



Organization for Security and Co-operation in Europe
MISSION IN KOSOVO

Independent Agencies and Institutions in Kosovo Democracy
December 2007

Executive Summary

Independent institutions are a cornerstone of democracy. They are a key element of the separation of powers, ensuring checks and balances and respect for the Rule of Law. In Kosovo, Independent bodies are assuming increasing responsibilities previously undertaken by the international community. However, these independent bodies face difficulties in their relations with the Government and the Assembly which could eventually undermine their sustainability and weaken Kosovo's young democracy.

Independent institutions are, like the Government, accountable to the people of Kosovo through the people's representatives in the Assembly of Kosovo. It is therefore the role of the Assembly to ensure that independent bodies are fulfilling their mandates as set out in the applicable laws.

In order to fulfil their functions of regulating and monitoring the executive, these bodies need to be independent, which means that their work should not be politically influenced or controlled by any organ of the executive. According to European standards, the essential conditions required by independent agencies are:

- 1) Financial independence, provided with sufficient funds to perform their functions with full operational autonomy;
- 2) Independence of appointment and tenure, to ensure that appointments are merit-based and transparent, and that board members and staff of independent institutions are able to work without fear of dismissal for arbitrary or political reasons; and
- 3) Independence from interference in decision-making, so that the Government does not have any influence over decisions taken by the independent institutions and executive authorities respect and uphold decisions taken by independent institutions.

Independent bodies exercising oversight and regulatory functions are crucial for the continued strengthening of Kosovo's young democracy and for the protection of its young institutions. Consequently, the protection of independent bodies is in the interest of the people of Kosovo. Adequate protection of independent bodies is also a clear sign of the Government's commitment to democratic and European standards.



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This paper shows that despite the fact that the democratic system in Kosovo relies on independent oversight and regulation to strengthen the separation of powers, those independent bodies (institutions and agencies) mandated to do so still face difficulties in their relations with the Government and the Assembly. This could eventually undermine their sustainability and weaken Kosovo's young democracy. Furthermore, since the independent bodies are working foremost in the interests of the people of Kosovo, this paper aims to familiarise the general public with the concept of independent institutions, their current status and the challenges they face. The examples in the paper are drawn from the expertise of OSCE advisors working with specific independent institutions.

What is an independent institution?

Independent institutions are a cornerstone of democracy. They are a key element of the separation of powers, ensuring checks and balances and respect for the Rule of Law.¹ In Kosovo, as in other democracies, there are several independent bodies that perform functions of oversight and regulation. These can be roughly divided into two types of bodies: 1) independent good governance and human rights institutions which perform oversight functions over the government and typically do not have significant own-source revenues; and 2) independent agencies and regulators which perform a regulatory or licensing function and frequently collect fees. See annex 1 for a list and brief description of the independent agencies operating in Kosovo.

Independent bodies in Kosovo are assuming increasing responsibilities previously undertaken by the international community. In fact, a majority of these bodies were created by UNMIK and have now been transferred, or are in the process of being transferred, to local hands. The PISG has also endorsed this important democratic feature; in 2006 it created the Anti-Corruption Agency and is currently finalising the transfer of the Independent Oversight Board.

Independent but accountable

“Independence” does not mean “unaccountability”, but rather the need to be “independent from the executive.” In fact, it is important that these institutions remain accountable. They must continue to observe all laws and regulations relating to public

¹ In Europe, independent agencies emerged in response to citizens' needs. The role and functions of these independent agencies are not static. In some countries new offices or institutions continue to be added as needs arise.

financing and accountability; this is particularly important given that independent bodies operate on the basis of directly-allocated public funds or, as in the case of many regulators, by license fees collected from those being regulated.

Most importantly, independent institutions are, like the Government, accountable to the people of Kosovo through the people's representatives in the Assembly of Kosovo. It is therefore the role of the Assembly to ensure that independent bodies are fulfilling their mandates as set out in the applicable laws. In Kosovo, as in most countries and regions, such institutions report their findings to the Assembly, which also assumes responsibility for appointment processes and should guarantee the independence of these bodies on behalf of the people it represents.

