

European ‘Dis-integration’ in Bosnia and Herzegovina: A Critical Reflection on Legal, Administrative and Political Obstacles Affecting the Approximation of Chapters 23 and 24 of the *Acquis Communautaire*

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Several pieces of legislation have been enacted with a view to regulating the European integration process in Bosnia and Herzegovina. A plethora of bodies are in charge for approximating the EU *acquis*. However, the stabilisation and association process in the field of justice related matters has not proceeded as planned due to the existence of at least four legislatures for the Justice Sector and 14 Ministries of Justice (MoJs) whose competences and tasks are not well delineated. This article focuses on the specific issues affecting the transposition of Chapters 23 (Judiciary and fundamental rights) and 24 (Justice, freedom and security) of the EU *acquis*. Based on the analysis of existing legislation and administrative structures and meetings with local officials and foreign donors, the author argues how, for an effective legal approximation process, a review of the current allocation of competences among State, Entities, Brčko District and canton level cannot wait. After drawing comparisons with regional best practices in the field of European integration and illustrating the complex constitutional framework of the country, the administrative and legislative obstacles characterising the approximation of domestic legislation with European standards in the field of Justice and Home affairs are explained. The author concludes by offering a set of solutions to overcome the current situation.

1. Introduction

The European Commission’s Directorate for European Integration remains the mandated institution to plan and coordinate the overall European integration process and, more specifically, the approximation with the *acquis communautaire* in Bosnia and Herzegovina. Focal

Points for European Integration within line ministries, far from functioning properly or having even been set up, should coordinate the implementation of European integration strategies and policies under the competency of the Ministries at the State, Brčko District (henceforth BD), Entity and Cantonal Level. In addition, so-called Inter-ministerial Working Groups should ensure an efficient coordination and representation of the government bodies in Bosnia and Herzegovina for legislative proposals impinging on European integration matters. However, a cumbersome constitutional framework and lack of political willingness have brought the European Integration process in Bosnia to a complete standstill.

The purpose of this article is to dwell upon the EU legal approximation bodies and procedures in Bosnia and Herzegovina by focusing on the specific issues affecting the transposition of Chapters 23 (Judiciary and fundamental rights) and 24 (Justice, freedom and security) of the EU *acquis*. After drawing comparisons with regional best practices in the field of European integration and illustrating the complex constitutional framework of the country, the administrative and legislative obstacles characterising the approximation of domestic legislation with European standards in the field of Justice and Home affairs will be investigated in depth. Despite the fact that Bosnia has received generous EU assistance, the author will argue to which extent contradictory legislation regulating the allocation of competences among State, Brčko District, Entities and Cantonal level, together with an endemic lack of communication and political willingness, have stalled the European integration process in the field of Justice and Home affairs and beyond. Only by solving the more basic legal, political and administrative issues engulfing the country and adopting constitutional structures inspired upon well-functioning federal models, will the path leading to integration finally be cleared.

2. The EU integration process in the Balkans

The EU integration process in the Balkans is based on the Stabilisation and Association Process (SAP), a long-term commitment to the Balkans, which progressively brings SEE (South Eastern European) countries closer to the EU through a series of steps that may be summarised as follows.

A feasibility report, on opening the Stability-Association negotiations is followed by the signing of the Stability-Association Agreement, which represents a far-reaching contractual relationship between the EU and each Western Balkan country, entailing mutual rights and obligations. After the signing of the Agreement, an agreement *ad interim* establishing a free trade area between the signatory country and the EU enters into force. The ratification of the Stability-Association Agreement by the European Parliament and all EU member states is followed by the state's application for EU membership. The European Council requests the European Commission to prepare an opinion on opening membership negotiations. The Commission's opinion is based on the answers of a country's questionnaire, which analytically examines (screening) domestic legislation in the light of the *acquis communautaire*. The main purpose of the screening process is to determine the differences that exist between the national legislation and the *acquis communautaire* divided into 35 Chapters. In this way, the screening process provides a basis for defining the negotiating framework, to identify possible needs for

harmonisation and, finally, to evaluate the readiness of the candidate country for the opening of substantive negotiations on individual chapters. The screening lists are filled out by the members of the Negotiating Team with the support of the relevant state administration body and its EU coordinator, as well as the Secretariat of the Negotiating Team. The European Commission, in consultation with the candidate country, draws up a report on the results of the screening process for every chapter. The report, forwarded to the EU Member States, as well as to the candidate country, reflects the European Commission's evaluation of the candidate state's readiness to adopt and implement the *acquis communautaire*. It may recommend the opening of substantive negotiations for individual chapters. On positive conclusion of the negotiation, the European Parliament and each member state gives its approval for the Treaty of Membership.

3. Governmental structures dealing with the Stabilisation and Association Process

The governmental structures dealing with the process of European integration are many and the purpose of this article is not to dwell upon all of them, but to focus rather on those bodies in charge for approximating the European *acquis*. The analysis of such bodies in other South Eastern European countries will enable us to identify the legal, political and administrative barriers that affect the stabilisation and association process in Bosnia in relation to Chapters 23 (Judiciary and fundamental rights) and 24 (Justice, freedom and security) of the EU *acquis*.

