management of all public funds, whether they be budget organisations' own resources or not, by requiring them to be deposited in the Kosovo Consolidated Fund managed by the Treasury. Independent agencies covered by the Budget Law are also required to deposit funds with the Treasury. Similar rules apply to available donor funds.

The 2009 Budget Law also prescribes that, prior to submitting any proposed new law to the government for consideration and following consultation with the Ministry of Finance and Economy, each budget organisation is required to provide the government with an estimate of the budget implications that the proposed law will have for the 2009 Kosovo Budget and for the budget for a period no less than the two succeeding years, as required in section 26 of the Law on Public Financial Management and Accountability.

The annual Budget Law in effect sets the context for the operation of the PIFC system in Kosovo.

The Law on Internal Audit (Law No. 02/L-74) was published in June 2007. This law is designed to ensure greater operational efficiency, budgetary and financial discipline, and legal and regulatory compliance of public sector entities. The law sets out the principles according to which internal audits are to be conducted, and it requires all public sector entities to ensure that their operations, records and management and control systems are regularly – at least once a year – and systematically subjected to a comprehensive internal audit. The audits are to be performed in accordance with the rules, policies, manuals, guidelines, code of ethics and professional standards developed by the

CHU/IA, which according to this law was to be established in the Ministry of Finance. Every budget organisation was to set up an internal audit unit. In addition, the law required the establishment of audit committees by each budget entity, composed of employees of that entity.

The Law on Internal Audit has been reviewed, and a draft law that would repeal Law 02/L-74 is currently under consideration by the Assembly. The main changes envisaged by this new internal audit law include the following:

- Harmonisation of internal audit practice according to EU good practice;
- Recognition that not all budget organisations should have internal audit units as for a smaller organisation the unit would be too small to be effective;
- Similarly, not all budget entities may wish to appoint audit committees for every second-level organisation; some may only want one committee to cover all activities;
- Setting of criteria for determination of the need for an internal audit unit and provision by the Ministry of Finance and Economy of audit services (a mobile team) to the smaller entities that decide not to set up an internal audit unit;
- Setting of criteria to determine the number of auditors required by a budget entity;
- Requirement for the elaboration of a strategic plan for internal audit;
- Plans for increasing the number of internal audit staff to at least two in the case of small internal audit units;
- Establishment of the CHU/IA as a special unit in the Ministry of Finance and Economy (this proposed change repeats the provision for the establishment of an internal audit CHU that was set out in the Law on Public Financial Management and Accountability).

In addition to the above laws, other laws have an impact on PIFC, including the laws governing the functioning of municipalities and the distribution of funds to them (Law on Local Government Finance).

The legal basis for financial control in Kosovo, as set out in both the Constitution and specific laws, provides evidence that an appropriate legal framework does exist. The proposed changes to the law (particularly to the Internal Audit Law) also suggest that where the established legislative framework has been shown to be deficient, revisions will be made to enhance it.

These laws in effect take over the proposals contained in the PIFC Policy Paper that was first published in 2005 and then revised and published in 2007.

While the PIFC laws correspond to EU and international standards, the real problem lies with the implementation and understanding by management of what those laws actually mean for the management process in practice. This problem is compounded by the weakness of current administrative capacities.

Although a comprehensive legal framework for financial control exists in Kosovo, it appears from the efforts that the government is making to modify some of these laws (e.g. Law on Internal Audit) and to implement some clauses in other laws (e.g. introduction of the CHU/FMC) that legal and operational reform and activity will be required to ensure the effective implementation of the legislation. There is also no evidence (which effectively functioning CHUs and an internal audit service could provide) that laws are fully understood and applied in practice and that government officials fully realise the implications of the laws. Indeed, the evidence suggests that this is not the case (see next section).

2.2 Are relevant management control systems and other procedures in place?

The Law on Public Financial Management and Accountability established that the chief administrative officer (CAO) – that is, the permanent secretary – in each budget organisation is responsible for the financial management arrangements. This person is the most senior official and

while his/her appointment is regarded as subject to political patronage (and therefore may change with a change of government), it is not a ministerial post (as is so often the situation in many other countries of the region). Therefore, the possibility exists that the appointee will be a person with at least some significant administrative background which, from a financial management point of view, is preferable to a situation where the person responsible for financial management and control is the minister, who may have no background in public administration. (However, in reality appointments made to permanent secretary posts may be made for political reasons that have nothing to do with administrative capabilities.)

It is not clear how far individual CAOs in line ministries understand the full implications of their responsibilities for financial management or the extent of training that had been provided to them to enable them to do so. The Treasury Financial Rule – Number 01 on Public Internal Financial Control defines internal financial control as “an integral process that is effected by an entities management and personnel and is designed to provide reasonable assurance that in pursuit of the entity’s mission, the following general objectives are being achieved:

- Executing orderly, ethical, economical, efficient and effective operations;
- Fulfilling accountability obligations;
- Complying with applicable laws and regulations;
- Safeguarding resources against loss.”

The purpose of this financial rule (issued under the authority of the Law on Public Financial Management and Accountability) is to establish a consolidated set of instructions and directions for the internal control and management of public finance in the Kosovo public sector. These rules apply to all public authorities, which include ministries, municipalities and other budget entities. The terms of this rule follow standard definitions, and no evidence has been provided to suggest that the management or internal audit have undertaken any activity that would enable them to confirm that “ethical, economical, efficient and effective operations” were being carried out. There was similarly no evidence that all relevant officials were aware of the Treasury Rules, and indeed as part of the Treasury proposals for the delegation of responsibility from the Treasury to line budget organisations, the Treasury has acknowledged that training is required (see below).

Effective financial control – in the narrow sense of ensuring that funds are spent in accordance with approved budgets and with the relevant regulations and cash flow forecasts – relies heavily on the effective management of the KFMIS, which is the responsibility of the Treasury in the Ministry of Finance and Economy. Individual budget organisations have access to this system through terminals generally located within the organisation, and operational access to these terminals is said to be carefully controlled. The Treasury maintains control, however; budget organisations are required to submit the relevant documentation supporting payments to the Treasury, which ensures that the appropriate officials, authorised by the Treasury, have signed the payment authority.

The practical effect of this is to transfer responsibility for financial control back to the Treasury from the budget organisation. However, the Treasury’s aim is to relax its control as internal control arrangements within budget organisations and as internal audit develop. Indeed, as from 2009 this relaxed control by the Treasury could occur. There is likely to be a six-month monitoring period and then, as budget-users become competent, the aim is to complete the transfer of responsibility by 2010. A training programme forms part of this process. The objective is to ensure that all current and future KFMIS users are trained to a proper level to use the KFMIS, with an understanding of their duties based on laws and financial regulations. The focus of the recently published Administrative Instruction aims to facilitate this transfer of responsibilities.

However, this training is not the same as management training in the responsibilities of financial management, which go well beyond a technical capacity to operate the KFMIS. Of course safe, secure and efficient management of the KFMIS is essential, and the strategy of the Treasury to ensure such management is welcomed. However, management also involves ensuring that funds are used in the most cost-effective way so as to deliver in terms of programme objectives, agreed performance

standards and timetables. This level of management performance requires much more than a robust Treasury system and can only be achieved over time. (Also, as pointed out above, the perception of the role of the CHU/FMC seems to be limited to the effective operation of the Treasury system, which will not provide any evidence of ethical, economical, efficient and effective operations.)

The Law on Public Financial Management and Accountability also specifies the organisational structure that is to be put in place to ensure effective financial control through the allocation of responsibilities to various officials. The competence of the various officials to be appointed, as prescribed in the Law on Public Financial Management and Accountability, and the extent to which all of these posts are filled will be decisive for the effectiveness of the system.

The Treasury's 2009 strategy also envisages the establishment of a CHU/FMC. The requirement for the provision of this CHU is set out in the Law on Public Financial Management and Accountability. The Treasury's strategy for 2009 envisages that this unit will become operational this year and to facilitate this, it apparently foresees to shift funds from other parts of the organisation. The strategy envisages the following developments regarding the CHU/FMC in 2009:

- Establish and implement a Public Internal Financial Control (PIFC) framework in consistency with EU standards;
- Develop and achieve best usage of the KFMIS in order to improve the financial management and control environment;
- Manage system controls in the KFMIS;
- Decentralise (although the strategy has questions about this stage of development).