In any democracy (and especially in a transitional democracy such as Kosovo's), the development of independent institutions is always a work in progress. In order to inform the general public and assist policy makers, the following sections and recommendations are based upon the international community's experience working with independent agencies both in Kosovo and other regions. During Kosovo's current transitional period, the independent agencies are increasingly performing roles which the international community previously carried out. Ensuring the sustainability of these agencies serves to solidify Kosovo's democracy

Conditions for Independence

In order to fulfil their functions of regulating and monitoring the executive, these bodies need to be independent, which means that their work should not be politically influenced or controlled by any organ of the executive. If, for instance, the Auditor General's Office (AGO) were to be appointed or dismissed by the Government directly, how could the Auditor General be considered independent while the position is controlled by the Government the AGO is supposed to audit? For this reason, the appointment is usually in the purview of the Assembly, with a procedure in place to ensure that appointees can act independently. Further, this illustrates that the independence of these institutions must be granted by law, and that the law must be effectively implemented by the Government and the Assembly. According to European standards², the essential conditions required by independent agencies are:

- Financial independence;
- Independence of appointment and tenure;
- Independence from interference in decision-making.

Financial Independence

Financial independence is a prerequisite for independent agencies' full operational autonomy from the executive branch. Essentially this means that an independent body is provided with sufficient funds to perform its functions, and cannot be

² See for instance the TAIEX (or Technical Assistance and Information Exchange which is an instrument of the European Commission that helps countries with the approximation, application and enforcement of EU legislation) report on Kosovo Independent Regulatory Agencies, a study carried out by the European Commission's Directorate General for Enlargement from 26 February to 2 March 2007 to assess the independent economic regulators.

threatened by the Government to have its funding (or its salaries and staffing levels) reduced or withdrawn arbitrarily by the Government. Institutions and Agencies must be financially accountable for funds they receive without being subject to political control. Without this guarantee, independence is compromised, since it gives the Government a means to control the decision-making of the agencies. Such control can be exercised both through the yearly budget cycle and the partial allocation of funds during the budget year. Financial independence must be guaranteed by law, and the law must be respected and implemented by the Government and in particular the Ministry of Finance and Economy (MFE).

Annual Government Budget Process

The Kosovo Government is under strong pressure from the International Monetary Fund to develop a balanced annual budget within limited resources, including through the reduction of the size of its civil service. This implies concessions from all institutions, including the independent agencies, which are expected to submit sound budget proposals. The MFE has, in previous years, withheld or withdrawn previously budgeted funding from independent institutions so that it could transfer these funds to ministries or other agencies, often based on decisions taken at cabinet and other high-level governmental meetings where the independent agencies have no representation.

Nevertheless, the Government must understand the specific needs of each of the agencies before indiscriminately applying budget ceilings. Institutions that do not generate their own revenues collectively account for only a small fraction of the budget of Kosovo. They are a very cost efficient system, considering the vital democratic function they perform in overseeing the proper functioning of many other public institutions.

Furthermore, the majority of the staff of these institutions is made up of professionals; reductions to their budgets thus have a disproportionately negative impact on the sustainability of these institutions. Indeed, they do not have structures similar to that of a ministry, which usually relies on a large number of administrative staff (pyramidal structure). This structural difference should be fully taken into account before imposing budget ceilings. This is especially the case for institutions that are in the process of transition, be it at the initial stages of their creation (the Anti-Corruption Agency, for example) or because they are entering a new phase of programmes (Kosovo Judicial Institute).

An additional difficulty faced by the independent bodies is that they currently have no institutional mechanisms through which they can protect themselves from governmental interference with their budgets. Due to their independent status, they have no voice within the Government to protect their interests and lobby directly at the cabinet table in their favour. This is particularly damaging when final inter-governmental negotiations on budget allocations take place.

In accordance with the TAIEX Assessment underlining “potential scope for undue influence... if budgets are set by the Ministries rather than the Assembly,” it is evident that the only organ competent to discuss the budget proposals of the independent institutions is the Kosovo Assembly. In that respect the board of the agencies appointed by the Assembly should ensure that the proposals are sound and meet the requirements stipulated in the applicable law regarding use of public funds

and in the founding laws of the respective agencies. The MFE should oversee this process only from a technical point of view, while it is the Assembly's role to agree on the requested budgets.

The Assembly of Kosovo has in previous years played a minor role in the budget process, being involved only at the end, essentially as a rubber-stamp after expenditures for the Kosovo Consolidated Budget (KCB) had already been drafted and approved by the Government and the Economic and Fiscal Council. As a positive development, in July 2007 the Assembly Committee on Budget and Finance held a two-part roundtable on the structural difficulties faced by independent institutions with regard to the budget process. The Committee adopted a report on the roundtable which included some specific recommendations, including that the committee should invite the Minister to participate in Committee meetings and initiate a review of the relevant legislation. This indicates an increased willingness to take an active role in defending the autonomy of independent institutions before the budget process is finalised, which should be encouraged in future budget cycles.