The first player to be considered is the Ministry of European Integration or equivalent body – FYROM (Former Yugoslav Republic of Macedonia) for instance opted for a 'Secretariat for European Integration' (SEI), Bosnia and Herzegovina for a 'Directorate for European Integration' (DEI), whereas Serbia has a 'European Integration Office' (EIO). Next to representing the official positions at high EU level, the Ministry of European Integration or equivalent body performs mainly a coordination and monitoring function of the Stabilization and Association Process (SAP) by supervising the Inter-ministerial Working Groups in charge for approximating domestic legislation to EU *acquis* chapters.

The Inter-ministerial Working Groups for preparation of negotiations on the individual chapters of the *acquis communautaire* participate in the analytical review and assessment of the harmonisation of the domestic legislation with the *acquis communautaire* (*screening*). They coordinate representatives of different ministries involved in preparing EU compliant draft legislation, since EU chapters are normally impinging on the competences of more than one ministry. They draw up the draft proposals of negotiating positions, in dialogue with state ministries or other bodies designated as competent authorities for individual chapters of the *acquis communautaire* and the EU Coordinator of the relevant body. The Inter-ministerial Working Groups have heads who administer their work in agreement with the member of the Negotiating Team in charge of coordinating a specific negotiation chapter. They are in dialogue with state ministries, which are supposed to set specialised European focal points within their structure, or European Integration Units (EIU) to act as focal points for EU-related assistance, reporting and monitoring. Normally one of more representatives of EIUs for each ministry is/are

members of the Inter-ministerial Working Groups. EIUs ensure internal coordination within a ministry and, at the same time, a direct link with the Ministry of European Integration (or equivalent body) and other line ministries regarding approximation of legislation and reporting on legal acts adopting the *acquis communautaire*.

4. The EU Approximation process in Bosnia

As a direct result of the Dayton Peace Accords, the complex constitutional and governmental framework in BiH was established. The State of Bosnia and Herzegovina (hereafter BiH) consists of two Entities, the Federation of BiH (FBiH) and the Republika Srpska (RS) plus the Brčko District. The constitutional framework of BiH is composed of the Constitution of BiH, the Constitution of the FBiH and the Constitution of RS. In addition, the District of Brčko (north East of BiH) is regulated by a Statute.

Bosnia and Herzegovina cannot be categorised as a federal or confederal state, the relations between entities and state level being extremely loose. In other words, the institutions of BiH are given limited competence under the BiH Constitution and most of the power rests with the entities.

A first increase of competences at the State level took place in 2003, when a new *Law on the Council of Ministers* entered into force. As a result, the State administration was reorganised and new institutions were established at the State level: Ministry of Security, Ministry of Justice and Directorate for European Integration, Ministry of Transport and Communications, Ministry of Civil Affairs and Ministry of Defence. Many of the ministries established at the entities level do not have an equivalent at the State level.

As far as the EU integration strategy is concerned, the Directorate for European Integration (DEI), acting under the direct authority of the Chair of the Council of Ministers (Prime Minister), was established in October 2002 as a successor to the Ministry of European Integration (MEI).¹ The function of the Directorate is to promote the integration process and the horizontal coordination of the implementation of the BiH Strategy for European Integration, including activities of legal harmonisation and coordination of EC assistance. DEI is not involved in the European integration process at the entities, canton and Brčko District level.² In accordance with *Decision on the Procedures in the Process of Harmonisation of Legislation of Bosnia and Herzegovina with the acquis communautaire*, DEI assists the state ministries and administrative bodies in legal drafting and verifies the compliance of draft laws and other legal acts submitted to the Council of Ministers by ministries and administrative bodies. *Decision on Establishment of Working Groups for Harmonization of Legal Regulations of Bosnia and Herzegovina with the Acquis Communautaire* was published on Official Gazette No. 52/05 with a view to provide 'assistance to ministries and other administration bodies of Bosnia and Herzegovina in the process of harmonization of legislation with the acquis, and performance of other duties defined by this decision'.

Taking into account the complex structure of Bosnia and Herzegovina, at the DEI's proposal the Council of Ministers approved the *Decision on Manner of Coordination in the Process of Accession of Bosnia and Herzegovina to the European Union*,³ which defines the manner of implementing horizontal and vertical coordination of the activities that BiH institutions are to undertake toward the BiH accession to the EU.

A *Decree on Establishing and Organizing European Integration Units* (EIU),⁴ located with the state Ministries and other administrative bodies, was adopted by the decision of CoM on 3 July 2008. The aim of establishing the European Integration Units was to ensure an efficient internal coordination of the European integration process within the responsibility of each administrative body in Bosnia and Herzegovina.

Several MoJs (Ministries of Justice) have not yet appointed EIUs.