As the CHU/FMC, according to the Treasury's strategy for 2009, appears to be concerned with issues related to the operation of the KFMIS, the above list represents a very limited vision of the role of the CHU/FMC. It would also suggest that while the "form" of PIFC exists, the "substance" in terms of it running like a thread through the whole management process does not seem to have been appreciated. The proposed technical assistance programme aims to assist with the development of FMC.

Another recent development has been the publication of a new chart of accounts operative for 2009.

Current control does rely heavily on the operation of the Treasury system and seems to focus on procedures and processes. The principles of management control do not appear to impact on operational management decisions in terms of ensuring ethical, efficient and effective public expenditures. Internal audit has not been able to provide the assurance that the framework is effective in these broader terms, and the evidence that has been provided by internal audit findings, which focus mainly on observance of rules and regulations, indicates weaknesses in compliance.

2.3 Is there a functionally independent internal audit mechanism in place, with relevant remit and scope?

The Law on Internal Audit of 2007 provided for the establishment of a functionally independent internal audit mechanism. The proposed new law, which is currently before the Assembly, should clarify and strengthen the position of internal audit. The fact that an Internal Audit CHU now exists (established on 1 April 2008) is a significant step forward. The proposed new internal audit law will define key audit terms, including economy, efficiency and effectiveness, and various types of audit, including systems, compliance, performance and IT audit. The draft law refers specifically to a code of ethics and to the need for audit charters. The 2007 law is far less clear on any of these points. Under the proposed new law, internal audit would report to senior management, defined as "Senior Management of Public Sector Organisations", which means the position that has the ultimate operational responsibility in the public sector organisation, generally ministers or chief administrative officers (CAOs). (In municipalities it is the President of the Assembly.)

In addition, the new law reinforces the provisions of the previous law regarding the establishment of audit committees. However, there is now some degree of flexibility in the operation of this

requirement and therefore the rationalisation of audit committees for very small organisations is possible. While this is a welcome step forward towards a more rational use of scarce human and financial resources, it is nevertheless questionable in terms of how far audit committees can add value at all in the context of the weak administrative capacity of Kosovo, as described above.

Rather unusual importance is attributed to the position of director of an internal audit unit because of the amount of the salary. The draft law provides that, because of the high level of competence required of the director of an internal audit unit, he/she is to have a salary equivalent to that of a permanent secretary. This is a very unusual requirement and the Head of Internal Audit should not be on the same level as the Permanent Secretary.

The new draft law lays down that the criteria for the establishment of internal audit units are to be prescribed in regulations, which provides scope for ensuring that internal audit units are of a minimum size. Clause 3 of the draft law allows public sector organisations to share internal audit resources and to procure such resources from the private sector, and it makes it possible for the Ministry of Finance and Economy to provide an internal audit service on behalf of other budget organisations.

The new draft law also specifies the training that is required and the requirement for new internal auditor recruits to possess a university diploma in economy, public administration, public finance, accounting or law. The training required will be specified by the CHU/IA.

Another recent development has been the publication of a comprehensive internal audit manual.

At the present time, at the central level there are 71 internal auditors including the seven CHU/IA staff, and at the local level/municipalities there are 35 auditors. The total number of internal auditors in Kosovo is therefore currently 106, not including auditors in social enterprises.

The CHU/IA has developed a system of reporting, with quarterly and annual reports required from budget organisations and with the CHU providing similar periodic reports to the Ministry of Finance and Economy, which passes these on to the government. The CHU's annual report covers the activities and developments in internal audit, and includes statistics on the number of audits and recommendations. Last year (2008) – according to this report – about 300 audits were completed and 1900 recommendations issued. 55% of recommendations had been implemented entirely, 24% were in the process of implementation, and 21% had not yet been implemented at the time of the report's finalisation, although the Head of the CHU expected that some of these recommendations would be implemented in the future. It has to be said, however, that these figures alone do not give any information about the quality of the recommendations. With regard to audit committees, 48% of the possible total number was reported to have been established, and the rest to be in the process of being set up.

The CHU itself has developed a strategy for the period 2010-2012, which has been approved by the government. Actions are now being taken to implement the strategy.

There are different perceptions of the extent and quality of internal audit activity as expressed by the Auditor General's Office as compared with the statistics produced by the CHU. This discrepancy may be partly due to a lack of effective interchange between the two organisations. There is also likely to be a mutual interest in training, and while there may be different needs in practice, given the overall small group of officials who need training, co-operation may be essential in order to secure economical training.

A strong view of outside observers was that the issues addressed by internal audit were limited and really reflected a continuation of the type of issues that would have fallen within the purview of traditional inspection, that is, they concerned transactions approved according to administrative requirements. There was limited evidence of a move to develop more advanced audit approaches. This was borne out in interviews with internal auditors. So far the main driver for improving internal audit quality has come from technical assistance, which has also provided the main training impetus. The establishment of the CHU/IA should change that, and therefore the developmental role of the CHU will be very important.

Many efforts have obviously been made again with the draft new Internal Audit Law to improve the legal basis for internal audit, and the proposed text once approved would improve the clarity of the provisions and help bring them in line with advanced international good practice. Given the current state of development of FMC and internal audit in Kosovo, the main immediate efforts should focus on developing the basic required skills of internal auditors and on ensuring that a) managers understand and accept their responsibility for delivering public services in a legal, economic, effective and efficient manner, and b) that the financial management systems are sufficiently developed to enable the managers to do so. Before basic requirements and the related understanding of those basics are in place, more advanced concepts, such as audit committees, will hardly add value to the development of public financial management in Kosovo.

Progress is being made towards the establishment of an independent internal audit. However, the evidence is that it is a considerable way from being fully functional. Internal audit units do exist in most organisations as do audit committees, but the range of their activity is limited and while a reasonable proportion of recommendations is accepted, discussions with internal auditors suggest that the scope of those recommendations are mainly concerned with transaction compliance-related matters and not with the wider issues, such as the strength of systems, the efficiency and effectiveness of expenditure, and the management of risk. There seems to be the risk that efforts focused on more advanced concepts draw attention away from basic requirements.

2.4 Are systems in place to prevent and take action against irregularities and to recover any amounts lost as a result of irregularity or negligence?

The Law on Public Financial Management and Accountability provides for penalties to be imposed on those who breach its provisions and regulations. There is no provision in this law to deal with irregularities and to recover amounts lost. Similarly, there does not seem to be any reference to the establishment of an AFCOS-type organisation (Anti-Fraud Co-ordinating Service) in the relevant laws, including in the annual Budget Law or in the 2007 Law (and new draft law) on Internal Audit. The evidence therefore is that no systems are in place to prevent and take action against irregularities and to recover lost amounts.

However, the PIFC Policy Paper issued in May 2007 specifically referred to the “fight against fraud”. This policy paper envisaged that the fight against fraud would be carried out by an inspection service, although the paper recognised the need to avoid any overlap with the internal audit activity. All fraud involving EU funds should be reported to the European Anti-Fraud Office (OLAF). The policy paper envisaged a programme of training for staff on the issues and on the development of new legislation (by the end of 2006). No specific references to the fight against fraud are included in the Law on Public Financial Management and Accountability or in the proposed new Internal Audit Law. The relevant Public Procurement Law (last amended in 2007) contains the usual provisions about corrupt practice, but has no specific reference to inspection or to the fight against fraud.

It is not clear if and to what extent special systems are in place to fight against irregularities or to recover lost sums other than through the normal legal processes.

3. Capacity to Further Develop the System

Nothing suggests that the Kosovo Ministry of Finance and Economy does not wish to continue with the development of the PIFC system, and the likelihood is that there will be a need for further development as one outcome of the proposed technical assistance project. The present technical assistance project proposals concerned with public expenditure management and with PIFC should provide a valuable incentive for improvement.