Allocation of funds

There are documented examples of where the MFE has not allocated the full amount of the annual budget requested by the independent institutions. In 2007, not one of the good governance independent institutions received the full amount they requested. The Kosovo Judicial Institute (KJI) was provided only two-thirds of its requested amount for 2007, and other institutions such as the Ombudsperson Institution and the Central Election Commission only received additional amounts after intervention by the international community. In the Ministry's budget proposal for 2008, a number of independent bodies, such as the Ombudsperson Institution, have suffered severe reductions of the funds requested by them. For example, the 2008 Kosovo Judicial Institute (KJI) budget was reduced by 41% from the amount requested. The new law establishing the KJI as a fully-localised institution gives the KJI the legal obligation to implement new programmes, which it cannot do under the budget and staffing plan imposed by the MFE. There are other examples where lack of proper Kosovo Consolidated Budget (KCB) funding has prevented independent bodies from properly implementing their respective mandates. Such budgetary limitations severely compromise the sustainability of independent institutions.

Independence of appointment and tenure

In order to be truly independent, board appointments must be merit-based and transparent, while board members and staff of an institution must be able to work without fear of dismissal for arbitrary or political reasons. To guarantee this fundamental principle, it is commonly considered that the appointment and dismissal of board members must occur only after a vote of the Assembly. In addition, the law should state explicitly under which circumstances such appointments and dismissals can occur. This is the case for most of the independent agencies, with a number of variants depending on the nature of the institution.

In the case of the Ombudsperson Institution, there was an attempt to ensure transparency of the appointment procedure by having the Assembly issue a call for public nominations by institutions involved in the promotion, protection and

monitoring of human rights and fundamental freedoms. The recruiting and voting process will then be in the hands of the Assembly, which needs to elect an Ombudsperson by absolute majority vote to ensure a high degree of political independence. Similarly, the IMC Council produced a short-list using a public nomination and vetting process before submitting it to the Assembly for selection and ratification.

In both of these cases, however, extensive delays in the process have been observed. The Assembly must play a vital role in reviewing the reports of the independent institutions (and in taking action where necessary), ratifying the appointment and dismissal of board members, and ensuring that they are accountable for the expenditure of public funds. The Assembly is therefore responsible for ensuring that it plays an effective role without unduly impacting upon the institutions by failing to appoint members on time or to review reports.

Another difficulty faced by independent agencies relates to attempts by some ministries to create parallel institutions within their departments that perform similar functions but report directly to the Ministry. Such a mechanism not only creates unnecessary duplication, but can also be seen as a way of undermining and replacing the role of independent oversight bodies and regulators with internal mechanisms that can be more easily controlled. This occurred previously with the Ministry of Public Services, which tried to promote a Law on Conflict of Interest that would have taken certain responsibilities of the Anti-Corruption Agency (ACA) back to the Ministry.

Independence from interference over decision-making

Independent institutions should report directly to the Assembly rather than to a Ministry or the Government. While institutions must be accountable for their expenditures of public funds, they must remain operationally independent from the Government. This means that the primary line of accountability should be to the Assembly and that the institutions should be free from ministries' reporting requirements that are not stipulated by law.

The Government should not have any influence over decisions taken by the independent institutions. Interference or attempted interference, can involve many different situations in which the Government attempts to influence decisions or behaviour. Advocating a particular course of action for the independent institution is an attempt to influence decisions. For instance, the IMC has often received letters from ministers requesting or advising against a certain action with respect to a particular broadcaster. Since the Assembly holds the independent institutions accountable, it may of course review their annual reports and ask whether they are doing their job correctly; but if the Government lobbies the independent agencies for particular decisions on particular issues within the mandate of those agencies this can be seen as attempted interference. Interference can also entail the refusal or failure of Government-controlled institutions to execute or apply decisions of independent institutions, for example by denying police support for the enforcement for a decision.

During the 2008 budget cycle, several institutions were confronted with a level of micro-management of the budget process that could have the adverse impact of constraining their operational independence. During the budgetary hearings for the

IMC, the MFE asked for information on the number of square metres per staff member in the IMC office; the justification for specific staff positions and their MPS-assigned pay-grades. Other agencies also experienced a similar level of micro-management during the budget hearings. While it is vital that independent institutions are accountable for their use of public funds, such a level of scrutiny would be better left to the relevant Assembly Committees.

