

EXPERT OPINION WITH RECOMMENDATIONS ON GUARANTEEING LOCAL AUTONOMY IN THE FEDERATION OF BOSNIA AND HERZEGOVINA THROUGH COMPLIANCE WITH THE STANDARDS OF THE EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT

30 May 2023

The task of this report is to present findings and propose recommendations following an analysis of the legal framework in the Federation of Bosnia and Herzegovina in view of harmonisation with the European Charter of Local Self-Government. The findings and recommendations should support the advocacy efforts of the Association of Municipalities and Cities in the Federation of Bosnia and Herzegovina.

The analysis was carried out by Jens Woelk, a member of the Group of Independent Experts on the European Charter of Local Self-Government, and Adelina Džanković, local expert.

The views expressed herein do not necessarily reflect the official position of the Congress of Local and Regional Authorities of the Council of Europe.

This report is available in English and in local language. Should there be any inconsistency or discrepancy between the English and local versions of the report, the English version shall prevail.

Guarantee of local autonomy in the Federation of Bosnia and Herzegovina through compliance with the standards of the European Charter on Local Self-Government

Expert opinion

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Controversial issues:

- *Specific case:* Do mayors of municipalities in the Federation of Bosnia and Herzegovina **have the authority to make a decision on the organisation of administrative services and other services of the local self-government unit** (FBiH) **or** do they need **the consent** of the municipal council to make regulations on internal organisation?
- *General question:* What is the position of the Law on Principles of Local Self-Government (2006) in the legal system? Is it *lex specialis* for local self-government?
- *Further implications:* What are the consequences of widespread non-compliance with the above stated in the Law on the Principles of Local Self-Government FBiH?

Context: Legal foundations of local self-government in Bosnia and Herzegovina

1. Bosnia and Herzegovina joined the Council of Europe in April 2002 and signed and ratified **the European Charter on Local Self-Government** (hereinafter "ECLSG", or " Charter ") in its entirety in July 2002. The Charter entered into force in relation to Bosnia and Herzegovina in November 2002. The state undertook to incorporate the principle of local self-government into domestic legislation in order to guarantee its effective implementation, to transfer competences to local communities with accompanying financial resources, and to ensure the full implementation of the principle of subsidiarity in order to guarantee the establishment of local self-governments as provided for in the Charter.
2. The institutional system introduced by the Constitution of Bosnia and Herzegovina (Annex 4 of the Dayton Peace Agreement) guarantees maximum autonomy to two entities - the Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (FBiH). **All competences related to local self-government are fully entrusted to the entities** that passed the constitutional provisions as well as the laws that regulate local self-government. Thus, the Constitution of BiH does not even mention local self-government (except for the Brčko District, Article IV.4 from 2009).
3. **The Federation of Bosnia and Herzegovina** (FBiH) is a federal system consisting of **three levels** with municipalities (or cities)³, cantons and the federal level. In the Federation, most of the powers related to local self-government are entrusted to the cantons, which is why the Constitution contains nothing but a few generic provisions on this matter, which prescribe some basic principles of local self-government that should be incorporated into the cantonal constitutions (Art. VI.A.1.-6, with amendments from 2004). All cantonal constitutions actually contain special provisions in special sections dedicated to "local authorities". All cantons have passed their own laws on local self-government, introducing different solutions regarding powers and functions, taxes and resources.
4. As a result, **ECLSG is implemented in FBiH through legislation on federal and cantonal level. Coordination shall be achieved by the Law on Principles of Local Self - Government from 2006** (hereinafter: Law on Principles), which is **fully aligned with the Charter**. In practice, however, many laws are not yet harmonised with this law.

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³ In the legislation of the Federation of Bosnia and Herzegovina, municipalities and cities are distinguished, with few effective legal differences. Therefore, in this text, the term "municipality" refers to the local level, which includes both.

5. In FBiH, there is no special body dedicated to local self-government at the federal level. The Administration Department within the Federal of the Ministry of Justice (FMP) *in addition to tasks related to administration, to a lesser extent also performs tasks* related to local self-government.⁴ **As a result, the specificities and the autonomy of local self-government easily run the risk of not being sufficiently considered.** In contrast, in the Republic of Srpska, there is a Ministry for Administration and Local Self-Government, with special departments, which established a distinction between public administration and local self-government.
6. A special guarantee of the right to local self-government is provided among the functions of the Constitutional Court of the Federation of Bosnia and Herzegovina (CC FBiH), (Articles IV.C.3 and 10. (3) of the Constitution).⁵ Municipalities can apply to the CC FBiH for an alleged violation of the constitutional right to local self-government.