However, a number of reforms are underway that may make development of the system more difficult, including the following:

- Proposals for the devolution of budgetary responsibilities to schools and clinics: A pilot scheme is currently being implemented, covering a limited number of municipalities; if successful, it

would be “rolled out” on a full-scale basis. There does not seem to be any particular discussion about the impact of this scheme on public internal financial control, and the main initial impact would be on the KFIMS. Clarification is required on this point.

- The idea that line ministries and other budget organisations assume much more responsibility for PIFC, thus reducing the role of the Treasury, could be appropriate in some circumstances. However, a competency comparison should be made between the Treasury and the organisations that would take over these responsibilities. It can be seen from the Treasury strategic plan that training programmes are envisaged and that one of the reasons for the devolution of responsibility is the development of internal control and internal audit. Even so, significant improvements need to be put in place for both of these elements of PIFC before any large-scale devolution occurs. The training of staff in the use of Treasury procedures is not in itself a sufficient precondition for devolution.
- There is apparently a limited perception of the role of the CHU/FMC. The activity and related training to be initiated by the CHU/FMC should go well beyond the effective implementation of the KFIMS. Attention has to be paid to the capabilities of the CAOs and their understanding of their responsibilities as managers of public expenditure and of the implications for improving the quality of public expenditure. This training would be provided in addition to the technical training of designated officials to be appointed according to the provisions of the Law on Public Financial Management and Accountability that would prepare them for properly fulfilling their roles. Indeed, below the level of the CAOs there would also be a range of officials who would assume responsibility for public financial management.

In addition to the above specific reservations, the following comments are to be made:

- There appears to be no co-ordinated needs assessment and human resources development process for internal audit and FMC staff. This situation may change with the development of the CHUs, but this is a priority issue that needs to be addressed, as otherwise the best recruits will prefer not to fulfil these functions or if they do, there is a greater likelihood that they will leave.
- There is a strong need to develop professional training (as opposed to short-course training) for both internal auditors and those concerned with financial management, with such a programme leading to the award of appropriate certificates. Crucial to raising the quality of public expenditure (which means achieving better value for money) is the need to ensure that capable managers are appointed and trained and that the PIFC system and the public expenditure management system provide incentives for improving the performance of public expenditure. Although this is a long-term aim, initial steps should be taken as soon as practical.
- While the new draft internal audit law is now under discussion in the Assembly, there is no assurance with regard to the form that it will eventually take. However, assuming that there are no major changes in the draft law, the Ministry of Finance and Economy is encouraged to think in terms of rather large internal audit units rather than what appears to be the current thinking, i.e. units of two persons. More economical and effective units staffed by a minimum of three persons – although four or five persons would seem to be a better scheme – would of course mean a greater sharing of internal audit resources. Again, creating structures where a “parental” institution would assume the internal audit function for smaller institutions of the same sector could also result in a more efficient use of scarce internal audit resources.
- The development of the CHU/IA is an encouraging step forward.
- The CHU/FMC is in a very early stage of development and has a limited scope of activity; this scope should be expanded.
- No evidence has been given of the establishment of co-operation arrangements between the two CHUs, and yet there is a need for extensive co-operation between these two units.

- From the interviews with a small number of internal auditors, a very high commitment could be observed, and some audits seemed to be of a high quality, although the majority appeared to be limited and similar in scope to traditional inspection reviews. This may be inevitable at this early stage of internal audit development, but for real progress to be made this situation has to change. Without such a change, there is a risk that internal audit will not be able to add value and that managers will become disillusioned with internal audit.
- Following from the previous comment, the CHU/IA should consider how it might improve the quality of the internal audit process. Ways of improving quality should be explored.
- Networking between internal auditors does not seem to exist so far, and it should be encouraged as a way of sharing experiences, generally supporting the development of new ideas, and gradually helping to improve quality. This networking would have the further benefit of helping to improve the “esprit de corps” of the internal audit cadre.

Co-operation between internal and external audit also does not seem to exist. This is unfortunate because there are common interests and confidence-building is also required. The application of regulations (when available) on corporate governance to publicly-owned enterprises (including municipal enterprises) should be reviewed by both internal and external audit.





SIGMA

Support for Improvement in Governance and Management

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**KOSOVO (under UNSCR 1244/99)
PUBLIC PROCUREMENT SYSTEM
ASSESSMENT MAY 2009**

1. Summary

1.1 Main Developments since last year

No changes were made to Kosovo's public procurement legislation in 2008. However, in 2008 the Public Procurement Regulatory Commission (PPRC) issued 23 standard forms or letters to be used between 1 August 2008 and 1 January 2009 by contracting authorities during tendering procedures. Such documents have obviously contributed to the proper application of the public procurement legislation.

The main development since last year has been the setting up of the Procurement Review Body (PRB), which has been in charge, since 1 August 2008, of reviewing complaints lodged by economic operators, who allege that they have been or could be harmed by contracting authorities' decisions that are contrary to EU law in the area of public procurement or to national rules transposing that law.

Unlike the PPRC, which had previously performed this function of complaints' review, the PRB is a quasi-judicial body that is empowered to take any measures provided for by Directives 89/665/EEC and 92/13/EEC, in particular by adopting interim measures, setting aside decisions taken unlawfully, removing discriminatory specifications, and awarding damages to persons harmed by an infringement to the public procurement legislation. The PRB deals with the complaints independently from the government and any contracting authority, and its decisions can be annulled or amended only by the Court of Kosovo. Its members, appointed by parliament, are independent from any governmental authority or political body as well as any contracting authority. Thus the review procedure mostly fulfils the objectives of the EC Remedies Directives.

1.2 Main Characteristics (strengths and weaknesses)

As underlined in previous Sigma assessments, Kosovo's public procurement system is moving in the right direction, thanks to political commitment and external assistance. However, a number of significant measures should be initiated in both the short and medium terms to improve the system.

Law 2003/17 on Public Procurement (PPL) largely incorporates the key mandatory provisions of Directive 2004/18/EC. However, it also includes internal provisions that create bureaucratic constraints for contracting authorities, without really strengthening competition between candidates and suppliers. Moreover, although it includes public utilities as defined in Directive 2004/17/EC, as well as any public company, it does not allow them to use the more flexible procedures adapted to commercial undertakings that are authorised by this Directive.

The Law on the Procedure for Awarding Concessions (Law 02/L-44) is more limited than EU legislation since it only applies to works concessions for infrastructure projects and not to all of the works concessions covered by Directive 2004/18/EC. Furthermore, it does not comply with the provisions laid down by this directive; for example, it authorises contracting authorities to award concessions without having published any notice. A new draft law on concessions has been prepared by the government and is currently being reviewed within the administration. The Sigma assessment team has not yet been able to analyse this draft.

1.3 Recommendations for Reform

1.3.1 Short-term Priorities

Consideration should be given to carrying out a full revision of the PPL so as to align it with EC Directives 2004/17 and 18 (to the extent practicable) and with international good practice, including in the area of concessions.

If a full revision of the PPL is not possible in the short term, as a first step consideration could be given to developing a specific utilities procurement regime based on EC Directive 2004/17, as well as to removing some of the most controversial provisions of the PPL, such as the purchase of electricity and the prior approval procedure.

The government should provide strong support, including by soliciting external assistance, particularly from the EC project (see below), to the Public Procurement Regulatory Commission

(PPRC), the Procurement Review Body (PRB) and the Public Procurement Agency (PPA) to ensure their efficient operations.

1.3.2 Medium-term Priorities

In the event that a full revision of the PPL, as described above, is not possible in the short term, such an action is definitely needed in a medium-term perspective.

The professionalisation of procurement functions at the level of contracting entities requires the improved training of procurement officers. This training should include re-designing the certification scheme as well as providing assistance to procurement officers through guidelines, manuals and interpretation of public procurement legislation;

It will be necessary in the medium term to develop the instruments and methods provided by the new EC Directives (e.g. framework agreements and e-procurement) and to provide practical support for their implementation.

