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JOINT AUDITS FROM BOSNIA AND HERZEGOVINA'S PERSPECTIVE: SHOULD DOMESTIC RELATIONS BE ARRANGED FIRST?

Joint audits from Bosnia and Herzegovina's perspective may impose significant challenges unless domestic fiscal relations are arranged prior to any international arrangements. However, present state of affairs concerning this matter shows surprising lack of respect for constitutional fiscal framework and distribution of powers. If not addressed, this problem may significantly impede future Bosnia and Herzegovina's harmonization of legal bases for joint audits in the Western Balkans region and beyond. Bosnia and Herzegovina consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republic of Srpska, which, along with Brčko District of B&H, all have separate and exclusive responsibilities in the matters of direct taxes, while the institutions of Bosnia and Herzegovina assumed responsibility for indirect taxes. Therefore, the institutions of Bosnia and Herzegovina have no control or higher instance power over tax administrations of the Entities. Furthermore, distinction between direct and indirect taxes in certain cases is not clear, which may result in conflicts of jurisdiction. The author examines how these challenges could be overcome, and suggests that existing internal tax competition and race to the bottom could be facilitated to reconsider Bosnia and Herzegovina's hesitation to support and join certain regional economic and tax initiatives.

Key words: Joint audit; Bosnia and Herzegovina; Direct tax; Indirect tax; Tax administration.

1. INTRODUCTION

The Open Balkans initiative (formerly known as Mini-Schengen Area) and other similar regional market initiatives have been met with quite diverse political reactions in Bosnia and Herzegovina. Even though "regional co-op-

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eration in tax matters is a key challenge for the WB6 economies",[1] this could be expected, given that Bosnia and Herzegovina is not only a federal country, but an asymmetrical and complex country with inherent strong confederal elements and thus diverging views on many issues, including regional cooperation. However, Bosnia and Herzegovina's internal structure and its constitutional decision making process might have and should have led to better understanding of regional integrational processes. Quite the opposite, even domestic tax legislation is not as harmonized as it should be. Furthermore, there are certain practices that can be characterized as unconstitutional. This article addresses several issues, ranging from potentially unconstitutional tax legislation of different levels of government in Bosnia and Herzegovina to lack of intergovernmental coordination, which could hinder B&H's participation in regional tax integration and joint audits. These include a) relative absence of coordination in direct taxes matters between the exclusively competent levels of government, b) flawed international tax agreements framework, implementation of which rests upon customary practices rather than constitutional division of power and competences, and finally c) unclear borderline between direct and indirect taxation, which is crucial for distinguishing the competent authorities of the institutions of Bosnia and Herzegovina or the Entities.

Prior to analysis of the above mentioned issues, general overview of the tax systems in Bosnia and Herzegovina is given. We have researched such topics extensively and published the results in several papers in Serbian,[2] which makes it necessary to recapitulate key findings here in English, with the emphasis on the references and sources in English, most of which we have not cited before and which, therefore, reaffirm our findings. The overview focuses on constitutional powers and competences, primarily on responsibilities of, and relations between, the Institutions of Bosnia and Herzegovina and the Entities – Federation of and Republic of Srpska. As

[1] *Competitiveness in South East Europe 2021: A Policy Outlook, Competitiveness and Private Sector Development*, OECD Publishing, Paris 2021, 1289.

[2] Đ. Marilović, „Peculiarities of Fiscal Relations in Federal States – the Example of Bosnia and Herzegovina", *Yearbook of the Faculty of Law in East Sarajevo* 2/2013, 53–76;

Đ. Marilović, „Constitutional Competences in Bosnia and Herzegovina Concerning Double Taxation Treaties on Income and on Capital", *Pravna riječ* 50/2017, 141–155;

Đ. Marilović, „Domestic Personal Income Tax Law Conflict – Federation of Bosnia and Herzegovina, Republic of Srpska, Brčko District of Bosnia and Herzegovina", *Collection of Papers* "*Twenty Years of the Dayton Peace Agreement*", Faculty of Law, University of East Sarajevo, East Sarajevo 2017, 442–457;

Đ. Marilović, „Financing of the Institutions of Bosnia and Herzegovina", *Collection of Papers* "*Constitutionalization of Bosnia and Herzegovina*", Faculty of Law, University of East Sarajevo, East Sarajevo 2021, 247–266;

Đ. Marilović, „Relationship Between Tax Systems in Bosnia and Herzegovina", *Collection of Papers* "*Constitutionalization of Bosnia and Herzegovina*", Faculty of Law, University of East Sarajevo, East Sarajevo 2021, 267–292.

opposed to generalizations and nonselective comparative law parallels, we argue for positivistic legal reasoning. Although comparative law analysis is not only useful, but necessary for the understanding of domestic tax systems in Bosnia and Herzegovina, it can never be the reason for justifying legal practice that may be unconstitutional. The continental European legal tradition offers no room for case law to be a primary source of law. Just like the comparative law analysis, case law can be beneficial for legal research or practice, but not by any means can it be a justification for practices with challenged legality or constitutionality, especially when opposed to positive law analysis. In this paper, I will try to shed some light on potential issues that would, if not addressed properly in the near future, most certainly undermine any attempt of Bosnia and Herzegovina's joint tax audits with other countries in the region and beyond.

2. UNDERSTANDING BOSNIA AND HERZEGOVINA'S TAX SYSTEMS

2.1. From two to four tax systems (jurisdictions)

It is no wonder that even domestic scholars refer to Bosnia and Herzegovina's constitutional system as a labyrinth, a maze.[3] Foreign readers might find it even more difficult to understand conundrum of relations and peculiarities of this legal system. Therefore, a proper terminology and methodology should be presented. The following clarifications and references to relevant sources are unavoidable, and could not have been condensed more than they already are in this paper.

During the socialist period, after World War II, one of the federal units in the Socialist Federal Republic of Yugoslavia (SFRY) was the Socialist Republic of Bosnia and Herzegovina (SRBH). Following the dissolution of Yugoslavia in the early nineties, on the territory of SRBH three de facto states were eventually created, one for each nation. Following a series of events and processes, such as the partitioning of the Bosnia and Herzegovina electorate into Muslims, Serbs and Croats, the consideration of a memorandum on the sovereignty of Bosnia and Herzegovina, growing mistrust etc.,[4]

[3] G. Marković, *Ustavni lavirint, aporije ustavnog sistema Bosne i Hercegovine*, Službeni glasnik, 2021.

[4] For a summarized list of events that led to dissolution of SFRY and SRBH, see: R. M. Hayden, , "Bosnia's internal war and the International Criminal Tribunal", *The Fletcher Forum of World Affairs* 1/1998, 45–64. *http://www.jstor.org/stable/45289022*, 11 December 2021; S. N. Kalyvas, N. Sambanis, "Bosnia's civil war: Origins and Violence Dynamics", *Understanding Civil War: Evidence and Analysis, Volume 2. Europe, Central Asia, and Other Regions* (eds. P. Collier, N. Sambanis), World Bank, Washington D. C. 2005, 191. *http://hdl.handle.net/10986/7438*, 11 December 2021.

the Republic of the Serb People of Bosnia and Herzegovina, later named Republic of Srpska (Serbian: Republika Srpska – RS), envisaged as a part of Yugoslavia, was proclaimed on 9 January 1992.[5] On the other hand, Muslim and Croat population strongly favored a referendum on the independence of Bosnia and Herzegovina, and proclaimed independence of the Republic of Bosnia and Herzegovina (RBH) in April 1992, which was followed by international recognition from USA and European states, as well as admission of the RBH to membership in the UN.[6] Although at first in favor of RBH, Croats proclaimed Croatian Community Herzeg Bosna on 18 November 1991, what would later be transformed to separate Croatian Republic Herzeg Bosna on 28 August 1993.[7] The US State Department conducted proximity talks in February 1994 in Washington between the representatives of Muslims, whose new name was Bosniaks as of 1994,[8] and Croats, who agreed to a framework for a federation of Croat and Bosniak majority areas in Bosnia and Herzegovina and a preliminary agreement for a confederation between the newly formed Federation and neighboring Croatia.[9] At the time, both Republic of Srpska and Federation of Bosnia and Herzegovina had separate tax systems, which was clearly stated in respective constitutions.[10]

[5] Declaration on the Proclamation of the Serbian Republic of Bosnia and Herzegovina (*Декларација о проглашењу Републике Српског народа Босне и Херцеговине*), *Official Gazette of the Republic of Srpska – O. G. RS*, No. 2/92.