5. Approximating Chapters 23 and 24 in Bosnia and Allocation of Competences: The Constitutional Framework

While noticing that Chapters 23 (Ref. 5) and 24 (Ref. 6) cover a wide spectrum of matters, the allocation of competences between the different levels (vertical allocation) is extremely problematic due to the lack of clear constitutional and legislative rules.

Despite the fact that the *Decision on Establishment of Working Groups for Harmonization of Legal Regulations of Bosnia and Herzegovina with the Acquis Communautaire*⁷ sets up inter-ministerial working groups divided by chapters of EU *acquis*, where representatives of State, Entities, Cantonal and Brčko district level sit together and *Decision on Implementation of Coordination in the Process of BiH Accession to the EU* is also trying to shed light on the coordination mechanism among the different actors of the EU integration process, problems remain concerning which level is competent for implementing specific pieces of European legislation.

The main rules on vertical distribution of the legislative competences are contained in the BiH Constitution,⁸ although they are extremely poor and confused. The responsibilities of the BiH institutions are laid down by Art. III, 1 of BiH Constitution, whereas Art. III 3 'a', of the same text explicitly outlines that 'All governmental functions and powers not expressly assigned in this Constitution to the institutions of BiH shall be those of Entities', i.e., the competences at state level are listed and this listing might seem exhaustive at first sight. A clear catalogue of competences is missing, since several other provisions of the Constitution refer to additional specific competencies of the State or Entities level other than those mentioned by Article III, 1 of BiH Constitution or Article III 3 a. The competences between the Federation of BiH and the cantons have been distributed in a similar fashion.

Concerning the legislative competences of BD,⁹ the BiH Constitution and state level laws are applied there directly, while on the other hand each draft normative act of BD must be in line with the state level legislation.¹⁰ Aside from the normative rules established in the BiH Constitution, the Constitution foresees that each of the two entities (in practice – through an agreement between BiH and the entities and a decision of the respective parliament) may transfer some of its powers to the state level.¹¹ To some extent, this mechanism widens the otherwise narrow powers of the state level. In other words, the allocation of competences established by BiH Constitution may be defined, rather than as a catalogue-based system, a dynamic process based on a number of provisions scattered all over the constitution and agreements (*memoranda of understanding*) among various bodies, belonging to different levels of government. Each memorandum defines their role in relation to specific matters.

The Constitutional Court of BiH decides on conflicts of attributions between State and Entities. That is why case-law of the Constitutional court should be also taken into consideration in order to reconstruct the allocation of competences.

Constitutional legislation is also poor in relation to criteria enabling the BiH Constitutional Court to solve possible conflicts between different levels of government. One may not find a provision similar, for instance, to Article 31 of the German Constitution ([Supremacy of Federal Law] ‘Federal law shall take precedence over Land law’), Germany together with Switzerland being one of the two European countries having MoJs at the Länder or cantonal level. There is also no provision similar to Article 28 of the German Constitution stressing the competence of the State for EU matters, with an obligation to take into account the Länder’s point of view if the act is impinging on their interests, or to delegate the power to issue legislation, if the matter is falling under the Länder competence (concurrent competence). A similar power sharing arrangement between State and regions is adopted by Article 117 of the Italian Constitution.

No specific reference to allocation of powers between State, Entities, Brčko District and Cantons, as far as Chapters 23 and 24 are concerned, is made. Art. III 3 of the Constitution of BiH provides for ‘International and inter-Entity criminal law enforcement, including relations with Interpol’ falling under the state level and protection of human rights. The Constitution of Republika Srpska in article 68 provides that the ‘The Republic shall regulate and ensure ... implementation and protection of human rights and freedoms’. Chapter X ‘*Courts and Public Prosecutor’s Offices*’ lays down fundamental principles on the organisation of the judiciary depending on RS. Article 2 of the Constitution of FBiH and says that ‘Both the Federation Government and the Cantons are to have responsibilities for the following: Guaranteeing and enforcing human rights’; Chapter 4 regulates the Cantonal Judiciary.

6. Approximating Chapters 23 and 24 in Bosnia and Allocation of Competences: The Legislative Framework

As a result of the obligation of gradually approximating BiH legislation to the EU *acquis*, the thirteen Ministries of Justice (MoJ) – one at the State level, two entity-level ministries and ten cantonal ministries in the Federation plus Brčko Judicial Commission – have been invited to prepare draft-legislation according to their competences. Unfortunately, the distribution of competences among them is far from clear if we analyse existing primary legislation.

One may argue that the leading role of the Ministry of Justice at the State level for fulfilling the obligations falling under Chapters 23 and 24. Article 13 ‘*Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina*’ mentions that the state level is in charge for preparing relevant draft-legislation in some of the matters included in Chapters 23 and 24 (e.g. judicial cooperation both at the international and inter-entities level, judicial training and organisation of that part of the judiciary depending on the state level). More importantly, the same provision adds that the State level Ministry of Justice has also to ensure that ‘the obligations of BiH deriving from international treaties are implemented and that legislation at all levels is in compliance with them’.¹²

An overlap may be noticed¹³ with the tasks assigned to the BiH Ministry of Human Rights and Refugees (MHRR), which, according to article 12 '*Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina*', is responsible for the 'monitoring and implementation of international conventions and other documents on human rights and fundamental freedoms'.