2. Assessment of Public Procurement/Concessions System

2.1 Legislative Framework

Public procurement in Kosovo is regulated by Law 2003/17 on Public Procurement (PPL), which entered into force in June 2004 and was amended in June 2007. In general, the PPL has successfully incorporated many of the provisions of EC Directive 2004/18 and international good practice. However, the PPL still includes a number of provisions inspired by sources other than the EC Directives, such as the World Bank guidelines or the UNCITRAL model law⁵⁷ (for contracts with a value not exceeding 10,000 EUR). It does not consistently implement EC Directive 2004/18 correctly, and EC Directive 2004/17 on utilities has not been introduced at all.

The PPL defines contracting authorities as:

1. public authorities, i.e. central, regional or local institutions that exercise legislative, administrative or judicial powers; bodies governed by public law and associations of one or more of such authorities and/or bodies;
2. public service operators;
3. public undertakings.

The public service operator category generally includes the utilities sector, which needs to follow the same strict rules as public authorities. The inclusion of public undertakings (other than those carrying out relevant activities) in the definition of contracting authorities has a strong potential to create difficulties in the daily activity of those entities that have exclusively commercial operations and must therefore cope with market pressures.

The rules governing tender documentation allow for the definition of technical specifications. These specifications can be defined either by reference to national standards that implement European standards, European technical approvals or common technical specifications, or in terms of performance and functional requirements. In practice, however, contracting authorities lack expertise in implementing these provisions. The PPL does not contain any specific provisions for including environmental characteristics in tender documentation.

The PPL provides for open, restricted and negotiated procedures (the last procedure can be with or without prior publication of a notice). Contracting authorities are free to use only the open procedure. When using the restricted procedure, it is still necessary to make a formal written determination. This determination must state that the product, service or work — due to its complexity — can only be supplied/provided/performed by an economic operator with specific capacities (similar to the UNCITRAL rules) and that it would be more economically efficient to first review the qualifications of interested economic operators and then to invite those with the minimum required qualifications to submit tenders.

The negotiated procedure, with prior publication of a notice, is only allowed when it is impossible to establish the contract specifications in a manner that would permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures, or when the nature of the works, supplies or services, or their related risks, do not permit prior overall pricing. This procedure is not allowed for:

- irregular or unacceptable tenders;
- work performed solely for research purposes, testing or development and not with the aim of ensuring profitability or recovering research and development costs.

As mentioned above, contracting entities from the utilities sector do not benefit under the PPL from the normal flexibility provided by Directive 2004/17/EC; thus the negotiated procedure with prior publication of a notice is only allowed under the same conditions as for cases in the classical sector. There are no provisions for competitive dialogue.

⁵⁷ UNCITRAL is the United Nations Commission on International Trade Law.

Simplified procedures are available for low-value contracts (between 1,000 EUR and 10,000 EUR) and for minimal-value contracts (less than 1,000 EUR). The PPL also contains provisions for framework agreements/contracts that can be awarded through the use of open and restricted procedures. However, framework agreements/contracts can be concluded with only one economic operator; there are no provisions for concluding such contracts with several economic operators. There are also strict conditions under which a contracting authority is permitted to use framework agreements. These differ from the rules of the Directive in that a contract award notice must be published for call-off contracts under the framework agreement and that the call-off contract is strangely subject to the review procedure in a context with only one contractor.

2.1.1 Advertising and Transparency

The PPL has well-developed rules on advertising and transparency. A contracting authority has to publish an indicative notice when it intends to award a contract with an estimated value of more than 250,000 EUR. It must also publish a contract notice if it intends to conduct an open, restricted or negotiated procedure with prior publication. If a contracting authority has awarded a contract using an open, restricted, negotiated or price quotation procedure, it must publish a contract award notice.

The notices must be in Albanian and in Serbian, and for large-value contracts in English as well, if considered necessary. The notices are sent to the Public Procurement Regulatory Commission (PPRC), which publishes all language versions on its website and in the Public Procurement Register.

Time limits start from the date of publication. For example, for an open procedure to award a large contract, the period provided for the receipt of tenders must not be shorter than 40 days. If the contract is not large (estimated value lower than 100,000 EUR for supplies and services contracts and 350,000 EUR for works contracts), this period must be not shorter than 25 days. However, the end-users put pressure on the PPRC to reduce the time limits, which are considered to be a burdensome obligation in the procurement process.

2.1.2 Selection and Award Criteria

The PPL distinguishes between (1) criteria for qualitative selection (“eligibility requirements”) and (2) contract award criteria. The first category includes criteria on the personal situation of the candidate/tenderer, such as professional suitability, economic and financial standing, technical and/or professional capability and quality assurance standards. There are no provisions for environmental management standards.

Contract award criteria include both the lowest price and the most economically advantageous tender (MEAT). The PPL suggests that the lowest-price criterion should be the general rule, while the most economically advantageous criterion (MEAT) is a specific exception, with rules that have more in common with the rules of IFIs⁵⁸ on lowest-evaluated price than with the award criterion of the EC Directives.

The PPL is considered to be an important safeguard against fraud and corruption in public procurement. This is the main reason why the rules do not allow for greater flexibility and why an open procedure — along with the lowest-price criterion — is the main approach in the procurement process.

For the same reason, article 30A.4 of the PPL contains a specific rule that generates significant delays in contracting authorities’ procurement activities. This article states that the procedure must be cancelled if fewer than three responsive tenders or, where applicable, requests to participate are received. In this case, the contracting authority must initiate a new procedure if it still wishes to procure the items or it must request the consent of the PPA if it wishes to continue with fewer than three tenders.

Another unresolved problem is related to some differences between the Albanian and English versions of the PPL. The PPRC has noted mistakes in the substance, translation and technical content of the

⁵⁸ International Financial Institutions.

Albanian version, and these mistakes make the implementation of the PPL more difficult. The Kosovo Assembly may take steps to eliminate these mistakes from the Albanian version, but it is not clear whether (or when) this will occur.

The legislative process for adopting secondary legislation has now been completed. However, the secondary legislation should be complemented by operational guidelines for selecting and evaluating tenders.

2.1.3 Compatibility with EU Legislation

The PPL is basically modelled on the EC Public Procurement Directives, but contains many additional provisions that are not found in the EU legislation.

The following elements of the PPL need to be discussed and potentially reconsidered in future legislative initiatives:

- A priority for Kosovo is the development of a specific regulatory framework for utilities that is in line with the EC Directives. This framework should reflect EC Directive 2004/17 by offering a more relaxed set of procedures and rules adapted to the particular operations of utilities.
- The purchase (import) of electricity should be excluded from the scope of the PPL in future revisions (it is not included in the EC Directives). This provision represents a particular burden for the Kosovo Energy Corporation (KEK). KEK should instead have the right to use sound commercial practices. The specific guidelines for the purchase of electricity could be defined in more detail in co-operation with the PPRC.
- Reconsideration should be given to the requirement for public enterprises of a commercial and industrial nature to follow the strict rules of the PPL. These rules do not promote the efficient and effective operation of these enterprises.
- Reconsideration should be given to the inclusion in the PPL of procurement of immovable property contracts; normally these contracts are outside the scope of public procurement legislation. It is difficult to understand how such tender proceedings can be organised so as to obtain a level playing field for tenderers.
- Reconsideration should be given to the structure and extent of thresholds for determining the types of contracts; the current thresholds appear to be debatable, requiring contracts to be carefully pre-valued since the thresholds greatly influence the procedures that are acceptable, including time-limits for the submission of tenders and the use of tender and performance securities. Too many thresholds may unfortunately encourage contracting authorities to split the tender or estimate the contract value incorrectly in order to keep from having to follow the rules. The design of technical specifications closely follows the EC Directives, which is good in principle. However, it is not clear to what extent these rules apply to the situation in Kosovo or to contracts other than high-value contracts.
- A re-examination is necessary of the way in which the restricted procedure is designed. The restricted procedure should not require any justification for its use since it has the same standing as the open procedure in the EC Directives. In the European context the restricted procedure is an open procedure with pre-qualification or short-listing. It is thus suitable for large works contracts or service contracts where a purchaser wishes to reduce the number of tenders. It is also difficult to understand how the pre-qualification phase of the restricted procedure is organised in the PPL; the PPL is not clear on this issue. Furthermore, the restricted procedure is rarely used in Kosovo — and it was not used at all in 2008.
- A new simplified competitive procedure for low-value contracts of all types should be introduced. The price quotation procedure allowed for minimal and low-value contracts (up to 10,000 EUR) for supplies and services (not works) is normally designed for the purchase of supplies and simple works contracts to satisfy recurrent needs, where the lowest price is the only criterion. It is not usually suitable for service contracts, where other factors need to be considered in the evaluation.