Competitive and secure compensation

The issue of salary scales is of particular relevance for the long-term sustainability of the independent agencies, since they must have the ability to attract qualified professional staff. Many institutions perform oversight functions, and in some cases their inspectors are currently paid substantially less than those they are inspecting. It is also important to retain staff in order to develop long-term expertise and institutional memory in these relatively new public institutions. At a roundtable hosted by the Assembly Committee on Budget and Finance to discuss the budget process, independent institutions reported that when staff remuneration is not set out in law at a competitive level, it is a challenge for the institutions to recruit and retain professional staff and a sustainable organizational structure. In the past, drastic salary cuts have led to a massive exodus of professional staff.

The TAIEX Assessment highlighted the inability to attract and retain key professional staff on civil service salaries as a serious problem for the independent regulatory agencies. Similarly, the good governance institutions have faced arbitrary reductions in the numbers of staff or reductions in salary levels from those written into their legal frameworks. For example, despite the fact that the 2007 budget provided for a total staff of 35 for the Anti-corruption Agency, after the hiring of 15 staff the MFE blocked all expenses for further recruitment.

In order to operate effectively and with complete autonomy, independent agencies must be free from arbitrary reductions in salaries and staffing levels. They must also have sufficient capacity to remunerate their professional staff at competitive rates in order to attract and retain talent.

Conclusion and recommendations

Independent bodies exercising oversight and regulatory functions are crucial for the continued strengthening of Kosovo's young democracy and for the protection of its young institutions. Consequently, the protection of independent bodies is in the interest of the people of Kosovo and serves as a reminder to the PISG that power must be controlled in order to be exercised appropriately. Adequate protection of independent bodies is also a clear sign of the PISG's commitment to democratic and European standards.

To the public (including media):

- Support independent institutions by reporting and listening to their concerns whilst pressuring elected representatives to protect them and the Government not to interfere.

To the Assembly of Kosovo:

- Play a greater role in overseeing the enforcement of the existing legislative framework of independent institutions;
- Appoint in a timely manner the boards or heads of the institutions and ensure they are highly qualified and independent;
- Take a more active role in reviewing and approving annual reports of independent institutions;
- The Committee on Budget and Finance should build upon its successful roundtable by reviewing the budgets of independent institutions annually and making recommendations to the Government regarding the budgets of the institutions before they are submitted to the Assembly for approval.

To the Ministry of Finance and Economy:

- Refrain from determining operational priorities for the institutions or interfering with their budget processes. This implies passing on the budget proposals of these institutions to the Assembly, whereby the Assembly can exercise budgetary oversight and hold them to account;
- Allocate to independent institutions the full budgeted amount;
- Restore/maintain the staffing levels of the independent institutions and allow these institutions to fill vacancies within those staffing levels.

To the Assembly and the Government:

- Draft framework legislation for all independent institutions and regulators to set out the criteria that would guarantee their independence based on the three principles of (i) financial independence, (ii) independence of appointment and tenure and (iii) independence from interference over decision-making, as well as specifying accountability requirements.

Good Governance and Human Rights Institutions

Anti-Corruption Agency (ACA)

The ACA was created in 2006 by the Assembly of Kosovo and has several responsibilities, based on Kosovo Law 2004/34 on the Suppression of Corruption and on the Anti-Corruption Action Plan of the Government, which includes: reception of individual complaints that are forwarded to the competent judicial institutions, research and analysis on corruption, advice to the PISG about anti-corruption policy, research on conflict of interests, analysis of Property and Assets Declarations by senior public officials and yearly reports to the Assembly.

Central Election Commission (CEC)

The CEC was created in 2000 by the OSCE, and is responsible for policy development and the managerial oversight of the conduct of elections to the Assembly of Kosovo and elections to the Municipal Assemblies in Kosovo. Its powers are in the process of being transferred, but remain part of the reserved powers under resolution 1244, with the Head of the OSCE Mission as the chair of the CEC.

Central Election Commission Secretariat (CECS)

The CECS was created by the OSCE in 2003 as a body responsible for the administrative and operational matters regarding the conduct of elections as authorized by the CEC and in accordance with the legislation in force. The CECS has been localized while the OSCE continues to support and advise.

Independent Oversight Board (IOB)

The IOB was created by the SRSG, in consultation with the Prime Minister, in 2004, and resolves appeals filed by civil servants and applicants for jobs in the Kosovo Civil Service (KCS); reviews appointments at the level of Heads of KCS departments; and enforces compliance with the Law on KCS. As foreseen in its founding law, the IOB is envisaged to be an autonomous body reporting to the Assembly of Kosovo when the transfer of powers is complete.