We now move on to analysing the competence of the other ministries of justice and similar bodies at the entities level. According to Article 7 of the Law on Ministries of the Republika Srpska,¹⁴ the Ministry of Justice of the Republika Srpska prepares draft legislation in the field of judiciary depending on RS. It also deals with criminal sanctions and international legal cooperation. Similar competences are granted to the Federation of Bosnia and Herzegovina Ministry of Justice by Article 7 '*Law on Government of the Federation of Bosnia and Herzegovina*'. More substantial are the competences of the Judicial Commission of Brčko District, where Article 14 (General Competences) '*Law on the Judicial Commission of Brčko District*' allocates matters, which, in the rest of BiH, concern the High Judicial and Prosecutorial Council (e.g. ensuring independence of the judiciary).

Finally, under Article 7 of the *Law on Cantonal Ministries and other Bodies of the Cantonal Administration*¹⁵ cantonal Ministries of Justice are competent for cantonal justice

institutions, correctional institutions, minor offence courts and legal aid services, supervision over the activities from judicial administration of the Cantonal judicial institutions, highest human rights standards and freedoms established by international instruments, the Constitution of the Federation, Cantonal Constitution, especially in the field of war and humanitarian law, pardoning of convicted persons for the acts recognised by Cantonal laws, right to association, supervision over the implementation of regulations from the field of criminal and misdemeanour sanctions and decisions of Cantonal and Federation courts, carrying out any other duties from those fields in accordance with the law, which do not fall within the competence of other administrative bodies.

In order to ensure a proper coordination of all stakeholders involved in approximating Chapters 23 and 24 both at the horizontal and vertical level, we already mentioned *Decision on Establishment of Working Groups for Harmonization of Legal Regulations of Bosnia and Herzegovina with the Acquis Communautaire*. The decision designates inter-ministerial acting under the chairmanship of the Ministry of Security of Bosnia and Herzegovina Inter-Ministerial Working group 7 for *Justice and Home Affairs*.

The bodies in charge of the two chapters and its members are clearly identified, namely representatives from: the Ministry of Security of Bosnia and Herzegovina, the Ministry of Justice of Bosnia and Herzegovina, High Judicial and Prosecutorial Council of Bosnia and Herzegovina, Ministry of Foreign Affairs of Bosnia and Herzegovina, Ministry of Defence of Bosnia and Herzegovina, Public Administration Reform Coordinator's Office of Bosnia and Herzegovina, Ministry of Internal Affairs of the Federation of Bosnia and Herzegovina, Ministry of Internal Affairs of Republika Srpska, Ministry of Justice of the Federation of Bosnia and Herzegovina, Ministry of Justice of Republika Srpska, Judicial Committee of Brčko District of Bosnia and Herzegovina and the Directorate for European Integration of Bosnia and Herzegovina. However, the meetings of Inter-ministerial Working Group 7 have never taken place, nor has a specific division of roles and tasks among the ministries and bodies identified above been devised.

Finally, a coordinating role in ‘Establishing the infrastructure and capacities in BiH and Entity MoJs and Brčko District Judicial Commission for support to the process of regulation harmonisation in the BiH justice sector with the *Acquis Communautaire*’ is given to the state level Ministry of Justice by the Justice Sector Reform Strategy (JSRS) for Bosnia and Herzegovina. The Justice Sector Reform is a joint declaration adopted at a conference on the funding needs of the State Justice Institutions of Bosnia and Herzegovina held in Brussels in 2006, where the Council of Ministers of BiH, donor countries and the European Commission committed to the principle that the Ministry of Justice of BiH should develop a comprehensive Justice Sector Plan, with a view to creating a joint framework for coordinating the other justice sector institutions in BiH. The implementation of JSRS is deputised to a so-called functional working groups (FWG). Functional Working Group No. 5 is in charge of supporting the process of harmonisation with the *Acquis Communautaire*. Regular meetings are held in Sarajevo, although representatives of some ministries of justice are constantly deserting the meetings.

To sum up: whereas the constitutional and legislative framework does not provide guidelines on division of vertical competences, three structures should be active in the approximation process of Chapters 23 and 24, DEI, Inter-ministerial Working Group 7 and JSRS established Functional Working Group No. 5. However, their legal base does not provide any clarification in relation to their effective attributions, allocation of powers among different levels of government, or even relations among themselves.

7. The Approximation Process at the State, Federal, RS and BD Levels

It has been noticed that the leading role that the State MoJ should perform under current legislation is not turned into reality. In this section it is shown that, due to the fact that the coordinating structures previously mentioned (Inter-ministerial Working Group 7 and JSRS established Functional Working Group No. 5) are not fully functioning, the EU approximation process of Chapters 23 and 24 (and other chapters) is taking place independently at each different level of government (State, Entities, Brčko District and Cantons). Entity ministries (including MoJs) and the BD Judicial Commission do not send their draft legislative act to the Directorate for European Integration, but to the competent entity/BD governmental body responsible for legal harmonisation at the respective level. It will be also pointed out that secondary legislation is not always checked for compliance with the EU *acquis*.