- Framework agreement rules need to be brought in line with the EC Directives. As mentioned above, framework agreements/contracts can only be concluded with one economic operator; there are no provisions for concluding such contracts with several economic operators. There are also strict conditions under which a contracting authority is permitted to use framework agreements, such as the requirements for a contract award notice to be published for call-off contracts under the framework agreement and for the call-off contract to be subject to the review procedure (even when there is only one contractor).
- Reconsideration should be given to the need for and length of the numerous time limits and deadlines for the publication of notices (indicative, contract and contract award notices) as well as for the submission of requests to participate and tenders, accelerated procedures, and clarifications of tenders, etc. Their length will depend on how the thresholds are set in the future.
- The design of award criteria should be re-examined. As mentioned above, contract award criteria include both the lowest price and the most economically advantageous tender. The PPL suggests that the lowest-price criterion should be the general rule, while the most economically advantageous criterion (MEAT) is a specific exception, with rules that have more in common with the IFI rules on lowest-evaluated tender than with the specific award criterion of the EC Directives. To the extent possible, the contracting authority should express sub-criteria, which need to be quantifiable, in monetary terms. The sub-criteria are specified in the PPL (article 50.3) and differ extensively from the non-exhaustive list of evaluation factors included in the EC Directives. Contracting authorities have limited discretion to decide on the award criteria, and it appears to be very difficult to design tender dossiers for the procurement of services and contracts where price and quality play a central function. Consequently, contracting authorities prefer to use the lowest-price criterion, which may result in contracts that hardly consider quality and life-cycle costs.
- The widespread use of tender and performance securities for large and medium-sized contracts should be reconsidered. Such securities may hinder participation and undermine competition, especially for small and medium-sized companies.
- The rules on the qualification and selection of tenderers need to be reviewed. While they are not incorrect, their general application for all large and medium-size contracts places a serious burden on economic operators and may restrict participation and competition.
- Consideration should be given to relaxing the rules requiring another tender proceeding in order to extend an existing contract. Under certain justifications, the EC Directives allow for additional deliveries of up to a maximum of 50% of the original contract value; the PPL only allows for 10%.

Other important aspects of the PPL, such as the role of the PPA and the PRB as well as the certification system for procurement officers, are discussed later in this assessment report.

Summary

Kosovo's PPL is basically modelled on the EC Directives (for the classical sectors). However, it also includes a number of provisions and arrangements inspired by other international procurement regulatory sources, such as the World Bank guidelines and the UNCITRAL Model Law, which could be seen as an adaptation to the specific circumstances governing the public sector market in Kosovo. This mixture of regulatory sources results in added and unnecessary complexity, potential confusion, and difficulties in applying the law and in preparing secondary legislation and guidance documentation.

Another key concern involves the overall complexity of the PPL and its insufficient adaptation to the size and nature of contracts; in principle, contracting authorities are forced to use the same complex set of procedures and rules irrespective of the contract value. There is no simplification for smaller contracts. The EC Directives are designed for high-value contracts that might attract

cross-border trade within the EU, not for the majority of contracts that normally follow more simplified national provisions.

However, the PPL also has a number of very positive features, such as its requirement to prepare and submit annual procurement plans, its ambition to increase professionalism among practitioners; its preference for open competitive procedures based on European rules and good practice; debriefing; and the strong institutional set-up that it promotes.

2.2 Concessions Legislation

The award of concessions is regulated by Law 02/L-44 on the Procedure for Awarding Concessions (hereafter referred to as the Concessions Law), adopted on 3 October 2005. In fact, this law applies only to works concessions for infrastructure projects, and not to works concessions for buildings (prisons or hospitals, for instance) or to services concessions. Furthermore, the law's procedures, which are based on UNCITRAL's *Legislative Guide on Privately Financed Infrastructure Projects*, do not comply with Directive 2004/18/EC: for cases not forecast by the EC Directive, the Concessions Law authorises contracting authorities to award concessions without having published any notice. Although no concession seems to have been awarded in pursuance to this law, the law nevertheless needs to be thoroughly amended so as to comply with the EC Directive. Other key observations relate to the incorrect application of definitions, insufficient co-ordination with the PPL, and a number of provisions that are entirely contract-specific.

A new draft law on concessions has been prepared by the government and is currently being reviewed within the administration. The Sigma assessment team has not yet been able to analyse this draft.

2.3 Central Public Procurement Organisation

As reported in the previous assessment, two main institutions continue to manage the system: the Public Procurement Agency (PPA) and the Public Procurement Regulatory Commission (PPRC).

2.3.1 Public Procurement Agency (PPA)

The PPA is an executive agency established within the government. The director and members of the PPA's executive board are nominated by the government and appointed by parliament for a three-year term. However, in accordance with the amended PPL, the executive board will be dissolved by 30 June 2009 and the management replaced by one director only. The PPA is organised into two main departments: (1) Centralised Procurement and Special Projects, and (2) Department of Control and Approval. The PPA currently has 15 employees but it has the right to fill two more positions.

The PPA's main function is central and co-ordinated purchasing. For reasons of professional expertise, cost-effectiveness, efficiency or other legitimate concerns (as listed in the PPL), the government, on the proposal of the PPA, may decide that any procurement procedure planned by any contracting authority in Kosovo is to be conducted by the PPA. The PPA also sets up framework agreements on behalf of the government administration. Each contracting authority is obliged to submit to the PPA at the beginning of the fiscal year a preliminary procurement forecast identifying works, supplies and services that it intends to purchase during the year. After the budget for the year is approved, the final forecast must be sent to the PPA. The PPA is also responsible for implementing a number of World Bank projects.

The PPA's next most important role – its second main function – is to perform some important control functions whenever procurement procedures are conducted directly by contracting authorities. This function involves two main responsibilities: (1) to approve a request by a contracting authority to use the negotiated procedure without prior publication, irrespective of the contract value (article 34.1); and (2) to consent to a request by a contracting authority to continue a procurement procedure even though fewer than three tenders have been submitted (article 30.A, and see above section 2.1.2). Contracting authorities are frequently irritated by and critical of the need for PPA approval in these two circumstances. Sigma was not able to obtain any statistics for 2008 during the assessment mission, but the following data dating from 2007 concern these two control functions:

Approval of the use of negotiated procedure without publication of a contract notice (2007):

Number of requests= 830

Number of approvals= 564

Decisions to revoke Article 30.A for less than three responsive tenders (data for second half of 2007):

Number of requests= 243

Number of approvals= 125

We understand that the number of requests within these two categories was more or less the same in 2008. On the positive side, the amended PPL has decreased the number of areas that are subject to PPA approval. Previously, the PPA had to approve all procedures other than the open procedure, as well as the reduction of time limits beyond those stipulated by the PPL for all contracts and contracting authorities, including utilities.