[6] General Assembly Resolution 46/237, Admission of the Republic of Bosnia and Herzegovina to membership in the United Nations, A/RES/46/237 (22 May 1992), *https://undocs.org/en/A/RES/46/237*, 16 December 2021.

[7] „Herceg Bosna", *Hrvatska enciklopedija, mrežno izdanje.* Leksikografski zavod Miroslav Krleža, 2021. *http://www.enciklopedija.hr/Natuknica.aspx?ID=25102*, 16 December 2021.

[8] The term Muslim (Serbo-Croatian: *Musliman*) was used in SRBH Constitution and later in RBH Constitution up until 30 March 1994 – Constitution of the Republic of Bosnia and Herzegovina (*Ustav Republike Bosne i Hercegovine – prečišćeni tekst*), *Official Journal of the Republic of Bosnia and Herzegovina – O. J. RBH*, No. 5/93; The term was then changed to Bosniak (Serbo-Croatian: *Bošnjak*) – Constitutional Law Ammending the Constitution of the Republic of Bosnia and Herzegovina (*Ustavni zakon o izmjenama i dopunama Ustava Republike Bosne i Hercegovine*), Art. 7, *O. J. RBH*, No. 8/94. At the time, the official language, mentioned it the SRBH Constitution and RBH Constitution, was Serbo-Croatian or Croato-Serbian.

[9] United States Institute of Peace, Washington Agreement, *http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/washagree_03011994.pdf*, 29 January 2022.

[10] Constitution of Republic of Srpska – RS Constitution (1992 – *Устав Републике Српске*), Art. 62, 63, 68, Amendment XXXII, *O. G. RS*, No. 3/92, 6/92, 8/92, 15/92, 19/92, 21/92, 28/94, 8/96, 13/96, 15/96, 16/96, 21/96, 21/02, 26/02, 30/02, 31/02, 69/02, 31/03, 98/03, 115/05 & 117/05; Constitution of Federation of Bosnia and Herzegovina – FBH Constitution (1994 – *Ustav Federacije Bosne i Hercegovine*), Art. III 1 g, *Official Journal of the Federation of Bosnia and Herzegovina – O. J. FBH*, No. 1/94, 1/94, 13/97, 13/97, 16/02, 22/02, 52/02, 60/02, 18/03, 63/03, 9/04, 20/04, 33/04, 71/05, 72/05 & 88/08.

The three warring parties and other parties and signatories agreed to peace when the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement, also: Dayton Accords, Paris Protocol or Dayton-Paris Agreement) was reached at Wright-Patterson Air Force Base near Dayton, Ohio, United States, in November 1995, and formally signed in Paris on 14 December 1995. In Annex 4 of the Agreement, the Constitution of Bosnia and Herzegovina was stipulated, consisting of 12 articles and 2 annexes.[11] It is still in force, and has only had one Amendment since 1995. According to the BH Constitution, Bosnia and Herzegovina (BH) consists of the two Entities, the Federation of Bosnia and Herzegovina and the Republic of Srpska.[12] Creation of Bosnia and Herzegovina as a state in 1995[13] did not bring anything substantially new to existing

[11] The General Framework Agreement for Peace in Bosnia and Herzegovina – Dayton Peace Agreement, Paris 1995, Annex 4 – Constitution of Bosnia and Herzegovina – BH Constitution, *https://peacemaker.un.org/sites/peacemaker.un.org/files/BA_951121_DaytonAgreement.pdf*, 16 December 2021. Neither the Dayton Peace Agreement nor the BH Constitution *per se* have ever been published in official journals and gazettes in Bosnia and Herzegovina.

[12] BH Constitution, I 3.

[13] There are different views in the legal theory on the exact date of Bosnia and Herzegovina's creation and its legal (dis)continuity. For the discussion on this topic and references to authors arguing for different views, see. G. Marković, 88 – 93. We follow the argumentation of the theory that puts this date in 1995, mainly because of pronounced constitutional discontinuity between newly formed states. For instance, the Republic of Bosnia and Herzegovina was created in 1992, contrary to the constitutions of the Socialist Federal Republic of Yugoslavia and its federal unit, Socialist Republic of Bosnia and Herzegovina. In 1994, again contrary to the previous constitutions, the Federation of Bosnia and Herzegovina was negotiated and created in Washington, when Croat and Bosniak representatives signed several documents – 1) Framework Agreement establishing a Federation in the areas of the Republic of Bosnia and Herzegovina with a majority Bosniac and Croat population, 2) Preliminary Agreement for a Confederation between the Republic of Croatia and the Federation, and 3) Constitution for the Federation. See: Washington Agreement.

Federation's Constitution and The Preliminary Agreement of the Confederation between the Republic of Croatia and the Federation, were ratified and adopted contrary to provisions of Republic of Bosnia and Herzegovina Constitution. Furthermore, when the Constitution of Federation of Bosnia and Herzegovina was adopted, the legal grounds for doing so was that very Constitution [sic]. For the ratification, see: Law on Ratification of the Agreement on Acceptance of Draft Constitution of the Federation of Bosnia and Herzegovina and the Preliminary Agreement on future economic and military cooperation between the Federation of Bosnia and Herzegovina and the Republic of Croatia (*Zakon o ratifikaciji Sporazuma o prihvatanju Prijedloga Ustava Federacije Bosne i Hercegovine i Preliminarnog Sporazuma u vezi buduće ekonomske i vojne saradnje između Federacije Bosne i Hercegovine i Republike Hrvatske*), *O. J. RBH*, No. 8/94, and Decision on the Acceptance of the Agreement on adopting Draft Constitution of the Federation of Bosnia and Herzegovina (*Odluka o prihvatanju Sporazuma o usvajanju Prijedloga Ustava Federacije Bosne i Hercegovine*), *O. J. RBH*, No. 8/94. For the adoption of the Constitution of the Federation, see: Decision on the Proclamation of the Constitution of the Federation of Bosnia and Herzegovina (*Odluka o proglašenju Ustava Federacije Bosne I Hercegovine*), *O. J. FBH*, No. 1/94.

tax systems, except for centralized BH customs policy and, comparatively quite uncommon, contribution system of financing of the BH institutions and international obligations.[14] Although the BH Constitution proclaimed continuation – "The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina', shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders"[15] – it also stipulates continuation of laws: "All laws, regulations, and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina."[16] For instance, the original articles of the RS Constitution regarding taxation principles have not been changed since its creation (1992) in spite of the new BH Constitution (1995).[17]

Distribution of powers between the Institutions of Bosnia and Herzegovina (BH Institutions) and the Entities is based on Article III of BH Constitution, which a) enumerates the exact responsibilities of the BH institution and assigns to the Entities all governmental functions and powers not expressly assigned to the BH institutions, and b) provides for additional responsibilities – BH Institutions will assume responsibility "for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities."[18] This meant that the Entities were exclusively responsible for taxation.

The first significant change related to tax systems was in 2000, when contrary to the Agreement on Inter-Entity Boundary Line and Related Issues, which stipulated for arbitration of the disputed portion of the Inter-Entity Boundary Line in Brčko area, and not for creation of a new political,

[14] Since BH initially did not have its own central tax system, the Entities contributed for the financing of the BH institutions and international obligations. BH Constitution, Art. VIII 3. This system of independent revenues of state units is usually associated with confederations or other unions of sovereign groups or states, rather than with states, however decentralized or federalized they might be.

[15] B&H Constitution, Art. I 1.

[16] BH Constitution, Annex II, Art. 2.

[17] RS Constitution, Art. 62–63.