7.1 *The Approximation Process at the State Level*

In order to illustrate the approximation process and the main bodies involved at the State level, we need to refer to the Unified Rules for Legislative Drafting in the Institutions of BiH.¹⁶ Rules on the Consultation Procedure¹⁷ and Decision of the BiH Council of Ministers on Procedures in the Process of Harmonisation of Legislation of BiH with the *acquis communautaire*.¹⁸ This legislation requires all ministries, including the MoJ and other administrative bodies of BiH to be in charge of compliance and harmonisation of national legal documents with *acquis communautaire* and to submit a certified statement of harmonisation with the *acquis communautaire* of the preliminary draft law and to deliver them to DEI.¹⁹

In the justice sector, DEI through its Legal Harmonisation Division, Department 'Justice and Home Affairs' checks the compliance of the draft law and produces an opinion that it sends to the Council of Ministers Secretariat for Legislation (SL). The Council of Ministers Secretariat is responsible for rendering opinions on methodological uniformity and harmonisation with the BiH Constitution and BiH laws.²⁰

After an opinion of conformity to the Constitution and the local legal order is issued by the Secretariat, the draft is sent to the Council of Ministers. Once approved, it is submitted to the Assembly. It must be noted that the SL opinion is not binding for the ministry, which submitted the draft law, and its remarks do not need to be reflected in possible amendments to the draft law.²¹ However, the respective ministry is supposed to give a reasoned opinion in case it rejects SL's remarks. Once a draft law is adopted by the CoM, it is submitted to the Parliament. A Joint Commission for EU Affairs functions there,²² which may check the conformity of the draft law with the EU *acquis*, although no obligation to do so is envisaged. Currently, the Joint Commission performs the check only in specific cases and not systematically. One of the reasons is the absence of a professional expert office.²³

There are cases of adoption and entry into force of normative acts that are not checked for compliance with EU law nor with the Constitution and local legal order. The practice of normative acts, which are sent directly to the Secretariat for Legislation with no DEI opinion on conformity with the *acquis communautaire*, has been observed. In such cases, there would be an obligation for the SL to send the whole case-file to DEI for consultation. Moreover, the Secretariat checks only draft laws, but not delegated secondary legislation issued by ministers. In general, secondary legislation that does not need to be adopted by the CoM is sent neither to the Secretariat nor to DEI. Only if a special CoM decision requests DEI intervention is the compatibility of the by-law checked.²⁴ Finally, in performing its duties the Secretariat observes only rules of a recommendatory nature.²⁵

In specific cases, state level laws require entities' assent. This is leading to not enacting several pieces of legislation since the assent is not always given or the entities present explicit objections. As a result, some draft laws are not included in the government's work plan (or in the legislative program), even if the conformity with EU law and domestic legal order was checked, and when a new attempt to adopt is made consultation procedures must be performed all over again.

Among the reasons why compliance checks with EU law are not always performed is the absence of sufficient staff to perform the checks required, the lack of translation of *acquis* in the local language, or insufficient training of the staff.

7.2. *The Approximation Process at the RS Level*

The RS Ministry of Justice prepares the respective draft normative acts falling within its scope of competence as envisaged by Article 7 Law on Ministries of the Republika Srpska. Under Article 2 of the Decision on the procedure and manner of harmonisation of legislation of RS with *acquis communautaire*,²⁶ adopted by the RS Government, the RS MoJ is in charge of harmonisation of the draft legislative act with the relevant *acquis communautaire*.²⁷ RS MoJ, like any RS Ministry, is requested to send the draft normative act together with a table of concordance and a statement of conformity with the *acquis*

communautaire to the RS Ministry of Economic Relations and Regional Cooperation (MERRC) for its opinion.²⁸

The competences of the RS MERRC regarding legal harmonisation, including the area of Justice and Home Affairs and the legislative activities of all the other 16 ministries, which are present in RS, are regulated by the Law on the Republic Administration (LRA)²⁹ and further developed in the above mentioned Decision on the procedure and manner of harmonisation. Interestingly enough, MERRC performs the role that at the state level is that of DEI. According to the last amendment to Article 8 LRA, which occurred in August 2010, RS MERRC is now in charge for coordinating activities and ensuring inter-sector cooperation in the process of harmonisation of laws and other regulations with the *acquis communautaire*.³⁰

Different kinds of cooperation between the RS ministries (including the RS MoJ) and RS MERRC are envisaged in the decision,³¹ in a way to ensure coordination in areas such as justice and home affairs, which fall under the competence of several ministries and institutions. The RS MERRC issued two instructions: Instruction for the Elaboration of a Statement of Conformability with *acquis communautaire*³² and Instruction for the elaboration of tables of concordance. The role of the RS MERRC is twofold. RS MERRC is competent for drafting the normative act itself and ensuring the necessary professional assistance (e.g. participation of a representative in the working group, permanent professional or other cooperation or another adequate manner). Secondly, it provides assistance to ministries by elaborating the mandatory statement of conformability with *acquis communautaire* and a table of concordance. Article 5 of the LRA requires each ministry to send the draft-legislative act, table of concordance and table of conformity together with the opinion of the Republic Secretariat for Legislation to RS MERRC.