Our recommendations are as follows:

1. The use of the negotiated procedure without publishing a contract notice reduces transparency in the award of public contracts. This practice may, in turn, increase the risks of abuse and irregularities in procurement processes. The EC Directives treat the negotiated procedure as an exceptional procedure that needs clear and well-defined justifications for its use. However, it is normally the responsibility of contracting authorities to make these justifications, to decide on the use of this procedure, and to be accountable for their decisions. On the other hand, control is exercised by efficient procedures for complaints review and remedies, as well as systems for internal and external audit. In Kosovo, the presence of the new Procurement Review Body (PRB) and the Office of the Auditor General (OAG) may justify changing the use of the negotiated procedure without publishing a contract notice. Furthermore, its use will probably be significantly reduced, with a more flexible procurement regime in general and the introduction of more appropriate procedures for medium and low-value contracts. In terms of contract value, the purchase of electricity by the Kosovo Energy Corporation (KEK) is one main reason for the extensive amount associated with the negotiated procedure (see section 2.1.3 above). Sigma accepts that during a transition period the government may wish to exercise a certain level of control over the use of the negotiated procedure without the publication of a contract notice. However, this prior approval procedure should be limited to large contracts only.

2. Our view regarding the need to launch another call for tender whenever fewer than three responsive tenders have been received is that the procedure should urgently be reconsidered. It is very burdensome for the PPA, causes delays for contracting entities without adding any clear benefits, and is not in line with good European practice. There is no reason why a contracting authority should not finalise a tender proceeding where the tender has been subject to an open invitation through the publication of a contract notice. All economic operators in the market have been given the chance to respond and unless there are major problems/mistakes in the tender documentation, re-tendering is not likely to meet with any more success. On the contrary, re-tendering may encourage collusive practices. Furthermore, in the case of fewer than three tenders being received in conjunction with the use of a request for quotations, a contracting authority is not even allowed to request an approval from the PPA, but must continue with new calls for tender until more than three tenders have been received.

Summary

As the PPA is itself an executing agency and major contracting authority, it should not exercise regulatory functions that conflict with its basic contracting functions. Instead, it should focus on developing its capacity as a central purchasing body and on becoming the main co-ordinating point for the management of framework agreements and electronic procurement. Therefore, all prior approval functions should be removed from the PPA's remit. If kept, prior approval of the negotiated procedure should be assigned to the PPRC or perhaps placed with a special "Exceptions

Committee” until the need for such prior approvals is phased out of Kosovo’s public procurement system.

2.3.2 Public Procurement Regulatory Commission (PPRC)

The PPRC is an independent agency formed under section 81 of the PPL. The PPRC started to function in February 2005. With the 2007 amendment to the PPL (Regulation 2007/20), the PPRC’s duties and responsibilities have changed.

The PPRC is managed by a board comprised of five members, who are proposed by the government and appointed by the Assembly of Kosovo. Amendments to the PPL are likely to reduce to three the number of permanent members, although the existing members of the PPRC are to continue to serve until the end of their mandates. The PPRC currently has 26 staff and is organised into four departments: IT and statistics; rules, supervising and monitoring; training; and administration.

The PPRC’s main functions are to:

- Be responsible for the overall development, operation and supervision of Kosovo’s public procurement system;
- Establish detailed rules to ensure the proper implementation of the PPL;
- Provide and publish written interpretations, and offer technical help and advice to contracting authorities and economic operators for the implementation of the PPL provisions;
- Establish and maintain an informative website that offers unlimited public access to data on public procurement in Kosovo, and improve publications required under the PPL (see www.ksgov.net/krpp);
- Support the Kosovo Institute of Public Administration (KIPA) and other public training and education authorities in providing training and increasing the skills of public procurement officers;
- Initiate and support the development of electronic procurement and communication concerning public procurement;
- Collect, analyse and publish information about public procurement procedures and all awarded public contracts in Kosovo;
- Co-operate with other organisations at home and abroad on matters associated with public procurement;
- Propose measures to the government and to the Assembly for improving the public procurement system and public procurement legislation.

In 2008 no draft law or regulation was adopted, but a complete set of 41 documents (standard notices, standard tender dossiers for works, supplies, services and small contracts, standard forms or letters to be used during the tendering procedures, model declaration under oath, and procurement code of ethics) entered into force. These documents, which are available in three languages on the website of the PPRC, are very useful since they help the procurement officers in charge of awarding contracts to properly apply the legislation even if they are not lawyers specialised in public procurement.

The PPRC also monitors and reviews public procurement operations governed by the PPL. The main duties and responsibilities of the PPRC’s Supervising and Monitoring Department are to supervise the implementation of the PPL and other procurement rules; monitor public procurement activities; and provide advice to contracting authorities during the procurement process. In 2008 the department accomplished the following:

- 12 inspections of the procurement activities of various contracting authorities, according to the annual plan;
- five ad hoc inspections following requests;

- monitoring of seven tender-opening activities; and
- fulfilment of 13 requirements for interpreting the PPL.

Summary

The PPRC's main focus seems to be on monitoring, supervision and legal interpretation. The annual statistical report is an excellent compilation of facts on how the public procurement system works in Kosovo. However, it needs to be further developed so as to place a stronger emphasis on guidance and advisory support and on the establishment of a help-desk function. The need for various capacities within the PPRC will increase in the future with the implementation of framework agreements and electronic procurement.

2.4 Procurement Operations and Practices

Statistics

In Kosovo there are 142 contracting authorities, including both classical and utilities sectors. In 2008 these authorities awarded 14,317 contracts of differing values. The total value of this procurement was more than 826 million EUR, compared with 400 million EUR in 2007. The 2008 value is almost 22% of GDP, which is very high.

Of these contracts, 9,169 were supply contracts, 3,601 were services contracts and 1,485 were works contracts. The contracting authorities organised 62 design contests. Contracting authorities from the classical sector awarded 76% of the contracts, while 24% were awarded by public companies. In terms of the value of the contracts, the classical sector accounted for only 55% of the procurement value while that of public companies represented 45% of the total value.

Despite the fact that there was only a small number of high-value contracts (858 or 6%)⁵⁹, their total value was significant (680 million EUR, or 82% of the total value). Small and minimal contracts (11,000 in all) accounted for 27 million EUR, or only 3% of the total value, but represented 76% of all contracts signed.

The preferred procurement method was the open procedure, making up 77% of the total value of contracts awarded. The *restricted procedure was not used at all in 2008*, which is an extraordinary finding. The negotiated procedure was used in 475 cases and amounted to 164 million EUR, or 20% of the total value of contracts awarded. However, KEK (Kosovo Energy Corporation) used the negotiated procedure for the purchase of electricity, and its total contract value amounted to 53 million EUR. If this contract is removed from the analysis, the negotiated value drops to 111 million EUR or 13% of the total contract value. The price quotation procedure for small contracts was used in 3,726 cases.

Interestingly, the lowest-price award criterion was used in 13,754 tenders (96%), but the total value of the contracts awarded with the use of MEAT exceeded 361 million EUR (44%), which refers to a few very large contracts. Generally, the MEAT criterion is rarely practised by contracting authorities.

The main contracting authority is KEK, whose contracts accounted for more than 31% of the total value of procurement in Kosovo. The second largest contracting authority is the Ministry of Transport and Telecommunications, which represents 21% of the total value. Other important contracting authorities that can be included in the "top ten" are Post and Telecommunications of Kosovo, KOSTT, Municipality of Pristina, Ministry of Education, Science and Technology, Ministry of Public Service, Kosovo Police Service, Pristina Airport, Ministry of Health, and Kosovo Protection Corps.

In 2008, 307 contracts were awarded to foreign economic operators, but the value of these contracts was significant (239 million EUR, or almost 29% of the value of all procurement in Kosovo).

⁵⁹ Equal or greater than 100,000 EUR for supply and services contracts and equal to or greater than 350,000 EUR for works contracts.

Training and Qualifications

The procurement department within a contracting authority usually has between two and four members of staff. According to the PPL, every contracting authority must designate a person to act as Public Procurement Officer, who is responsible for all procurement activities. The person must hold a university degree and a Procurement Professional Certificate issued by the KIPA. The KIPA will only issue the certificate to persons who have participated in a specific training course (10 days/year) and who, on the basis of testing, have satisfactorily demonstrated their knowledge of procurement law. The certificate is valid for one year. Any interested person may attend a procurement professional training course.