[18] BH Constitution, Art. III 5.

administrative or government unit,[19] the High Representative[20] issued the Decision on the establishment of the Brčko District of BiH.[21] In 2009, Parliamentary Assembly of Bosnia and Herzegovina adopted the Amendment I to the BH Constitution, which states that "The Brčko District of Bosnia and Herzegovina, which exists under the sovereignty of Bosnia and Herzegovina and is subject to the responsibilities of the institutions of Bosnia and Herzegovina as those responsibilities derive from this Constitution, whose territory is jointly owned by (a condominium of) the Entities, is a unit of local self-government with its own institutions, laws and regulations, and with powers and status definitively prescribed by the awards of the Arbitral Tribunal for the Dispute over the Inter-Entity Boundary in the Brčko Area".[22] Therefore, Brčko adopts and enacts tax laws and regulations, and administers taxation.

The fourth tax jurisdiction emerged in 2003, when the Entities' parliaments approved and prime ministers signed the Agreement on Responsibili-

[19] "Unless otherwise agreed, the area indicated in paragraph 1 above shall continue to be administered as currently." Dayton Peace Agreement, Annex 2 – Agreement on Inter-Entity Boundary Line and Related Issues, Art. V 4.

[20] In one of the annexes to the Dayton Peace Agreement, the parties requested the designation of a High Representative, "to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a U.N. Security Council resolution". Dayton Peace Agreement, Annex 10 – Agreement on Civilian Implementation, Art. I. Soon after, Peace Implementation Conference was held in London on 8 and 9 December 1995, with the aim of mobilizing the international community to support the Dayton Peace Agreement implementation. Therefore, the participants approved the designation of the High Representative and decided to establish the Peace Implementation Council (PIC), composed of all those States, international organizations and agencies attending the Conference. Conclusions of the Peace Implementation Conference held at Lancaster House, London, on 8 and 9 December 1995 (London Conference), *https://peacemaker.un.org/sites/peacemaker.un.org/files/BA_951209_LondonConferenceConclusions.pdf*, 28. February 2022.

UN Security Council endorsed the establishment of a High Representative, following the request of the parties – UN Security Council resolution 1031 (1995) on implementation of the Peace Agreement for BiH and transfer of authority from the UN Protection Force to the multinational Implementation Force (IFOR), *http://unscr.com/en/resolutions/1031*, 28 February 2022.

[21] High Representative Wolfgang Petritsch, *Decision on the establishment of the Brčko District of BiH*, Office of the High Representative, *http://www.ohr.int/decision-on-the-establishment-of-the-brcko-district-of-bih-3/?print=pdf*, 11 January 2022.

[22] Amendment I to the Constitution of Bosnia and Herzegovina (*Amandman I na Ustav Bosne i Hercegovine*), *Official Gazette of Bosnia and Herzegovina – O. G. BH*, No. 25/09. For the English version of the Constitution and translation of the Amendment see: *Constitution of Bosnia and Herzegovina*, Office of the High Representative, Department for Legal Affairs, *https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf*, 9 January 2022.

ties in Indirect Taxation Matters,[23] that transferred the constitutional power, or responsibility, concerning indirect taxation, from the Entities to the BH Institutions.[24] The Agreement itself is flawed in many ways,[25] but it gave way to creating the Indirect Taxation System. Today, indirect taxation yields all the revenue needed for covering the expenditures required to carry out the responsibilities of the institutions of Bosnia and Herzegovina and the international obligations of Bosnia and Herzegovina. Furthermore, the rest is shared and accounts for the most significant part of revenues of the Entities, of the Cantons[26] in the Federation of BH and of the Brčko District.

Regarding the "No taxation without representation" principle, one of essential principles of constitutionalism and taxation, it must be noted that not only does the BH Constitution fail to even mention taxation, but the BH Constitution has never been ratified or passed in Bosnia and Herzegovina's Parliamentary Assembly, nor the Entities' parliaments, which renders it rather illegitimate and undemocratic constitution and system[27] with "imposed" federalism.[28] Certain authors are explicit that the Dayton Peace Agreement was not based on the will of the three constituent peoples of Bosnia and Herzegovina (or of the "others").[29] The search for this essential principle of taxation can only lead us to the two Entities' Constitutions, mentioned above,[30] which were passed in respective parliaments consisting of elected representatives, and which explicitly regulate taxation principles.

Other than those challenges to the principle "No taxation without representation", Bosnia and Herzegovina is known for a practice unheard-of in modern democracies. A number of laws, including tax laws, was imposed or amended by an unelected individual who is not even a domestic citizen – the High Representative – who, for instance, amended the Law on the Indirect

[23] The Agreement has never been officially published. The text of the Agreement has recently been published in Đ. Marilović, (2021*b*), 278, fn. 42.

[24] "The Entities had maintained their capacity to adopt legislation in the field of indirect taxation, but had conditioned their capacity to do so by transferring a right of prior approval to a body established by Bosnia and Herzegovina." P. Leroux-Martin, "Article III.5 – Additional Responsibilities" in C. Steiner et al., *Constitution of Bosnia and Herzegovina – Commentary*, Konrad Adenauer Stiftung e.V. Rule of Law Program South East Europe, Sarajevo 2010, 600.

[25] Đ. Marilović, (2021*b*), 278.

[26] Cantons, ten in total, are federal units within the Federation of Bosnia and Herzegovina.

[27] On the questioning of the legitimacy and undemocratic origins of the BH Constitution, see: S. Yee, "The New Constitution of Bosnia and Herzegovina", *European Journal of International Law*, 2/1996, 176–192.

[28] S. Keil, *Multinational Federalism in Bosnia and Herzegovina*, Ashgate, Surrey 2013, 106, 131, 133.

[29] *Ibid*., 132.

[30] See footnote 10.

Taxation System in Bosnia and Herzegovina, and even conditioned the Parliamentary Assembly to adopt the Law "without amendment and with no conditions attached".[31] Furthermore, the composition of National Assembly of Republic of Srpska, specifically its Sixth Assembly, was heavily affected by the High Representative's *en masse* dismissals of public officials, "without even admitting the dismissed persons to confront the charges brought against them, let alone granting them a fair hearing or a right to appeal", which "must be seen as the crudest infringements of the principles of rule of law and the right to due process."[32] In 2003, only months before deciding on the Agreement on Responsibilities in Indirect Taxation Matters, more than 10 % of the Members of the Parliament were "removed from position as member of the Republika Srpska National Assembly", with "immediate effect" and without "any further procedural steps".[33]

To sum up, there are four different tax systems in BH, two of which predate Dayton Peace Agreement and exist to this day – tax system of Republic of Srpska (1992), and tax system of Federation of Bosnia and Herzegovina (1994). The other two emerged only later, in 2000 – Tax system of Brčko District – and 2003 – Indirect Taxation System in BH.

2.2. The main challenges of tax legislations in Bosnia and Herzegovina

Plurality and evolution of the four tax systems in Bosnia and Herzegovina are different from the experiences and legal history of other countries to such an extent that they led to quite unique challenges and problems. It can all be boiled down to two essential problems concerning taxation. Firstly, legality and legitimacy have often been disregarded, especially in creation of the post-Dayton tax systems. Secondly, inter-jurisdictional relations are

[31] High Representative Dr. Christian Schwarz-Schilling, *Decision Enacting the Law On Amendments to the Law on the Indirect Taxation System in Bosnia and Herzegovina*, Office of the High Representative, *http://www.ohr.int/decision-enacting-the-law-on-amendments-to-the-law-on-the-indirect-taxation-system-in-bosnia-and-herzegovina-2*, 9 January 2022.

The list of similarly imposed several hundred laws and regulations, constitutional amendments, extrajudicial punishments without the right to fair trial or legal remedy, and appointments by the High Representative, for the 1997–2009 period, is available at: The Republic of Srpska 20th Report to the UNSC - the Subversion of the Dayton System, October 2018, Republic of Srpska Representation in Brussels, *https://834aab95-6938-4c04-a8e6-4b74a43fff7e.filesusr.com/ugd/9ddb20_f44f0df814784156bcc7d862c0edb3b4.pdf*, 9 January 2022.

[32] T. Banning, "The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment", *Goettingen Journal of International Law* 6/2014, 275.