Kosovo Judicial Institute (KJI)

The mandate of the Kosovo Judicial Institute is to train the magistrates of the Kosovo judiciary and prosecution. It was created in August 1999 as an integrated part of the OSCE. In April 2006, the Assembly Law on KJI was promulgated by the SRSG (Reg. No. 2006/23). With the promulgation of this Law the KJI will continue functioning as a independent local institution providing initial training for future judges and prosecutors, basic training for lay judges, and promotional and continuous training for Kosovo's judges and prosecutors.

Legal Aid Commission (LAC)

Established pursuant to UNMIK Regulation 2006/36 on legal aid, the Legal Aid Commission of Kosovo is responsible for the provision of free legal assistance to financially disadvantaged persons in the areas of criminal, civil and administrative law. The LAC is also responsible for ensuring that legal aid is accessible to all vulnerable groups, including ethnic minorities, providing public legal education,

advising the Government on ways to simplify legal procedures and producing statistics on access to justice needs in Kosovo.

Office of Auditor General (OAG)

The OAG was established in 2002 as a professional and sound independent body to promote high standards of transparency, accountability and integrity in the financial management of public administration in Kosovo. It conducts annual independent audits of all entities that receive monies from the Kosovo Consolidated Budget (KCB).

Ombudsperson Institution of Kosovo (OIK)

The OIK was created by OSCE, in 2000. Its main functions are the investigation of alleged human rights violations or abuses of authority by the public authorities in Kosovo. Its powers have been transferred almost completely after the withdrawal of the last international Ombudsperson in late 2005 and the adoption of a new regulation in February 2006. The finalization of the process is awaiting the appointment of a new Ombudsperson by the Assembly.

Independent Regulatory and Technical Agencies

Central Banking Authority of Kosovo (CBAK)

The CBAK was created by UNMIK in August 2006 as the successor to the Banking and Payments Authority of Kosovo established by UNMIK in November 1999. The CBAK has the authority to license, supervise, and regulate financial institutions in Kosovo; to foster the soundness, solvency, and efficient functioning of a stable market-based financial system; and to support general economic policies in Kosovo with a view to contributing to an efficient allocation of resources in accordance with the principles of an open market economy. The CBAK also acts as the banker and fiscal agent for Kosovo public institutions.

Civil Aviation Regulatory Office (CARO)

CARO was established in 2003, and regulates civil aviation issues in Kosovo. CARO performs its duties in conjunction with the Icelandic Civil Aviation Administration (ICAA).

Energy Regulatory Office (ERO)

The ERO was established in 2004 and is in charge of regulating activities in the energy sector, including Electricity, Heating and Gas, with the aim of achieving a transparent and non-discriminatory energy market based on free market principles.

Frequency Management Office (FMO)

Frequency Management is a reserved power of the SRSG. The FMO has administrative control and authority over frequency management in Kosovo. Its functions and duties were set out in 2004 in an Administrative Direction.

Independent Commission on Mines and Minerals (ICMM)

The ICMM was established in 2005 and oversees and administers all activities in the field of mining and mineral extraction in Kosovo. As exploitation licensees pay royalties, the ICMM is a net revenue earner for the Kosovo Consolidated Budget (KCB).

Independent Media Commission (IMC)

The IMC was created through a law of the Assembly of Kosovo in 2005, as the transferred local successor to the Temporary Media Commission established by OSCE in 2000. The IMC was formally constituted in August 2006 after the appointment of the Kosovo resident members of the IMC Council by the Assembly of Kosovo. The IMC is responsible for managing, regulating, and assigning resources of the broadcast frequencies spectrum in Kosovo, licensing public and private broadcasters, collecting duties for usage of broadcasting frequencies, and adopting and implementing a broadcasting policy and other regulations affecting broadcasters.

Railways Regulatory Office (RRO)

The establishment of the RRO is pending the promulgation of a draft regulation that was submitted to the UNMIK Office of The Legal Adviser (OLA) on 10 July 2004. The RRO will be established as an independent regulatory body.

Telecommunications Regulatory Authority (TRA)

The Law on Telecommunications adopted in 2003 established TRA as an independent regulatory agency responsible for licensing and supervising the providers of telecommunications services in Kosovo, encouraging private sector participation and competition in the provision of services; setting standards for all service providers in Kosovo and establishing provisions for consumer protection.

Water and Waste Regulatory Office (WWRO)

The WWRO was established in 2004 as an independent body exercising the functions of an economic regulatory authority for all Publicly and Socially Owned Enterprises that are providers of water, wastewater, and solid waste services (including solid waste collection and solid waste disposal services).