Generally, the public procurement officers consider the training courses to be too theoretical. It seems that the curriculum has remained much the same over the last four years. The officers in training expected to be given more practical examples of how to conduct a procedure, particularly how to prepare technical specifications. Other practical topics could focus on the use of the MEAT as a criterion for awarding a public procurement contract, the establishment of weights for various criteria, and ways of dealing with common problems during the procurement process. Contracting authorities need guidelines and the PPRC may also have a role in preparing this type of operational tool. In this respect, it should be noted that the PPRC has prepared manuals for purchasing officers, which will be in force as from 1 July 2009.

Views on PPL Amendments

Most Kosovo contracting authorities are satisfied with the changes to the PPL, but they consider that the rules need to become more flexible. Time limits seem to be a general problem for all contracting authorities. However, the time limits specified in the PPL are not excessive, at least for large-value contracts. In many cases the constraint lies more with the limited capacities to manage procurement operations. If a decision is made to reduce the time limits, it should only apply to small-value contracts.

The concentration of procurement procedures in the latter part of the year could also cause difficulties, but such problems cannot necessarily be resolved by public procurement legislation.

As described earlier, contracting authorities complain about the procedure to cancel the procurement if three responsive tenders cannot be obtained and about the additional time taken to request the PPA to waive this requirement. In many situations there is only a small number of companies (e.g. fuel); in other cases, even if the market is well developed, the number of economic operators expressing an interest in participating can often be fewer than three. The main reasons for the non-participation of many economic operators seem to be the impossibility of fulfilling the selection criteria, and for long-term contracts, the impossibility of keeping within the price mentioned in their tender. Of the 4,566 contract notices published on the PPRC website in 2008, 1,612 (35%) were cancellation notices, which is far too many. This high cancellation rate probably reflects the problems with article 30.A (discussed above in sections 2.1.2 and 2.3.1).

Summary

There is a need to simplify the regulatory framework and remove unnecessary barriers to participation, especially by withdrawing article 30.A of the Public Procurement Law. The public procurement market in Kosovo is relatively small (826 million EUR) which in turn, of course, is a reflection of the size of the economy. The competitive situation in many sectors of the market is generally unsatisfactory, which adds to the problems of insufficient tender participation and excessive cancellation of tenders. However, in some sectors (such as small works and supply contracts) the private sector operates satisfactorily. Many contracting authorities complain about the lack of direct access to foreign manufacturers and the resulting obligation to rely heavily on local representatives and agents.

The PPRC's annual statistical report is an excellent compilation of data on the public procurement market in Kosovo and deserves wide recognition.

A principal problem of great magnitude concerns the function and responsibilities of the Public Procurement Officer. He/she is assigned the sole responsibility of formally making the award decision on behalf of the contracting authority regarding any contract, irrespective of the size of the contract. The evaluation committee makes a recommendation concerning the award, but it is left to the procurement officer to undertake his/her own review of the evaluation process and to decide. The rationale for the procedure may have some good grounds to ensure the integrity of the process, but it raises at the same time some fundamental questions. With this system, the procurement officer is forced to accept a function and role that normally does not correspond to his/her competence and authority within the line organisation. It cannot be reasonable for a procurement officer at a rather low management level to be solely responsible and accountable, for example, for a multi-million euro investment contract. This arrangement should be changed so that – for all contracts other than low-value contracts – the relevant manager within the line organisation (i.e. the person with budget responsibility) assumes the responsibility and makes the decisions on the basis of a sign-off by the Public Procurement Officer.

The certification scheme for public procurement officers, including the training, needs to be reconsidered. There should be no need for a procurement officer to be re-certified annually, especially if that officer has remained in the profession without disruption. Normally, a procurement officer would increase his/her knowledge with time in the profession. The training course needs to become more specialised and practice-oriented. Sigma's work on the training project may promote this development. The KIPA also has some organisational problems (high staff turnover, for example) that need to be given serious attention.

2.5 Control, Review and Integrity

2.5.1 Complaints Review

The amended PPL has established a new independent authority — the Procurement Review Body (PRB) — that is independent of both the PPRC and the PPA. The PRB, which is responsible for implementing review procedures as regulated by Title VIII of the PPL, started its operations on 1 August 2008.

A complaint can be submitted to the PRB by any interested party at any stage of the procedure, but not later than eight calendar days after the contract award notice was published. The complaint can concern any infringement (act or omission) of the PPL by the contracting authority. Interestingly, any complaint filed with the PRB must be accompanied by a deposition fee representing 5% of the contract value (but for not less than 1,000 EUR and for a maximum of 5,000 EUR). The intention is to deter frivolous complaints.

All complaints lodged with the PRB are heard by a review panel composed of one to three members, depending on the value of the contract or the difficulty of the issue (if the case is of significant importance and interest, the review panel should be composed of all five members of the PRB).

Submission of a complaint results in the automatic suspension of the procedure unless and until the review panel decides otherwise.

The first step in reviewing a complaint is for the PRB to appoint a review expert⁶⁰. Within seven days, the expert is to: (1) review the contracting authority's documentation and other related records; (2) interview any official or consultant of the contracting authority or the complaining party; and (3) provide a written assessment of the case to both the review panel and the contracting authority. Within four calendar days of the date of receipt of the review expert's assessment, the contracting authority must communicate its decision to the review expert, the review panel and the complainant. If the contracting authority denies the complaint, does not respond or fails to implement corrective measures, the complainant has three calendar days to bring the case before the review panel.

⁶⁰ Selected from a list of qualified experts; whenever possible, the PRB will engage as review experts persons who hold a current and valid procurement certificate.

The review panel has the power to suspend or terminate the procurement activities, to cancel or revoke a decision by the contracting authority, to prevent any further damage to the complainant, and to impose any necessary corrections to the procedure. These corrections can include removing discriminatory technical, economic or financial specifications, requirements or criteria contained in notices, tender dossiers or contract documents. The review panel also has the power to oblige the contracting authority to pay compensation to a complainant.

The decision of the review panel may be appealed in the competent court.

In general, the review procedure and the provisions for institution-building for the most part fulfil the objectives of the EC's Remedies Directives. The remaining problem lies in implementing these provisions. The five members of the board have been appointed and the number of staff amount to 18. A website publishing the cases has been successfully launched. In 2008 (from August to December) the PRB considered 179 complaints.

Another new function of the PRB is to decide on a request by a contracting authority to review and potentially revoke a decision by the PPA regarding article 30.A of the PPL and the negotiated procedure without publication. The PRB has reviewed 28 appeals from contracting authorities since August 2008. Interestingly, the PRB approved the requests of the contracting authorities and revoked the PPA decisions in 22 of these cases.

Summary

The ability of a contracting authority to challenge a decision by the PPA on article 30.A of the PPL is highly questionable, for both principle and practical reasons. The PPA has been assigned the authority under the PPL to decide on prior approvals, and its decision should be final. The ability of the PRB to overrule a decision made by the PPA delays the process and, most importantly, may constitute a conflict of interest. As a public procurement review body, the PRB should not take part in a dispute between two administrative entities. If it does so, it risks eroding its own credibility by potentially becoming party to its own decision (the risk that an economic operator files a complaint with respect to such a case). This function should be removed from the PRB (as should the whole prior approval procedure, possibly with the exception of the negotiated procedure — see above).

2.5.2 External Audit

External audits are carried out by the Office of the Auditor General (OAG). A new Auditor General was appointed at the beginning of 2009. The OAG has 58 auditors out of a total of 83 staff. The OAG's procurement capacities are slowly being developed. It focuses on the legal aspects of the procurement process to determine compliance with procurement legislation, but it intends also to gradually look into the performance of public procurement. However, capacity constraints mean that the OAG cannot review procurement procedures thoroughly enough. There is also a need to further strengthen the SAI's understanding of public procurement through training, as to date procurement-specific activities have been very limited.

No annual report for 2008 has yet been issued. However, some statistics are available on the audit of 427 contracts among 16 central government bodies. The extent of findings amounts to 529 and the major problems relate to mistakes in the preparation of tenders (availability of funds), discrepancies between contract and tender amount, paid amount higher than contract amount, proceedings with fewer than three tenders (no approval), incorrect valuation of contracts or split of tenders in order to avoid a certain procedure, and incorrect technical specifications.