[33] For instance, see: High Representative Paddy Ashdown, *Decision To remove Mr. Djojo Arsenovic from his position as member of the Republika Srpska National Assembly, and to bar him from holding any official office*, Office of the High Representative*, http://www.ohr.int/decision-to-remove-mr-djojo-arsenovic-from-his-position-as-member-of-the-republika-srpska-national-assembly-and-to-bar-him-from-holding-any-official-2/*, 9 January 2022.

either not coordinated – which leads to race to the bottom[34] – or they are not consistently distinguished, leading to existence of indirect taxes in a jurisdiction that should exclusively be a direct tax jurisdiction, or resulting in noncompetent authorities' actions in the field of international taxation and double taxation treaties network. Other issues, including existing obstacles for joint tax audits, stem mainly from these two problems. The possible obstacles on the way to joint tax audits, in my opinion, as already mentioned, are a) relative absence of coordination in direct taxes matters between the exclusively competent levels of government,[35] b) flawed international tax agreements framework, implementation of which rests upon customary practices rather than constitutional division of power and competences,[36] and finally c) unclear borderline between direct and indirect taxation, which is crucial for distinguishing the competent authorities of the institutions of Bosnia and Herzegovina or the Entities.[37]

Inter-jurisdictional relations, when it comes to direct taxation, can be described as those of complete independence. The Entities and the Brčko District have separate direct tax systems. The Constitutional Court of Bosnia and Herzegovina only has exclusive jurisdiction to decide any dispute that arises under the Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities. It does not, however, have the jurisdiction to apply the tie-breaker rule when it comes to a specific case, nor there is any tie-breaker tax rule at the common BH level of governance, hence the exclusivity that the Entities have in passing laws and regulations. For example, there is no substantial difference between Entity-Entity or Entity-District double taxation, on the one hand, and double taxation regarding residents from the foreign states, on the other hand.[38] Quite the opposite, indirect taxes are in the responsibility of BH Institutions. The Entities may adopt legislation in the field of indirect taxation only if they are granted prior approval by The Governing Board of the Indirect Taxation Authority of

[34] For example, current corporate income tax rates of 10 % it the three direct taxation systems in BH are all below the global minimum tax rate of 15 %.

[35] See: Đ. Marilović, (2017*b*), 444–452.

[36] Đ. Marilović, G. Marković, (2017), 145–148.

[37] Đ. Marilović, (2021*b*), 281–282.

[38] Tax laws of the Entities and the District provide for tax credit, as a method of double taxation elimination. There is no substantial difference between residents of foreign states and residents of other Entity or of the District – they are all entitled to a credit for non-refundable tax paid in that other state, Entity of District. See: Law on Personal Income Tax (*Закон о порезу на доходак*), *O. G. RS*, No. 60/15, 5/16, 66/18, 105/19, 123/20, 49/21, 119/21 & 56/22, Art. 67; Law on Personal Income Tax (*Zakon o porezu na dohodak*), *O. J. FBH*, No. 10/08, 9/10, 44/11, 7/13 & 65/13, Art. 25; Law on Personal Income Tax (*Закон о порезу на доходак*), *Official Gazette of Brčko District of Bosnia and Herzegovina*, No. 60/10, 14/17, 24/20 & 21/22, Art. 26.

Bosnia and Herzegovina.[39] Problems arise when the Entities do so without the approval, for which there is at least one significant example in practice.

When it comes to international taxation, tax treaties etc., the constitutional tax responsibilities can be described as concurred competences of BH and the Entities, which I will focus on next.

3. JOINT TAX AUDITS: BY WHOM, FOR WHOM?

If Bosnia and Herzegovina joined a regional or other initiative that encompasses joint audits, the questions would arise as to who would be responsible for the audits, which institution would be the domestic competent authority, and even who would be entitled to sign relevant treaties. In order to answer these questions, one can not only refer to generally accepted practices in comparative law – one has to scrutinize the BH Constitution, the Entities' constitutions and practical implications of the relevant provisions.

3.1. Who can conclude joint audit international treaties and agreements?

Article III 1 of the BH Constitution puts the Foreign policy at the top of BH Institutions' responsibilities. However, responsibilities stipulated under this article are not exclusive by nature.[40] The Entities "have the right to establish special parallel relationships with neighboring states consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina".[41] Furthermore, "Each Entity may also enter into agreements with states and international organizations with the consent of the Parliamentary Assembly. The Parliamentary Assembly may provide by law that certain types of agreements do not require such consent."[42] This concurrence of responsibilities is particularly important if we take into consideration that the Entities have the exclusive direct taxation competence. Direct taxes can be levied and collected only by the Entities' authority. There is no law or constitutional arrangement at BH level that provides for any limit or administrative control of the BH Institutions over direct taxation of the Entities, and consequently the District.[43]

[39] Law on Indirect Taxation System in Bosnia and Herzegovina (*Закон о систему индиректног опорезивања у Босни и Херцеговини*), *O. G. BH*, No. 44/03, 52/04, 34/07, 4/08, 50/08, 49/09, 32/13 & 91/17, Art. 25, Para. 4.

[40] Steiner *et al*., 585.

[41] BH Constitiution, Art. III 2 a).

[42] BH Constitiution, Art. III 2 d).

[43] This has been confirmed by the respective administrations – Notice (*Obavještenje Poreske uprave Federacije Bosne i Hercegovine*) No. 13/08-02-4-10-1451/19, 23 October 2019, Tax Administration of Federation of Bosnia and Herzegovina; Information – Reply (*Информације – одговор Министарства финансија Републике Српске*) No. 06.05/020-1256-1/17, 15 February 2018, Ministry of Finance of the Republic of Srpska.

There is generally no question about this, in theory and practice,[44] which leads us to the next point; Who is entitled to enter, sign or accept international obligations concerning exclusive competences of the Entities, namely the direct taxation competences, one of which would be joint tax audits and procedures? The answer can be illustrated with the analysis of practice and experience in concluding double taxation treaties (DTT).

Given that the Entities may enter into agreements with states and international organizations, under certain conditions, the answer to previous questions should be straightforward – only the Entities can enter into a DTT. Firstly, the Entities' right to establish special parallel relationships with neighboring states, consistent with the sovereignty and territorial integrity of Bosnia and Herzegovina, in matters equally significant as taxation – such was defense (while it was still in Entities' power), was confirmed before the BH Constitutional court.[45] Secondly, the Entities may enter into agreements with states and international organizations, either with specific consent of the Parliamentary Assembly, for each particular case, or with general consent, i.e. when The Parliamentary Assembly provides by law that a category of agreements does not require such consent. If there is any matter to be pointed at as a justification for this broad definition of the Entities' competences in the sphere of international treaty law, it should be exclusive direct taxation competence of the Entities. However, the implementation of the above mentioned constitutional norms in case of DTT and other tax agreements has never happened. Cases that somewhat resemble these conditions can be found in financing matters, where both Bosnia and Herzegovina and Republic of Srpska are separate parties and signatories,[46] but that is still far from what the above mentioned BH Constitution norms provide for.

It is not uncommon, in comparative law, for the federated and regional entities to be involved in treaties that they themselves conclude, as well as in treaties made by central government. For instance, the European Commission

[44] See: Decision of the Constitutional Court of Bosnia and Herzegovina (*Одлука Уставног суда БиХ*), U-17/11, *O. G. BH*, No. 36/12.

[45] Prior to its transfer to BH Institutions, responsibility for defense was under the Entities' competences. At that time, the BH Constitutional Court decided that the special and parallel relationship of Republic of Srpska (the Entity) and Republic of Serbia (the neighboring country), regarding military cooperation and defense, are in accordance with the BH Constitution.