ECLSG-Monitoring: Congress in its Report on BiH (2019)

7. In its monitoring⁶ of the implementation of the ECLSG in BiH, the Congress of Local and Regional Authorities of the Council of Europe, among other things, marked the harmonisation of legislation as a necessity, as well as the need to secure accompanying financial resources when they are delegated and transferred to municipalities. In both cases, a revision of the legislation was recommended to bring it fully into line with the ECLSG. The following recommendations were made (emphasis added):
 - "5.c. revise the legislation in order to avoid overlapping jurisdictions and to ensure subsidiarity in practice, especially in the Federation of Bosnia and Herzegovina , **to align the cantonal legislation with the Federal law on principles of local self-government;**
 - "5.f. revise the legislation to ensure that local authorities have adequate and adequate financial resources and **ensure the transfer of delegated powers to lower levels of government is accompanied by concomitant financial resources;**".
8. In addition, the Monitoring Report for BiH (2019) recalls that "as early as 2012, a Recommendation was given to the FBiH authorities to consider the institution of a special Ministry for Local Self-Government (similar to the one in Republika Srpska), as an interlocutor for cantons and municipalities". However, "such a Ministry has not been established so far. To date, municipalities have to turn to different ministries (at the FBiH level)".⁷ The question of a coordinating interlocutor at the political level remains open to this day .

Specific question: Consistent application of the provisions of Article 15 of the Law on Principles of Local Self-Government in FBiH?

9. According to **Article 6 of the ECLSG**, municipalities have **the authority to determine their own internal administrative structures**, respecting legal provisions and restrictions. In general, this requires a proposal by the mayor/municipal head and a decision by the local council. However, the mayor, as the head of the executive and administrative staff, also has moderate powers of his own to determine the way in which the administrative services are organized, and to introduce changes or adjustments in the administration.
10. Consequently, **Article 15 of the Law on Principles**, implementing Article 6 of the ECLSG, prescribes **powers** (and responsibilities) in relation to the organisation of services as well as internal organisation. It contains the authority to "determine the organisation of services for the administration and other services of the local self-

⁴ Among others, the functions of the Institute for Public Administration comprise the "construction of the local self-government system"; Website of the FBiH Ministry of Justice (<http://80.65.161.138/3ravda3/ministarstva/3ravda.php>).

⁵ The Congress for BiH (2019) deals with legal remedies for municipalities in the FBiH (paragraphs 173 and 175-178), highlighting the problem of unenforced judgments of the CC of the FBiH.

⁶ Local and regional democracy in Bosnia and Herzegovina, Report CG37(2019)18final, 31 October 2019 – Recommendation 442 (2019): <https://rm.coe.int/local-and-regional-democracy-in-bosnia-and-herzegovina-monitoring-comm/168098072a>

⁷ Congress monitoring report on BiH (2019), paragraph 103.

government unit" and pass regulations on the internal organisation of the services of the local self-government unit" (hereinafter: "regulations on internal order). The last sentence of Article 15 assigns responsibility for the "constitutionality and legality of the acts they pass" to the mayor.

11. The obligation to harmonise legislation regarding the authority to determine the organisation of services and other services of local self-government units has not been complied with. This leads to **contradictory provisions regarding the adoption of regulations on the organisation and internal structure of the local self-government unit**: Articles 49, paragraph 4, Article 50, paragraph 3, and Article 52, paragraph 1, point 3 and 4 of the Law on the Organisation of Administrative Bodies FBiH (2005) stipulate that the decision on the organisation of services is made by the municipal/city council, and that the adoption of regulations on internal organisation requires the consent of the municipal/city council, by contrast with Article 15 of the Law on Principles of Local Self-Government FBiH (2006) which assigns this authority to the mayor, without the need for such consent from the municipal council. The authority to make this decision and to adopt a rulebook on internal order is, according to legal logic, with the mayor/municipal head, as a body of executive power as part of his/her legal powers and obligations to implement laws and regulations. .