2.5.3 Integrity of Procurement Operations

Sigma was informed that the Office of the Auditor General had discovered three cases of potential corruption, which had been handed over to the prosecutor for review. There may be additional cases of public money not being properly used. However, the Kosovan authorities are aware that public procurement may be subject to corrupt practices and more generally to mismanagement of public money, and are trying to overcome this problem.

The PPL includes clear and acceptable rules on conflict of interest (articles 61.1 and 61.A), rules on excluding an economic operator from tender proceedings if irregularities are found by a competent court (article 61.2), as well as strict rules on irregularities in public procurement in terms of unlawful influence and retribution, with clear definitions of corrupt and fraudulent practices (article 117). It also includes fines for contracting authorities who violate the PPL. Fines are imposed by the PRB and are not less than 5,000 EUR. Furthermore, a civil servant of a contracting authority who fails to implement a decision by the PRB is to be dismissed and fined not less than 1,000 EUR (article 118).

Moreover, a draft law amending the Anti-Corruption Law as well as a draft law on whistle-blowing and protection of witnesses are under preparation. In addition, a memorandum of co-operation with the Kosovo Anti-corruption Agency is being prepared in order to co-ordinate actions in this area.

Summary

By strengthening the legal and institutional framework, training purchasing officers and providing them with operational tools and advice, the authorities will gradually limit the risk of corrupt practices. The reforms and implementing measures currently under preparation should help to improve the situation in Kosovo, at least in the medium term.

3. Reform Dynamics

The adoption of the new PPL and its amendments has resulted in a clear improvement of the public procurement system. However, a number of problems have been identified that need to be remedied in the course of future public procurement reform. On the positive side, the PPL is accompanied by a comprehensive set of templates for notices and standard tender documents. However, the PPRC will need to develop operational guidelines and its help-desk function, as well as strengthen its own capacity and procurement professionalism *as a main entity in charge of designing and driving the public procurement policy of Kosovo.*

The establishment of the PRB in 2008 is a very positive step and creates a sound division of responsibilities between the administrative bodies engaged in the public procurement system. The review and remedies system follows EU rules, but needs to be amended in order to take into account the most recent EC remedies directive regarding the standstill period. The PRB is a young and inexperienced organisation and will need much support and training in the coming years if it is to operate efficiently, with credibility and trustworthiness.

The main critical observations of the public procurement system include the confusion between various legal models; the strict regime for utilities; the inclusion of purchase of electricity; the tender procedure if fewer than three tenders are received; and, to some extent, the negotiated procedure without publication of a contract notice; the design of the restricted procedure; the certification system; and the role of the public procurement officers.

In this respect, phase 3 of the project "Reform to Public Procurement System" delivered by Europe Aid⁶¹, which started on 19 January 2009 and will run for two years, should be helpful. Its aims are to help develop Kosovo's public procurement system, ensure that it is compatible and up-to-date with EU standards and that it promotes efficiency and transparency in the use of public funds. These aims will be achieved by:

- providing continuous legal advice to the Public Procurement Regulatory Commission (PPRC);
- ensuring that the PPL is up-to-date with EU legislation and its implementation, i.e. in line with the EC Directives;
- providing technical assistance to the PPRC and to the Public Review Body (PRB) for implementing the new secondary legislation framework;
- providing advice on management structure and organisational improvement for the PPRC and the PRB; and

⁶¹ Europe Aid/126497/C/SER/KOS.

- providing assistance to the PPRC and the Kosovo Institute of Public Administration (KIPA) to improve the training and certification framework for public procurement.

Continuing efforts to improve the operational efficiency of the public procurement system are needed to ensure fair competition and professional handling of tenders and to encourage the development of competition in the domestic market. *In this context, we recommend simplifying the PPL to make it more flexible and functional for contracting authorities and more attractive for economic operators. Indeed, the outcome expected from any legislation can be achieved only if this legislation is really implemented in practice. Any external assistance should also take account of this imperative.*

ANNEX

PROCUREMENT/CONCESSIONS STATISTICS for 2008ⁱ

1.1.1 A. Number of contracting entitiesⁱⁱ		
1.1.2 Central government	79	
1.1.3 Regional and local authorities	34	
1.1.4 Other (bodies governed by public law)	1	
1.1.5 Utilities	28	
1.1.6 Total number of contracting entities	142	
1.1.7 B1. Awardedⁱⁱⁱ public contracts/Contracting entities	Total (estimated) value (Mio EUR)	Total number^{iv}
Central government	376 458 565,80	6 148
Regional and local authorities	80 237 154,52	4734
Other (bodies governed by public law)	160 682,75	4
Utilities	369 627 159,60	3431
Total public contracts awarded	826 483 562,67	14317
1.1.8 B2. Awarded concessions/Contracting entities		
Central government		
Regional and local authorities		
Other (bodies governed by public law)		
Utilities		
Total concessions awarded		
1.1.9 C1. Awarded public contracts above the EU thresholds^v		
Works ^{vi}	148 039 362,19	11
Services ^{vii}	20 943 847,39	40
Goods ^{viii}	258 187 488,16	190
Mixed contracts	427 170 697,74	241
Total public contracts above the EU thresholds		

1.1.10		
1.1.11 C2. Awarded concessions above the EU thresholds		
Works ^{ix}		
Services ^x		
Other		
<i>Total concessions above the EU thresholds</i>		
1.1.12 D. Procurement methods used^{xi} (above the national thresholds^{xii})		
Open procedure	635 247 646,07	2614
Restricted procedure	#	#
Negotiated procedure with prior publication of a notice	31 305 268,41	20
Negotiated procedure without prior publication of a notice ^{xiii}	164 156 690,61	465
Other procedures (competitive dialogue, etc.)	4 359 210,04	6499
1.1.13 D1. Low- value procurement (estimated)	18,288,457.42	3726
E. Participation rate (average number of submitted tenders)		
Works		
Services		
Goods		

F. A list of 10 largest procuring entities (name, main activity, (estimated) annual procurement budget):

No.	Contracting Authorities:	Contract description	Contract value (€)
1	Kosova Energy Corporation	Complete reparation with turnkey of transporting tape system- fold removal of ashes in the Mining of Coal in KEC	49,983,528.52
2	Kosova Energy Corporation	Complete reparation with turnkey of transporting tape system- fold removal of ashes in the Mining of Coal in KEC	22,157,385.00
3	Post and Telecommunications of Kosova	Expanding network of Vala/PTK-Phase 5 (Vala Network Extension-Phase 5)	20,498,331.00
4	Kosova Energy Corporation	Remounting of two excavators SchRs 650 (E 9 & E10)	19,920,512.00
5	Ministry of Public Services	Overall renovation of Media Building – Tower and auditorium	14,694,453.67
6	Kosova Energy Corporation	Purchase of Electrical energy during period 04.10.08--31.03.2009	14,141,960.00
7	Ministry of Transport and Telecommunications	Construction of roundabout in the crossroads of M9 and M2 Pristina	11,750,446.99
8	Post and Telecommunications of Kosova	Building of 29 local cable networks with turnkey	10,318,737.46
9	KOSTT	Communication network	9,214,769.00
10	Kosova Energy Corporation	Purchase of electrical energy for the period 4 January 2008 until 15 March 2008	9,073,520.00



- i Statistics should cover contracts awarded in the period 1 January 2008 – 31 December 2008.
- ii As for 31 December 2008.
- iii Statistics should refer to contracts awarded (based on contract award notices), if not available, please give the data on contracts advertised (based on contract notices).
- iv Please indicate whether the data include the low value contracts.
- v Please indicate whether the data include contracts awarded by the utilities sector.
- vi Above 5.150.000€.
- vii Above 137.000€ for public institutions, 412.000€ for utilities.
- viii Above 137.000€ for public institutions, 412.000€ for utilities.
- ix Above 5.150.000€.
- x Above 137.000€.
- xi Both for public contracts and concessions.
- xii Including contracts above EU thresholds.
- xiii Including single-source procurement.