[46] See: Finance contract between Bosnia and Herzegovina and Republic of Srpska and the European Investment Bank – Hospitals of Republic of Srpska Project (*Уговор о финансирању између Босне и Херцеговине и Републике Српске и Европске инвестиционе банке*), *Official Gazette of Bosnia and Herzegovina – International Agreements*, No. 4/12;

Finance contract between Bosnia and Herzegovina and Republic of Srpska and the European Investment Bank –Project of Water and Sanitation Republic of Srpska (*Уговор о финансирању између Босне и Херцеговине и Републике Српске и Европске инвестиционе банке*), *Official Gazette of Bosnia and Herzegovina – International Agreements*, No. 6/11.

for Democracy through Law (Venice Commission – the Council of Europe's advisory body on constitutional matters) conducted a research through questionnaire and compared the allocation of powers in the field of international relations in 13 states.[47] Federated states or regions (jointly referred to as entities) were found to be empowered to conclude international treaties in Argentina, Austria, Belgium, Bosnia and Herzegovina, Denmark, Germany and Switzerland.[48] The Report classifies possible arrangements in five groups:

1) A "parallel" approach, the most advantageous arrangement from the entities' point of view, where "the entities, like central government, can conclude international treaties in the same areas in which they can make their own legislation, subject to the provisions of special clauses allocating the treaty-making powers",[49]

2) The central authority has general substantial treaty-making powers, while the entities may conclude treaties within their internal sphere of competence – "the conclusion by the central authority of a treaty on a matter within the remit of the entities deprives the entities of substantial treaty-making powers in that field".[50]

3) Rather controversial approach, specific to Germany, developed as a response to disputes over constitutional norm: "Insofar as the Länder have power to legislate, they may conclude treaties with foreign states with the consent of the Federal Government".[51] It was questioned if treaty-making powers should only reflect internal legislative powers, or if the treaty-making powers of the central state had priority and the Länder could conclude treaties only when the federal state had not done so. The solution was reached through the Lindau Agreement of 1957, which stipulated that the central state has to a) obtain consent and enable participation from the Länder in

[47] Federated and regional entities and international treaties – Report adopted by the Commission at its 41th meeting (Venice, 10–11 December 1999), The European Commission for Democracy through Law – Venice Commission, Strasbourg, 2000, *https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2000)003-e*, 22 March 2022. The 13 states are: Argentina, Austria, Belgium, Bosnia and Herzegovina, Canada, Denmark, Finland, Germany, Italy, Portugal, Switzerland, Ukraine and the United States.

[48] *Ibid*., 3.

[49] This approach means that treaty can be the exclusive responsibility of central government, or the exclusive responsibility of the entities, or the responsibility of both central government and the entities (which is rather complex situation). *Ibid*., 4.

[50] *Ibid*. Belgium is an example of a country with such an approach. As of 2021, Flanders, the Flemish Region in Belgium, was party to 41 bilateral treaties. Government of Flander, Flanders Chancellery and Foreign Office, "Flanders is international", *https://www.fdfa.be/en/flanders-is-international*, 30 March 2022.

[51] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 29 September 2020, *Federal Law Gazette* I p. 2048, Art. 32 Para 3.

case of a treaty concerning the exclusive competence of the Länder, and b) consult and inform the Länder in case of treaties affecting essential interests of the Länder, regardless of the fact that it does or does not constitute exclusive competence of the Länder.[52]

Aside from the fact that there is no universal acceptance of the Lindau Agreement as the source of the German constitutional law,[53] it is important to bear in mind that direct taxation in Germany is distributed as a concurrent power of the Federation and the Länder,[54] unlike the exclusive power of the Entities in BH, therefore making this model unsuitable for any parallel with the BH model. The analogy of that kind would be fruitless or misleading.

4) The arrangement specific to Bosnia and Herzegovina, which we elaborated above. Interestingly, Bosnia and Herzegovina was characterized as a distinctive arrangement in the Report.

5) Restrictive model specific to Denmark, where central government has the general treaty-making power, and the (autonomous) entities' power is limited to administrative arrangements, international treaties of a technical nature.[55]

The Report gives valuable instances of border cantons in Switzerland that concluded treaties with their neighbors, in a very wide range of matters, including double taxation.[56] It also recognizes the only real exception to the rule that central authorities may not delegate treaty-making powers to their entities, and that is Bosnia and Herzegovina, "where a law passed by the national parliament may assign treaty-making responsibility in a particular field".[57] Why has such a law not been passed by now, especially in the matters of taxation? A different path was taken just months after Dayton Peace Agreement entered into force, and it has become a customary practice never questioned since.

On 27 July 1996, RBH[58] and Islamic Republic of Iran concluded Convention for the elimination of double taxation with respect to taxes on income and on capital. The Convention was published in Official journal of Republic of Bosnia and Herzegovina – International Agreements (*Službeni list Republike Bosne i Herzegovine – Međunarodni ugovori*), No. 7/96. There are several

[52] Lindauer Abkommen (Text), *http://www.lexexakt.de/index.php/glossar/lindauerabkommentxt.php*, 30 March 2022.

[53] "Die rechtliche Qualität des Lindauer Abkommens ist nicht abschließend geklärt." *Fragen zum sog. Lindauer Abkommen und der Ständigen Vertragskommission der Länder*, Deutscher Bundestag, Wissenschaftliche Dienste, Berlin 2016, 4.

[54] Basic Law for the Federal Republic of Germany, Art. 105.

[55] Federated and regional entities and international treaties – Report adopted by the Commission at its 41th meeting (Venice, 10–11 December 1999), 3–5.

[56] *Ibid*., 7.

[57] *Ibid*., 11.

[58] Note: RBH, not BH.

problems with this convention. RBH had ceased to exist in that form and under that name by the time the Convention was concluded. Dayton Peace Agreement and BH Constitution clearly stated that the name and internal structure of wartime RBH were modified.[59] Had there been any tax agreement previous to Dayton Peace Agreement, ratified by the Republic of Bosnia and Herzegovina, it should have been disclosed to Members of the Presidency within 15 days of their assuming office; Any such treaty not disclosed would have been denounced.[60] Within six months after the Parliamentary Assembly first convened, at the request of any member of the Presidency, the Parliamentary Assembly should have considered whether to denounce any other such treaty.[61] Although the BH Constitution also stipulated that "until superseded by applicable agreement or law, governmental offices, institutions, and other bodies of Bosnia and Herzegovina will operate in accordance with applicable law,"[62] the above mentioned legal norm explicitly provided for a special procedure concerning international agreements, treaties. Therefore, conclusion and ratification of the Convention by the RBH Government, on the basis of RBH Constitution, with reference to RBH legislation, in spite of a completely new BH Constitution already in force at the time that provides for completely different procedure, different competent authorities and institutions of BH,[63] makes this Convention susceptible to critical examination and evaluation, with regard to its invalidity, both domestically and internationally.

It is rather intriguing that the Ministry of Finance and Treasury of Bosnia and Herzegovina, on its official website, presents false information on exact official gazette in which the agreement was published. The Ministry's website cites the inexistent source, the Official gazette of Bosnia and Herzegovina (*Službeni glasnik Bosne i Herzegovine – International Agreements*), No. 7 of 1996, while, in fact, this official gazette was established a year later, in 1997.[64] As mentioned above, the Convention was published in the Official journal of Republic of Bosnia and Herzegovina[65] – International Agreements.

[59] BH Constitiution, Art. I 1.

[60] BH Constitiution, Annex II, Art. 5 (Treaties).

[61] *Ibid*.

[62] BH Constitiution, Annex II, Art. 4 (Offices).

[63] BH Constitution, in Article V 3 d) stipulates that only the Presidency may negotiate, denounce, and, with the consent of the Parliamentary Assembly, ratify treaties of Bosnia and Herzegovina.

[64] Law on Official Gazette of Bosnia and Herzegovina (*Закон о службеном гласилу Босне и Херцеговине*), *O. G. BH*, No. 1/97. This law has no transitional provisions and does not even mention official gazettes of RBH, FBH, or any other official gazette. There is no legal basis for any claim that Official Gazette of Bosnia and Herzegovina succeeds any other official gazette or official journal.

[65] Note: Republic of Bosnia and Herzegovina, not Bosnia and Herzegovina.

Seven years passed until next DTT was signed, this time with Moldova.[66] The term "competent authority" for Bosnia and Herzegovina was assigned to Ministry of Finance and Treasury of Bosnia and Herzegovina, contrary to the distribution of powers in Bosnia and Herzegovina. As already shown, the Institutions of Bosnia and Herzegovina, such as Council of Ministers or any of the ministries of BH, do not have any control or higher instance power over Entities' authorities and institutions, and particularly are not competent for direct taxation. In this respect, Institutions of BH cannot delegate any power, or "authorize" any representative for the competence which they do not have.