Analysis: Consistent interpretation through chronological order and *Lex specialis* – rule

12. The Law **on the Principles of Local Self-Government** is *lex specialis* regarding the organisation of local self-government vis-à-vis *general* legislation in the administrative sphere. The authorities must apply its principles fully and consistently, not selectively. The *lex specialis*-character was confirmed in 2008 and 2009 by the FBiH Ministry of Justice,⁸ in relation to its articles 13 and 15.
13. The *lex specialis*-character of the Law on the Principles of Local Self-Government and the obligation to respect the principles of local self-government are highlighted in Article 58 of the same Law on the Principles of Local Self-Government which prescribes **the obligation to create consistency through harmonisation** of legislation for the federal and cantonal levels ("within six months").⁹
14. Therefore, the Federation and the cantons have **a legislative duty to create and guarantee a consistent framework that respects local self-government**, confirmed by the verdict of the Constitutional Court of the Federation of Bosnia and Herzegovina (CC FBiH).¹⁰ However, neither the Federation of Bosnia and Herzegovina nor most of the cantons have so far fulfilled this obligation by harmonizing their laws passed before the FBiH Principles Law came into force. Even 17 years after the expiration of the six-month deadline, only one Canton has harmonised its legislation with the FBiH Law on Principles of Local Self-Government.
15. A **comparative analysis** of the legal framework of local self-government shows that the Republika Srpska in 2016 adopted a new Law on Local Self-Government, which was amended in 2019 and 2021. This law precisely defined and expanded the scope of local self-government units, demarcated competences between the bodies of local self-government units with the principles of mutual respect, but also simultaneous responsibility for their own competences and the mayor/municipal head is given the authority to make decisions on the organisation of services and to adopt regulations on internal organisation.
16. In the countries of the region (Croatia, Montenegro, Serbia) there are **different solutions** regarding the powers of local self-government units, mayors/municipal heads and city/municipal councils. These specificities are primarily a consequence of the territorial organisation of the respective country:
 - in the Republic of **Croatia**, municipalities, cities, and counties are considered local self-government units. The Law on Local Self-Government stipulates that the decision on the organisation of services is made by the council, and the rulebook on internal organisation by the municipal mayor, with the fact that the

⁸ Letters from the FBiH Ministry of Justice, acts 06-02-556/08 of 29 July 2008 and 06-02-1090/08 of 12 February 2009.

⁹ Article 58 of the Law on the Principles of Local Self-Government: "The Federation of Bosnia and Herzegovina and the cantons are obliged to harmonise their laws with this law, and carry out the transfer of tasks and responsibilities, as well as the responsibilities assigned by this law to local self-government units. of the Act **within six months from the date of its entry into force ...**". (Emphasis added)

¹⁰ Judgment of the Constitutional Court of FBiH U -14/09 dated 12 October 2010.

municipal mayor has greater authority regarding the disposal and management of property (in FBiH, the latter issue is the exclusive competence of municipal councils) .

- In **Montenegro**, although the president of the municipality is elected indirectly, i.e. from among the councilors, the authority to adopt the above-mentioned documents is in his competence and with much wider powers than what is provided for in the FBiH.
 - The Republic of **Serbia** has a specific arrangement of local self-government with established bodies: the assembly, the president of the municipality, the municipal council and the municipal administration, whereby the municipal mayor and the municipal council are the executive bodies of local self-government. The municipal mayor and the municipal council are elected indirectly from the ranks of representatives in the assembly. The Assembly makes decisions on the establishment of services, while the municipal mayor has the authority to regulate and direct the work of services. The specifics consist in the status of the municipal council as an executive body with the authority to enact regulations on the internal organisation of services, as well as the fact that municipal services are not managed by the president of the municipality but by the municipal mayor, who is appointed on the basis of a public competition.
17. However, even without legislative changes, **consistent interpretation** according to general standards of legal interpretation, conflicts between **opposing legal sources** can be resolved by the rules of chronological order and/or *lex specialis*. In the controversial case, both methods lead to the same result: **the Law on the Principles of Local Self-Government (2006) is to be applied instead of the Law on the Organisation of Administrative Bodies of FBiH (2005)**. Not only is it a subsequent law, but it is **also special in content**, because it refers to local self-government as a special sector of public administration, as well as to the implementation of a special international Treaty on this issue (the ECLSG).
18. In 2009, **the FBiH Ministry of Justice confirmed** this assessment expressly in relation to the authority to make a decision on the organisation of services and the rulebook on internal organisation in the Opinion on the competences of decision-making bodies of local self-government units.¹¹
19. In 2010, **the FBiH Constitutional Court** ruled that **the Canton of Sarajevo** violated the right to local self-government of the Municipality of Centar Sarajevo, because it did not **adopted the appropriate legislation for harmonisation** within the legal deadline and thus did not comply with Articles 58, 59 and 60 of the Law on Principles of Local Self-Government.¹² This judgment confirms the *lex specialis*-character of the Law on the Principles of Local Self-Government of the FBiH, its connection with the implementation of an international agreement (ie ECLSG), as well as the obligation to harmonise legislation. However, this has not been implemented so far.