One of the key obligations of the Republic Secretariat for Legislation is to check that EU legal instruments are not taken mechanically and also to guarantee that, when implementing several EU measures regulating the same matter, they shall not be transposed into two or more separate domestic pieces of legislation.³³ One difference with what happens at the State level, both laws and secondary acts of the RS are checked for conformity with the legal system of the RS and *acquis communautaire*.

A minimal level of coordination with DEI is permitted through the EU Integration Unit with the Prime minister. Therefore, DEI or State level Ministry of Justice may contact the relevant ministries, including the RS MoJ, only through the EU Integration Unit with the Prime minister.

7.3. *The Approximation Process at the FBiH Level*

The FBiH MoJ is supposed to send each draft legislative act together with a table of concordance and a statement of conformity³⁴ with the EU *acquis* to the Federal Office for Legislation and Legal Harmonisation (FOLLH). FOLLH is responsible for harmonisation of legislation and also for maintaining cooperation with DEI and with equivalent institutions (e.g. RS MERRC and BD Government).³⁵ Once it receives a draft law it provides an opinion regarding its conformity with the FBiH Constitution, the FBiH legal order and the EU *acquis*. Subsequently, the draft law and the FOLLH opinion are sent back to the ministry, which forwards them³⁶ to the Council of Ministers. If the Council of

Ministers fails to accept the FOLLH opinion, it must provide an adequate motivation.³⁷ Different from what happens at the State level, both laws and secondary acts are checked for conformity with the legal system of the FBiH and *acquis communautaire*, since FOLLH is always to give a consultative opinion of their correspondence to EU law.³⁸

The Federal Government must cooperate with the governments at a state level, the RS and BD on all matters that are relevant to the reform of the legal system, an effective fight against corruption, and the protection of human rights.³⁹ Unfortunately, this does not always happen.

Once the Council of Ministers approves the draft law, it may be submitted to the Parliament. The Federal Parliament consists of the House of the Representatives of the Parliament of the Federation and the House of Peoples. Law Commissions function within each of these bodies, examining the respective draft once it has been received by the Council of Ministers and giving an assessment of whether it is in line with the Constitution and whether FOLLH has given an opinion. Only when this procedure has been completed may a draft law be examined by the Parliament.

7.4. *The Approximation Process at Brčko District Level*

In BD, the Judicial Commission has the competence to draft and submit to the district Assembly legislation that relates to organisation and operation of the District Judiciary, the Legal Aid Agency, the District Prosecutor's Office and the Public Attorney's Office, and regulation of the practice of lawyers and notaries in the District.⁴⁰ A European Integration Unit has been set up as an organisational structure of the BD government.⁴¹ Within this structure a coordination team for EU Integration is established. There is also a sub-coordination team and one of the members of this team is a representative of the Judicial Commission of BD.⁴² This team and sub-team are responsible for checking the compliance of draft laws with *acquis*. Moreover, there is a European Integration section and Sector for Legal Affairs within the administration of Office of the Mayor of BD, which work together on legal approximation. One of the competences of the Mayor of BD is to put forward drafts of normative documents to the Assembly on behalf of the BD Government.⁴³

8. Conclusion

The problems illustrated in this article, including a lack of a proper vertical competence system, the existence of several bodies and institutions deputed to implement the EU *acquis*, and the lack of coordination among the same, are exacerbated by the fact that no other European country having such a complicated constitutional structure has ever faced the challenge to approximate, all at once, its legislation to the 35 chapters of the EU *acquis*. The only EU Member State having MoJs at the Länder level, Germany, to which one may look in order to draw some lessons, is characterised by a clear catalogue of competences between the central government and the Länder. Rules offering secure guidelines to the Constitutional court in order to solve possible conflicts between State and Länder, that is to say Article 31⁴⁴ and Article 28 Constitution,⁴⁵ are also in place.

The rather confused system for allocating competences among different MoJs and the necessity to harmonise several processes of EU approximation running in parallel at

the State, Entities, Brčko District and Cantonal level may be solved by centring the competence upon the State level MoJ, relying on Article 13 ‘*Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina*’ (State level Ministry of Justice has to ensure that ‘the obligations of BiH deriving from international treaties are implemented and that legislation at all levels is in compliance with them’).

A similar solution should be accompanied by constitutional rules better addressing the issue of the hierarchy of sources of Law at the State, Entities and Cantonal Level, since at the moment it is not clear which source of law is supposed to have supremacy in case of conflict and/or contradiction. Alternatively, as it has been suggested by EU technical assistance,⁴⁶ the adoption of an agreement among all MoJs acknowledging the leading role of the state-level MoJ might also provide a solution.