In the meantime, the Law on the Conclusion and Execution Procedure of International Treaties,[67] had been enacted. It states that the basis (platform) for negotiation process for conclusion of international treaties, for matters that are exclusively Entities' competence, has to include "opinion of competent authorities of the Entity".[68] We have already contested the constitutionality of this provision in previous research.[69] In short, the Law provides for less than what was guaranteed in the Constitution. The "opinion", in its legal nature, is not legally binding nor is it in any way adequate instrument of acceptance of competence transfer; The opinion issuer (the Entity) therefore cannot condition decision-making process of the opinion recipient (BH Institutions), which is, in itself, contrary to legal nature of constitutional competence distribution of exclusive Entities' powers. Furthermore, executive bodies, the administration of the Entities cannot accept any transfer of competences without the representative body's approval (the Entity Parliament/Assembly). In practice, contrary to this, exactly the executive, the ministries, have given consenting opinions.[70]

[66] Convention between Bosnia and Herzegovina and the Republic of Moldova for the elimination of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, *Official gazette of Bosnia and Herzegovina – International Agreements*, No. 10/04.

[67] Law on the Conclusion and Execution Procedure od International Treaties (*Закон о поступку закључивања и извршавања међународних уговора*), *O. G. BH*, No. 29/00 & 32/13.

[68] Law on the Conclusion and Execution Procedure od International Treaties, Art. 4, Para. 5 Subpara. e).

[69] Đ. Marilović, G. Marković, 2017, 147–148.

[70] Information – reply, Ministry of Finance of the Republic of Srpska.

For instance, in the Republic of Srpska, the National Assembly ratifies agreements concluded between the Republic and other states or international organisations, upon the consent of the Parliamentary Assembly of Bosnia and Herzegovina. Also, the Republic of Srpska regulates and ensures international co-operation, other than co-operation transferred to the institutions of Bosnia and Herzegovina. RS Constitution, Art. 68, Subpara. 15 & Art. 70 Para. 2 Subpara. 2. Direct taxation or international co-operation concerning direct taxation, have never been transferred to the institutions of Bosnia and Herzegovina. Therefore, they remain in the Republic of Srpska's competence.

Unlike the German constitutional history, which shows inclination toward more active role of the Länder and has seen central state's discretion somewhat limited through the Lindau Agreement of 1957, development of legal practice in Bosnia and Herzegovina has shown the opposite. Instead of adopting the law that would give the Entities the general consent, constitutionally guaranteed right, to conclude treaties and implement their exclusive powers and responsibilities in domestic and international law, Bosnia and Herzegovina overstepped its authority and concluded treaties in which it: a) designated its ministries as "the competent authority" notwithstanding that they cannot exert any supervision or have any legal control over the implementation of the treaties regarding exclusive powers of the Entities – specifically, the application of DTT provisions with respect to direct taxes, and, more importantly, b) agreed on limitations of the tax legislation of the Entities, by preventing them from taxing certain items within the scope of DTTs (since certain items may be taxed in only one contracting state), for which BH does not have a permission from the competent legislature, the parliaments of the Entities. The process of ratification may have different importance in monist and dualist states;[71] even so, "what is common to both systems is that clearly the participation of the parliament is needed in all cases for a treaty to become a part of the internal order".[72] In Bosnia and Herzegovina, BH Parliamentary Assembly, which participates in the ratification process of DTTs,[73] is not the parliament that can enact tax law concerning the scope of the ratified treaty, the direct taxes. Given that "the treaties or the selected provisions must be adopted in the same way as any other statutory legislation,"[74] the parliaments that should, therefore, participate in the ratification process are National Assembly of the Republic of Srpska and Parliament of the Federation of Bosnia and Herzegovina, since they are the parliaments responsible for adoption of the statutory legislation regarding direct taxes. *Mutatis mutandis*, all the same challenges would be faced if this practice overspread to joint audits concerning direct taxes and respective tax procedures of the Entities and Brčko District.

[71] This classification refers to different systems of international law relation to domestic law. In monist states, "after ratification, with the participation of the parliament in the process, the treaty usually becomes a part of the internal legal order on the basis of a constitutional provision", while in dualist states "nternational treaties, duly ratified, never become a part of the internal legal order as a consequence of ratification as such, regardless of whether or not the parliament has given its approval for ratification", D. T. Björgvinsso, *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis*, Edward Elgar Publishing, Cheltenham–Northampton 2015, 53.

[72] *Ibid*.

[73] The Presidency of Bosnia and Herzegovina ratifyies treaties of Bosnia and Herzegovina, with the consent of the Parliamentary Assembly. BH Constitution, Art. V 3 d.

[74] D. T. Björgvinsso, 53.

The next question is of lesser importance for joint audits, but it should be mentioned for all the instances in which the pre-war conventions may affect present tax cooperation. The conventions concluded prior to SFRY dissolution in tax matters, including fourteen DTTs that SFRY concluded from 1975 to 1989, should be addressed properly. In matters that are exclusive responsibility of the Entities, the following order should be observed: The BH Constitution provides for the continuation of laws, as mentioned above. Therefore, the Republic of Srpska applies its Constitutional Law for the implementation of the Constitution,[75] which prescribes that, until relevant laws and regulation of the Republic of Srpska are enacted, laws and regulation of SFRY and SRBH will be applicable, provided that they are not in conflict with Constitution and existing laws of Republic of Srpska. DTT's of SFRY should, therefore, be implemented directly in the Republic of Srpska on the basis of this legal reasoning.[76]

In Federation of Bosnia and Herzegovina, all laws, regulations, judicial rules of procedure, and international treaties and other agreements as well, that were in effect within the Federation on the day on which the FBH Constitution entered into force remained in effect to the extent not inconsistent with the Constitution, until otherwise determined or denounced by the competent body.[77] That leads to the laws, regulations, rules and agreements of RBH. The FBH law connection with Yugoslav law is not direct, it extends through the RBH law. Unlike the Republic of Srpska approach regarding the application of the legislation of Yugoslavia, RBH took a sharp turn. It did not provide for general rule of application of Yugoslav legislation, where and when it would be applicable, but it strictly and exhaustively listed both applicable and inapplicable Yugoslav laws. It took two separate laws, which were originally decree-laws (decrees with the force of law), to enumerate 130 applicable and 55 inapplicable Yugoslav laws.[78] Not all relevant Yugo-

[75] Constitutional Law for the Implementation of the Constitution of the Republic of Srpska (*Ustavni zakon za provođenje Ustava Republike Srpske*), *O. G. RS*, No. 3/92, 6/92, 7/92, 15/92, 19/92 & 21/92.

[76] This has been previously stated concerning the application of the international conventions on the rights of children in Bosnia and Herzegovina. D. Ćeranić, „Application of the international convention on the rights of the children in Bosnia and Herzegovina", *Collection of papers* "*Currency and Relevance of Human Rights and Freedoms*", Faculty of Law, University of East Sarajevo, 2011, 275.

[77] FBH Constitution, Art. IX 5.

[78] Law on Endorsement and Application of Federal Laws applied in Bosnia and Herzegovina as Republic Laws (*Zakon o preuzimanju i primjenjivanju saveznih zakona koji se u Bosni i Hercegovini primjenjuju kao republički zakoni*), *O. J. RBiH*, 2/92 & 13/94.