Problem: Sudden change in administrative practice and the Constitutional Court

20. As seen above, in the first decade after the entry into force of the FBiH Law on Principles of Local Self-Government, the authorities (including the FBiH Ministry of Justice) gave a consistent interpretation of this issue, despite the inconsistency of cantonal legislation. However, in 2018 and 2020, the Ministry **unexpectedly changed position** without explanation, now **considering the principles of the Law on the Organisation of Administrative Bodies of FBiH as mandatory for local self-government units**. According to two decisions, the Law on the Organisation of Administrative Bodies of FBiH "determines the basic principles of the organisation and functioning of bodies at all levels of government "and" aims to define the identical characteristics of the body and a unique way of their functioning".¹³ The FBiH Ministry of Justice adds that "the application of the Law on the Organisation of Administrative Bodies was unquestionable, because these issues [namely the adoption of regulations on internal order] are regulated only by that law". Thus, the Ministry insists on derogating from the provisions of the FBiH Law on Principles of Local Self-Government, which regulates

¹¹Letter from the Ministry of Justice FBiH 06-02-109 (08 dated 02.12.2009)

¹²Constitutional Court of FBiH U-14/09 from October 2010.

¹³ MP FBiH, acts 03-49-1332/18 from April 2018 and 03-45-2602/20 from September 2020.

these issues differently, and which represents an expression of the autonomy of local self-government units in the organisation of the administrative structure.

21. In 2022, **the Constitutional Court FBiH changed its position**, now considering the provisions on the necessary consent to the rulebook by the city/municipal council in the Law on Organisation of Bodies of FBiH (Articles 49, paragraph 4, and 52, paragraph 3 and 4) in accordance with the right to local self-government.¹⁴ For the CC FBiH, local self-government units as such still retain the right to determine their own internal administrative structures (as provided for in Article 6 ECLSG); the fact that within the local self-government unit the decision on the organisation of services is made by the council, i.e. that it is not decided by the mayor/chief himself, but a decision or consent of the council is required, is considered a "potential conflict of jurisdiction" of these bodies within the local self-government unit and is therefore not relevant for consideration. It cannot be qualified as a violation of the rights of local self-government units under the ECLSG, because "they can establish an appropriate administrative structure within the limits of their competences".
22. In December 2022, the **FBiH MoJ issued an Opinion** that the municipal/city council should give its consent to the rulebook on the internal organisation of the municipal/city body. The **FBiH Civil Service Agency** sent this Opinion to the City of Sarajevo and all municipal councils and mayors in Sarajevo Canton. Previously, it issued a similar order to the Municipality of Centar Sarajevo, requesting submission of the Ordinance on Internal Order to the Council and its retroactive approval. In these opinions and orders, the Law on the Organisation of Administrative Bodies is considered a "cardinal law" for the organisation and functioning of administration at all levels of government and must also be applied in cases where the Law on Principles of Local Self-Government provides otherwise.
23. Due to **the lack of clear motivation**, this sudden change in the judicial practice of the Constitutional Court of FBiH and in the practice of the FBiH authorities creates significant **legal uncertainty** in the relationship between the two laws. There is also a question regarding **the obligation to harmonise legislation** because most cantons have not yet fulfilled this obligation. And finally, it raises important questions regarding **the scope of local autonomy**.
24. Formally, the local self-government unit may still determine the appropriate internal administrative structures, but **the pressure for uniform solutions** from the general Law on the organisation of the FBiH administration will increase and at the same time reduce the scope of authority and autonomy of the local self-government units granted by the Law on the Principles of Local Self-Government in the FBiH.
25. Also, there is a certain unequal treatment, because the executive bodies of the Federation and cantons do not need the approval of the parliaments for acts concerning their internal administrative organisation; the city /municipal council is certainly not a parliament in the formal sense, it is a representative body and its functions in relation to the mayor/municipal head resemble the relationship between the legislative and executive bodies. Also, the direct election of the mayor/municipal head increases his legitimacy and responsibility for the work and functioning of the services of the local self-government unit, i.e. the responsibility as the head of the executive power for acts within the administration, in contrast to general acts sent to the public that require a council decision.
26. Another important issue is the conclusion that follows from the judgment ("verdict" in BHS) of the CC of FBiH, that is, that there is no **legal remedy in case of a conflict of jurisdiction between bodies within a local self-government unit**. This issue definitely needs to be resolved, because otherwise this important area of administrative activity is left without judicial control, and those who claim that their rights have been violated do not have the possibility of legal protection.

¹⁴Constitutional Court of FBiH U-12/22 from October 2022.