Proposals have been made for concluding a ‘*Memorandum of Understanding for Institutional Cooperation Regarding the EU Integration Process Obligations for the Justice Sector*’,⁴⁷ where the leading role of the State level MoJ is recognised in relation to European integration strategy and policy, coordination of European Union assistance instruments/programs, and harmonisation of the legal system of Bosnia and Herzegovina with the *Acquis Communautaire*. However, adopting a MoU raises other questions.⁴⁸ In the end, a more profound constitutional reform, perhaps drawing on the experience of an advanced federal European country, might not only stall the present procrastination, but might prove the only way to turn the stabilisation and association process in Bosnia and Herzegovina into a success story.

References and Notes

1. The DEI role is defined in the Law on the Council of Ministers of BiH published on 3.12.2002 at http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=28609 and in the Law on Ministers and Other Administrative Bodies of BiH (*Official Gazette of Bosnia and Herzegovina*, 5/03) at www.ohr.int/ohr-dept/legal/oth.../BH-LAW-ON-MINISTRIES.doc.
2. Competence of the DEI is regulated by article 23 Law on Council of Ministers of Bosnia and Herzegovina, and Article 18 on the Ministries and other administrative Government Bodies in BiH (*infra*).
3. *Official Gazette of Bosnia and Herzegovina*, No. 44/2003. According to para IV, ‘Vertical coordination shall be performed through the European integration coordinator from the entities, Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District of Bosnia and Herzegovina.
The European integration coordinators from the entities and Brčko District of Bosnia and Herzegovina shall have the following duties:
 - Participation in drafting of strategic documents,
 - Organization of preparation and monitoring of timely meeting of duties and measures defined in the strategic documents,
 - Continuous contact to the Directorate for European Integrations in relation to all issues related to reporting and exchange of relevant information and data,
 - Regular gathering of information on entity institutions,
 Reporting of entity governments and government of Brčko District of Bosnia and Herzegovina on the accession process of Bosnia and Herzegovina to the European Union’.

4. *Official Gazette of Bosnia and Herzegovina*, No. 66/08. According to Article 2, (Establishment of Organizational Units and Jobs)
 - '(1) Ministries, permanent bodies of the Council of Ministers of Bosnia and Herzegovina (hereinafter: the Council of Ministers of Bosnia and Herzegovina) and independent administrative bodies shall define in its rulebooks on internal organizational jobs, departments or similar mechanisms for the performance of duties as referred to in Articles 4–8 of the decision that belong to the competence of the ministry.
 - Duties referred to in Articles 4–8 include coordination within each line ministry where they are established of European integration strategy and policy, European Union assistance instruments/programs, harmonization of legal system of Bosnia and Herzegovina with the *Acquis Communautaire*, in compliance with the constitutional competence in Bosnia and Herzegovina and translation of the *Acquis Communautaire* and cooperation with DEI'.
5. Chapter 23 'Judiciary and Fundamental Rights' covers a number of policy areas namely independence of judiciary, anti-corruption policies; data protection; EU citizen's rights (the right to move and reside freely within the EU, to stand as candidates for the European parliament and municipal elections, diplomatic protection from a EU Embassy when they are abroad), fundamental rights as a right to live, and prohibition of torture, freedom of religion, right to education, and free speech, together with minority rights and cultural rights of citizens etc.
6. Chapter 24 'Justice, Freedom and Security' covers border control, visas, external migration, asylum, police cooperation, fight against organised crime and against terrorism, cooperation in the field of drugs, customs cooperation and judicial cooperation in criminal and civil matters.
7. Adopted by the Council of Ministers of Bosnia and Herzegovina, in the 82nd meeting held on 2 April 2009.
8. Annex 4 to the General Framework Agreement for Peace in BiH, signed on 14 December 1995.
9. Brčko District (BD) was established by the International Arbitration Decision of 1999, its constitutional structure is regulated by the Statute of BD. BD operates as a single self-governing administrative unit, under the sovereignty of BiH. It is separate from the two entities and has the status of an autonomous territory with its own legislation.
10. Article 1, paragraph 4 of the Statute of BD (adopted on 7 December 1999 at OHR website at http://www.ohr.int/ohr-offices/brcko/default.asp?content_id=5367) prescribes that the BiH Constitution, like other laws and decisions of the BiH institutions that are in force, shall be directly applicable on the whole territory of Brčko District. Further, any legislation or decisions passed by the BD authorities must be compatible with the laws and decisions of the BiH institutions.
11. See Article III, 4 of the BiH Constitution 'BiH shall assume responsibility for such other matters as are agreed by Entities'.
12. Law on Ministries and other administrative bodies, *Official Gazette of Bosnia and Herzegovina* 5/03.
13. See Functional Review of the BiH Justice Sector p. 25.
14. *Official Gazette of Republika Srpska*, 70/02.
15. *Official Gazette of Central Bosnia Canton*, 2/97.
16. Adopted by the BiH Assembly on 26 January 2005.
17. Adopted by the Council of Ministers of BiH at its 128th session held on 7 September 2006 at http://www.mpr.gov.ba/web_dokumenti/rules_for_consultations.pdf
18. OG of BiH, 44/2003.