Law on Non-application of Provisions of Federal Laws and Bylaws Enacted for the Implementation Thereof on the Territory of Bosnia and Herzegovina (*Zakon o neprimjenjivanju odredaba saveznih zakona i propisa donesenih za njihovo izvršavanje na teritoriji Bosne i Hercegovine*), *O. J. RBH*, No. 2/92 & 13/94.

slav laws were covered, which meant that there had to be additional RBH laws which specifically provided for endorsement and application of certain Yugoslav laws.[79] None of the Yugoslav laws on ratification of conventions and international agreements was listed. Instead, RBH at first only ratified, in its own capacity, several conventions and agreements.[80] Later on, RBH made notifications of succession, acceptance or accession, more than 230 international multilateral treaties, listed in two "Overviews".[81] No such information was given on succession regarding DTTs. Also, there is no information in official gazettes on recognition and adopting of any of these RBH instruments whatsoever by the Presidency of BH, regarding the provisions of BH Constitution, Annex II, Art. 5 (Treaties). At this moment, Ministry of Finance and Treasury of Bosnia and Herzegovina, on its official website, lists DTTs concluded by SFRY as applicable in BH, without any reference to legal instruments or grounds regarding succession.[82]

The only legal basis for the application of DTTs, or any other treaties concerning direct taxation, concluded by SFRY, in my opinion, is that of the above mentioned Republic of Srpska's Constitutional Law for the implementation of the Constitution, and BH Federation's Constitution, respectively. Currently in BH, the only tax jurisdictions legally competent for the

[79] Such laws were Law on Endorsement of the Law on General Administrative Procedure (*Zakon o preuzimanju Zakona o opštem upravnom postupku*), *O. J. RBH*, No. 2/92, 16/92 & 13/94, Law on Endorsement of the Law of Contract and Torts (*Zakon o preuzimanju Zakona o obligacionim odnosima*), *O. J. RBH*, No. 2/92 & 13/94, Law on Endorsement of the The Law on Basis of Ownership and Proprietary Relations (*Zakon o preuzimanju Zakona o osnovnim svojinsko-pravnim odnosima*), *O. J. RBiH*, No. 2/92 & 13/94, etc.

[80] See. Law on Ratification of International Conventions (*Zakon o ratifikaciji međunarodnih konvencija*), *O. J. RBH*, No. 5/92, 15/92 & 13/94, and Law on Ratification of International Conventions in the Area of the Law of War and of Judicature (*Zakon o rafitikaciji međunarodnih konvencija iz oblasti ratnog prava i pravosuđa*), *O. J. RBH*, No. 16/92 & 13/94. Conventions ratified by this Law have already been ratified by SFRY, but RBH has not endorsed those ratifications, and therefore acted and ratified them as a new state. Among ratified conventions were the Vienna Convention on Diplomatic Relations, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, etc.

[81] See: Overview of International Multilateral Treaties (*Pregled međunarodnih multilateralnih ugovora*), *O. J. RBH*, No. 25/93 and Overview of International Multilateral Treaties (*Pregled međunarodnih multilateralnih ugovora*), *O. J. RBH*, No. 15/95. The overviews were redacted by the Ministry of Foreign Affairs of RBH.

[82] Unlike the Ministry of Justice of Bosnia and Herzegovina, which specified that notifications of succession were made regarding listed bilateral agrements, Ministry of Finance and Treasury of Bosnia and Herzegovina only lists the agreements, without any reference to legal grounds of their application in Bosnia and Herzegovina. Compare: Ministry of Justice of Bosnia and Herzegovina, *http://www.mpr.gov.ba/organizacija_nadleznosti/medj_pravna_pomoc/bilateralni_ugovori/default.aspx?id=939&langTag=en-US*, 23 March 2022. Ministry of Finance and Treasury of Bosnia and Herzegovina, *https://mft.gov.ba/Content/Read/sporazumi-u-primjeni*, 23 March 2022.

implementation of pre-war double taxation treaties and other direct tax related treaties and conventions should the Federation of Bosnia and Herzegovina and the Republic of Srpska, which should have made notifications on succession, accordingly. However, this would entail the issue of succession and application of The Vienna Convention on Succession of States in Respect of Treaties, the legal analysis of which would have to be deliberate and would by far exceed the scope of this paper.

3.2. Domestic joint audits – possible and necessary precursors of international joint audits

It would be pretentious to advocate for establishing of international joint audits, while, at the same time, tax authorities in Bosnia and Herzegovina have no such cooperation. Existing cooperation is limited mainly to exchange of information. The cooperation was formally established in 2013, when Indirect Taxation Authority of Bosnia and Herzegovina, Tax Administration of the Republic of Srpska, Tax Administration of the Federation of Bosnia and Herzegovina and Tax Administration of the Brčko District signed a Memorandum on Institutional Cooperation and Exchange of Taxpayer Information.[83] Joint audits, however, are not covered by this instrument. By definition, joint audit is joint administrative enquiry/examination/engagement of two or more tax administrations, carried out in pre-agreed and coordinated manner by a single audit team including representatives from each tax administration, regarding tax situation, issue, or transaction of one or more related taxable persons.[84] It is usually associated with cross-border, international situation, but in BH it can equally be domestic, in view of three fully independent direct taxation systems in BH. The joint audits of the Entities' and District's tax administrations could only be possible after an agree-

[83] I have not been given the opportunity to analyze the Memorandum, but was informed about it in Information No. 13/08-02-4-10-1535/19 – V.P., dated 24. October 2019, issued by Tax administration of FBH. For some information on the scope of the Memorandum, see: Questionnaire on the Human Rights Impact of Fiscal and Tax Policy, 7, *https://www.ohchr.org/sites/default/files/Documents/Issues/Poverty/ContributionsFiscaltaxpolicy/BosniaAndBosniaAndHe.pdf* , 28 March 2022.

FBH Financial and Informational Agency and RS Agency for Intermediary, IT and Financial Services later joined the Memorandum. Strategic Plan of the Federation of Bosnia and Herzegovina Tax Administration 2019–2022, 5, *http://pufbih.ba/v1/public/upload/files/Strateski%20plan%20PUFBiH%20za%20period%202019-2022%20(en).pdf*, 28 March 2022.

[84] Compare definitions in: Regulation (EU) 2021/847 of the European Parliament and of the Council of 20 May 2021 establishing the 'Fiscalis' programme for cooperation in the field of taxation and repealing Regulation (EU) No 1286/2013, Annex I, *OJ* L 188, 28.5.2021; Joint Audit 2019 – Enhancing Tax Co-operation and Improving Tax Certainty – Implementation Package, Forum on Tax Administration, OECD Publishing, Paris, 2019, https://doi.org/10.1787/17bfa30d-en, 13.

ment is reached between the Entities, with respect to their joint cooperation, and between the Entities and the District. In either case, the proper means of establishing such a cooperation would be an agreement, not a unilateral instrument such as law or statute. The exclusivity of the Entities' direct taxation power would not allow for BH common level of legislation to prescribe anything that concerns that matter, including joint audits mechanism. The same applies for the Entity–District relations, and the constitutional provision that "the relationship between the Brčko District of Bosnia and Herzegovina and the institutions of Bosnia and Herzegovina and the Entities may be further regulated by law adopted by the Parliamentary Assembly".[85]

Given the overall distribution of taxation powers and competences in BH, as well as the core principle of legality of taxation, the only legally acceptable means of establishing joint audits for all four tax jurisdictions in BH would be a multilateral agreement between the governments of the Entities, Government of the District and the Council of Ministers of BH, with the adequate prior approval from the National Assembly of Republic of Srpska, the Parliament of the BH Federation, and the Parliamentary Assembly of Bosnia and Herzegovina.[86] Any unilateral instrument, such as a law adopted by the Parliamentary Assembly of Bosnia and Herzegovina, exclusively regulating join audits in BH, would imply transfer of competences, which would be politically most demanding and practically least certain to happen.

The overall agreement on joint audits, enclosing provisions on administration of not only direct but also indirect taxes, would eliminate several possible problems that would arise if only direct taxation was addressed. Although the Entities may not adopt legislation in the field of indirect taxation unless prior approval by The Governing Board of the Indirect Taxation Authority of Bosnia and Herzegovina was granted, the relevant legal definition of "indirect tax" is not as clear as it should be, and therein lies the problem. The Law on Indirect Taxation System in Bosna and Herzegovina, which sets out the institutional and organizational framework for the BH System of indirect taxation, defines indirect taxes as "import and export duties, excises, value added tax and all other taxes levied on goods and services, including sales and transfer taxes and road tolls."[87] The Agreement on Responsibilities

[85] BH Constitution, Amendment I.

[86] The role of Brčko District Assembly is of no importance in this case. Assembly of the Brčko District of Bosnia and Herzegovina could only refer to any dispute relating to protection of the determined status and powers of the District that may arise between an Entity or more Entities and the District or between Bosnia and Herzegovina and the Brčko District, whereas Constitutional Court of Bosnia and Herzegovina has the jurisdiction to decide in any such dispute. See: BH Constitution, Amendment I.