Further issues: Obligation of accompanying financing together with delegation of powers

27. The question of the position of the FBiH Law on the Principles of Local Self-Government is a general issue, due to the obligation **to harmonise other important legal regulations**. Even 21 years after the ratification of the ECLSG, this obligation is still largely unfulfilled. This refers to the transfer of duties and responsibilities, as well as responsibilities assigned to local self-government units (Articles 58 and 59 of the Law on Principles of Local Self-Government FBiH)¹⁵ in order to harmonise with the European Charter on Local Self-Government. In that period, the Constitutional Court of FBiH issued several judgments in which it found a violation of the right to local self-government, and these were never implemented (eg the Law on Registers in FBiH - there are several judgments of the Constitutional Court of FBiH); Law on Forests FBiH; Sarajevo Canton Concessions Act; Law on Amendments to the Law on Restitution, Allocation and Sale of Apartments in FBiH; The Law on Amendments to the Law on the Sale of Apartments with Occupancy Rights in the FBiH).
28. Also, the **transfer or delegation of new responsibilities to municipalities** usually does not include the **transfer of necessary financial resources** for the new tasks (e.g. the Law on the Distribution of Public Revenues in the Federation of Bosnia and Herzegovina; the Law on Accounting and Auditing in the FBiH; the Law on Amendments to the Water Law of the Sarajevo Canton; Law on Preschool Education of Sarajevo Canton; Law on Civil Registry in FBiH).

¹⁵Article 58 of the Law on the Principles of Local Self-Government: "The Federation of Bosnia and Herzegovina and the cantons are obliged to harmonise their laws with this law, and carry out the transfer of tasks and competences, as well as responsibilities assigned to local self-government units within six months from the entry into force of this law."

How to proceed? - Recommendations

29. **The Law on Principles of Local Self-Government** in the Federation of Bosnia and Herzegovina, adopted in 2006, must be **applied and fully respected**. As a *special* legislative basis for local self-government in BiH (and within the FBiH), it implements the principles of the European Charter on Local Self-Government (ECLSG), which is an international treaty ratified by BiH in 2002. Its main function is to **coordinate cantonal legislation**, which must be harmonised in order to guarantee full implementation of ECLSG principles also at the cantonal level. That is why **priority must be given to the principles within the Law on Principles Local Self-Government:**
- **cantons and FBiH** must urgently fulfill their - overdue - obligation to harmonise legislation with the Law on Principles of Local Self-Government in FBiH.
 - **all authorities of FBiH** should respect the special nature of the FBiH Law on Principles of Local Self-Government in the application and interpretation of other laws that may affect local self-government. The Law on the Principles of Local Self-Government of the FBiH was adopted as a *special* law guaranteeing local self-government and its principles vis-à-vis *general* legislation, e.g. the *general* organisation of administrative structures.
30. To fully respect the European Charter on Local Self-Government and effectively guarantee local self-government in the Federation of BiH, **awareness** of the European principles of the ECLSG and the peculiarities of the Law on the Principles of Local Self-Government of the FBiH, which frames these principles for their implementation in the FBiH, is crucial. Public **seminars or discussions** on this issue can be organized by the Association of Municipalities and Cities, with the participation of decision-makers from all levels of government in FBiH (and mayor/chief).
31. With regard to the **specific issue** of the authority of the municipal head/mayor to make a decision on the internal organisation of the administration services and other services of the local self-government unit and the allegedly necessary consent of the municipal/city council, **the Parliament of FBiH and the Government of FBiH should guarantee the implementation of the legal obligation and the harmonisation of** the provisions of Article 49, paragraph 4, Article 50, paragraph 3 and Article 52, paragraph 1, points (3) and (4) of the Law on the Organisation of Administrative Bodies of the FBiH with the provisions **of** Article 15 of the Law on Principles of Local Self-Government, respecting the special *character* and priority of the latter Law for regulating issues related to local self-government in FBiH.
32. In addition, the important issue of transferring/**delegating competences** to local self-government units, **together with appropriate funds**, should be regulated in a separate part of the draft **Law on financing of local self-government units**, which should be adopted soon. Such a law has long been demanded by the Federation of Municipalities and Cities of FBiH; although the draft exists, it still needs to be discussed in the working group and in the Parliament.¹⁶ The Association of Municipalities and Cities of the FBiH could create public awareness of the need to pass such a law for an efficient system of local self-government.
33. Finally, the legal and **judicial protection of local self-government units should include disputes between the bodies within** these units. In case of alleged violations of rights, the Constitutional Court of FBiH should deal with and decide on these disputes. In the specific case of the internal regulations, it is important whether the powers of the Mayor are respected.

¹⁶See Congress Monitoring Report on BiH (2019), paragraph 138.