19. Otherwise, the proposed legal document shall be returned for completion; the proposing body has to act urgently and must complete it no later than 10 days after the day of return of the draft legal document.
20. Under Article 35 Rules of Procedures of CoM, the SL is also in charge of ensuring the publication of decisions in the Official Gazettes of Bosnia and Herzegovina, the Entities and the District of Brčko.
21. Before 1992 the Secretariat was an independent body, which issued mandatory opinions on the conformity of a draft law with the Constitution and domestic legal order. The Secretariat functions under a new statute and powers as of 1995.
22. Rules of Procedures of the House of Parliament (*Predstavnicki Dom*) and Art. 51 of Procedures of House of Peoples (*Dom Naroda*) at <http://www.parlamentfbih.gov.ba/>.
23. Within the Parliamentary administration a Legal Office has been set up, but its administrative capacity is too small.
24. Guidelines on the way of drafting and process of adoption of the technical legislation, OG BiH, 35/2006.
25. No such rules have been developed at a federal level. RS has some rules in this regard, which are 90% similar to these of the state level. Currently new rules are drafted and they will be mandatory for all levels of the legislative process. It is foreseen that the state level parliament must give recommendations to the entity parliaments on how to apply these rules.
26. OG of RS 81, 12 September 2007.
27. Article VI of Decision on the Procedure and Manner of Harmonisation of Legislation of RS with *acquis communautaire*.
28. Article 3 (2) of Decision on the procedure and manner of harmonisation of legislation of RS with *acquis communautaire*.
29. OG of RS 118/2008, 11/2009, 74/02.08.2010.
30. It also coordinates activities for strengthening the capacities of ministries for development aid; accomplishment of an Integration Strategy and legal harmonisation of RS legislation with EU regulations etc.
31. See Article VII, Decision on the Procedure and Manner of Harmonisation of Legislation of RS with *acquis communautaire*.
32. OG of RS, 107/2007.
33. Article VI, Decision on the Procedure and Manner of Harmonisation of Legislation of RS with *acquis communautaire*.
34. Article 3 (1), (2) of Regulation of FOLLH, OJ of FBiH, 49/2007.
35. Article 3 (3) of Regulation of FOLLH OJ of FBiH, 49/2007.
36. See Article 27 (1) of *Rulebook for the Work of the Federal Government* (integral text), OJ of FBiH, 6/2010.
37. The idea behind this practice is that the FOLLH is not competent to intervene in the work of the ministry as a body having legislative initiative.
38. Article 6 (3) of Regulation of FOLLH, OJ of FBiH, 49/2007.
39. Articles 80, 81 and 82 of *Rulebook for the Work of the Federal Government* (integral text), OJ of FBiH, 6/2010.
40. Article 71, 'f' of the Statute of BD District and Article 14 'h' of the Law on BD Judicial Commission (Annex VII to the Order of the Supervisor for the Adoption of a Series of Laws and Amendments to Laws of Brčko District, dated 26 June 2007, in compliance with the Order of the Supervisor on Amendments to the Statute of Brčko District, dated 2 February 2007).
41. See Organisational Plan of the Office of the Mayor of BD (Rulebook on Internal Organisation of the BD Government).
42. This information was provided by the Secretary of the JC of BD.

43. Article 16, 'f' of Law on BD Government.
44. [Supremacy of federal law] 'Federal law shall take precedence over Land law'.
45. The provision stresses the competence of the State for EU matters with an obligation to take into account the Länder's point of view if the act is impinging on its interests or to delegate by framework legislation to the Länder the power to issue legislation if the matter is falling under the Länder competence.
46. See EU Technical Assistance Contract 'Support to the capacities in the Ministries of Justice in Bosnia and Herzegovina for strategic planning, aid co-ordination and European integration' Terms of Reference, Activity 1.5. The contract was running from January 2010 to July 2011.
47. A reference to agreements as sources of legal norms is made in Article 17 Law on Rights and Duties of the Council of Ministers OG of Bosnia and Herzegovina, at http://www.ohr.int/decisions/statemattersdec/default.asp?content_id=28609 ('In exercising its rights and duties, the Council of Ministers shall adopt decisions, conclusions and resolutions, draft and proposed laws, analyses, information materials, strategic documents, programmes, agreements, protocols and other acts (hereinafter: acts)').
48. Is a MoU an administrative act or a political one? Is it subject to judicial review? How can it be enforced? How is conflict between a MoU provision and primary/secondary legislation solved?

About the Author

Marco Roccia, after practising law as an advocate in Turin, Italy, joined the University of Kent at Canterbury as associate lecturer. Roccia worked as legal approximation expert in several technical assistance projects. As resident advisor in the EU-funded IPA 'Support to the capacities in the Ministries of Justice in Bosnia and Herzegovina for strategic planning, aid co-ordination and European integration', he provided support in transposing Chapters 23 (Judiciary and fundamental rights) and 24 (Justice, freedom and security) of the EU *acquis* in Bosnia and Herzegovina.