[87] Law on Indirect Taxation System in Bosna and Herzegovina (*Закон о систему индиректног опорезивања у Босни и Херцеговини*), *O. G. BH*, No. 44/03, 52/04, 34/07,

in Indirect Taxation Matters, a cornerstone of competence transfer from the Entities to the Institutions of BH with regard to indirect taxes, has not even defined indirect taxes, the very essence of its subject-matter.

Cantons in the Federation of Bosnia and Herzegovina, at the same time, have enacted laws on real estate transfer taxes. Although taxes on transfer of immovable property have been recognized as indirect taxes, both in the literature[88] and comparative law,[89] and notwithstanding the fact that the Law on Value Added Tax provides for taxation of "the ownership rights or the rights to dispose of newly-constructed immovable property",[90] though only for the first transfer of the immovable property, the problem of this potentially unconstitutional taxation in the Cantons has not been widely recognized. If the Entities adopted, or rather when the BH Federation adopted, legislation in the field of indirect taxation, it should be and should have been previously approved by the Governing Board of the Indirect Taxation Authority of Bosnia and Herzegovina. However, the Governing Board has never issued any such approval whatsoever.[91] In fact, the Governing Board of the Indirect Taxation Authority of Bosnia and Herzegovina, as well as The Tax Administration of Federation of Bosnia and Herzegovina consider cantonal real estate transfer taxes to be direct taxes.[92]

4/08, 50/08, 49/09, 32/13 & 91/17. The mentioned road toll is not a user charge *per se*, but rather a specific excise, which is why it is regulated as such in the Law on Excises in Bosnia and Herzegovina, *O. G. BH*, No. 49/09, 49/14, 60/14, 91/17 & 50/22.

[88] One of the leading tax scholars in the region, D. Popovic states that tax on transfer of immovable property is a type of taxes on financial and capital transactions, and therefore it is an indirect tax. D. Popović, *Nauka o porezima i poresko pravo* [*The Science of Taxes and Tax Law*]. Open Society Institute / Constitutional and Legislative Policy Institute (Institut Otvoreno društvo / Institut za ustavnu i zakonodavnu politiku), Savremena administracija, Budapest–Belgrade, 1997, 753.

[89] Illustrative examples of taxes and duties on the transfer of immovable property recognized and classified as indirect taxes in the EU law are: Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital, *OJ* L 046/2008 & L 141/2013 – see Art. 5 and 6 thereof; Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, *OJ* L 176/2016, L 338/2017, L 143/2018 & L 259/2022 – see Annex I, Fn. 3. In Spain, the Property Transfer Tax (*El Impuesto sobre Transmisiones Patrimoniales*) is considered indirect tax – Impuestos en España, *https://www.investinspain.org/es/establecimiento/impuestos*, 1 March 2022.

[90] Law on Value Added Tax (*Закон о порезу на додату вриједност*), *O. G. BH*, No. 9/05, 35/05, 100/08 & 33/17, Art. 4 & 25.

[91] The last information officially available for this research was gathered via the Notice No. 02-50-66-2/19, 10 October 2019, Governing Board of the Indirect Taxation Authority of Bosnia and Herzegovina.

[92] Notice No. 02-50-66-1/19, 27. September 2019, Governing Board of the Indirect Taxation Authority of Bosnia and Herzegovina. Notices No. 13/08-02-4-10-1451/19, 23. October 2019, and 13/08-02-4-10-1535/19 – V.P., 24. October 2019, Tax Administration of Federation of Bosnia and Herzegovina.

Borderlines between the Indirect Taxation System and tax jurisdictions of the Entities and the District, based on the distinction between direct and indirect taxes, should be rather clean-cut. If there are certain scientific discussions and disagreements on what exactly constitutes a difference between direct and indirect taxes, and there had certainly been such discussions from the very inception of the idea of this tax classification,[93] then at least there should be an administrative, legal definition which would serve as a standard norm for that matter. In practice, however, it can be troublesome. Even the Constitutional Court of Bosnia and Herzegovina failed to define the difference between direct and indirect taxes, although it decided on unconstitutionality of certain Federation's legislative interventions regarding indirect taxation. The Constitutional Court simply cited the Law and stated that the "Law changes were made in the area of 'indirect taxes'", for which the FBH Parliament had to previously obtain the approval from the Governing Board of the Indirect Taxation Authority of Bosnia and Herzegovina.[94] The laws in question were the Law Amending the Law on Tax on Sales of Products and Services, and the Law Amending the Law on Special Tax on Non-alcoholic Beverages.

Should there be any join audit arrangements between tax jurisdictions in Bosnia and Herzegovina, let alone internationally, with other countries, the division of tax powers and responsibilities should be consistently implemented in BH. Domestic joint audits, therefore, are not only possible, but necessary, before any efforts are made toward international joint audits.

4. CONCLUSION

Bosnia and Herzegovina's capacity to join regional and other initiatives regarding joint tax audits depends on its ability to face internal problems and inconsistencies. Tax systems, i.e. different tax jurisdictions within Bosnia and Herzegovina have exceptionally high level of independence, often unparalleled in comparative law, which gave rise to several possibly unconstitutional practices, eroding this independence. In the terms of joint audits, this makes it possible for the four tax jurisdictions and its tax administrations to gain valuable experience in crafting efficient and effective joint audit system.

[93] "It has been shown that all attempts to distinguish direct from indirect taxes offer more or less serious difficulties and fail to attain that exactness and completeness which are necessary for purposes of strictly scientific definition […] In view of such facts it would seem best for economists to abandon the terms direct and indirect taxes. But such a course is not free from difficulty. The words have been so long fixed in popular usage, and have been given such importance in administrative, and even constitutional, law, that it is doubtful whether the near future will see such a radical change effected in our terminology". C. J. Bullock, "Direct and Indirect Taxes in Economic Literature", *Political Science Quarterly* 3/1898, 476.

[94] Decision on Admissibility and Merits, Case No. U-14/04, 29 October 2004, Constitutional Court of Bosnia and Herzegovina.

Obstacles that may be encountered in this endeavor may range from concurring competences of the BH institutions and the Entities regarding international taxation, to unclear or overlooked criteria for establishing institutional cooperation of tax authorities within Bosnia and Herzegovina. The potential of different politics to destabilize legal and social processes in Bosnia and Herzegovina should not be underestimated, for which the best evidence are obstructions made to any attempt of Bosnia and Herzegovina to join regional joint audit initiatives. This is exactly why proper scientific legal analysis must be given priority over established practices and *ad hoc* solutions.

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ЗАЈЕДНИЧКЕ ПОРЕСКЕ КОНТРОЛЕ ИЗ УГЛА БОСНЕ И ХЕРЦЕГОВИНЕ: ТРЕБА ЛИ ПРВО УРЕДИТИ ДОМАЋЕ ОДНОСЕ?

Сажетак

Заједничке пореске контроле са становишта Босне и Херцеговине могле би довести до значајних изазова осим уколико би, прије закључења међународних споразума, домаћи фискални односи били уређени. Како било, тренутно стање ствари у овој области обиљежено је изненађујућим недостатком поштовања уставног фискалног оквира и подјеле надлежности. Уколико се овом проблему не посвети пажња, он би могао знатно уназадити будуће усклађивање правних основа у Босни и Херцеговини за заједничке пореске контроле на Западном Балкану и шире. Босну и Херцеговину чине два ентитета, Федерација Босне и Херцеговине и Република Српска, који, заједно са Брчко Дистриктом БиХ, имају засебне и искључиве надлежности у области непосредних пореза, док су институције Босне и Херцеговине преузеле надлежност у области посредних пореза. Стога, институције Босне и Херцеговине немају могућност надзора или власти вишег степена над пореским органима ентитета. Штавише, разликовање између непосредних и посредних пореза у одређеним случајевима није јасно, што може довести

до сукоба надлежности. Аутор у овом раду испитује како ови изазови могу бити превазиђени, и заговара да се постојећа пореска конкуренција и трка до дна могу употријебити за испитивање и поновно разматрање оклијевања Босне и Херцеговине да подржи и придружи се појединим регионалним економским и пореским подухватима.

Кључне ријечи: *Заједничка пореска контрола; Босна и Херцеговина; Непосредни порез; Посредни порез; Пореска управа.*