

**Making the Market on  
Constitutional Reform in BiH  
in the Wake of the EU Initiative**

**A DPC Policy Brief**

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## EXECUTIVE SUMMARY AND RECOMMENDATIONS

The European Union (EU) initiative for Bosnia and Herzegovina (BiH), initiated by Germany and the United Kingdom in November 2014<sup>1</sup>, has effectively sidelined the question of constitutional change for the foreseeable future. EU officials and member state diplomats have taken great pains to emphasize that none of the vaguely outlined (and yet to be defined) reforms in the “irrevocable written commitment”<sup>2</sup> recently accepted by party leaders and voted on in the BiH Parliamentary Assembly will require any amendment to the Dayton constitutional order; statements by Republika Srpska (RS) President Milorad Dodik echo this assertion.<sup>3</sup> Whether the socio-economic reforms envisioned in the Compact for Growth and other elements can be achieved *without* confronting these structural issues remains to be seen.<sup>4</sup> That it took two and a half months from the adoption of the initiative by the EU to secure the commitment is worthy of note, as is the fact that signatories to the commitment – notably HDZ BiH leader Dragan Čović – at the same time continue to advocate for major changes to the state structure.

The initiative on the constitutional question in BiH was ceded to the EU by the U.S. in particular in 2006, which initially believed enlargement would impel structural and functional reform. The EU itself was inclined to frame all of BiH’s problems within the context of accession. The EU remained silent as BiH’s political leaders stripped the meaning of constitutional reform of any elements that would improve functionality; instead the sole focus became the narrow implementation of the *Sejdić-Finci* ruling of December 2009, in which the European Court of Human Rights (ECtHR) called for constitutional changes to ensure that citizens of any self-identification may run for all elected offices. With the new EU initiative, these other actors – notably the Council of Europe (CoE), the U.S., and the Office of the High Representative (OHR) – have been sidelined, as have most individual EU member states. This policy brief demonstrates that this ceding to the EU of virtually all initiatives related to defining BiH’s constitutional problem (and, inter alia, the country’s functionality problems) began long ago. Over the last five years the term “constitutional reform” has become simplistically synonymous with implementing *Sejdić-Finci*. This was always far too narrow, as was the reduction of the question of OHR closure to the 5+2 formula (without including constitutional reform).<sup>5</sup> This reductionism should now be definitively abandoned. The CoE, the U.S. and other PIC Steering Board (SB) members, as well as individual EU member states, still have a chance to “make the market” on constitutional reform – for both BiH politicians *and* the EU. Perhaps most importantly, this is an opportunity to start being honest with BiH citizens.

A conundrum remains at the heart of international action in BiH: not only have international actors given up on replacing the constitutional order set out in the Dayton Peace Agreement (DPA) with something more accountable, functional and self-sustaining, they are also failing to meaningfully enforce the existing constitutional order, for example, the Dayton provisions on refugee return.<sup>6</sup> In the post-EU initiative environment, other actors in the PIC Steering Board, Board of Principals and individual EU member states which were excluded from the design of the initiative should re-assert their roles in ensuring direct and pragmatic discussion on this central problem. Quick fixes are neither possible nor desirable; acknowledgement of this reality is a prerequisite to developing an effective approach. But it

should be clear that functionality, human rights and popular accountability are essential ingredients if BiH is to fulfil its outstanding international obligations and take on new ones such as EU and NATO membership.

To this end, DPC recommends the following:

*To the entire 'international community':*

- The EU, its member states, the CoE, the U.S. and OHR should refocus co-ordinated and coherent efforts toward constitutional reform by spelling out clear rewards for compliance (e.g., EU candidate status) and clear sanctions for non-compliance (e.g., suspension of EU funds, suspension of CoE membership).

*To the Council of Europe:*

- The CoE at the highest levels should re-assert the full spectrum of its requirements, working in tandem with the EU when possible, but remaining firm on its own standards independent of the Brussels agenda.
- The Parliamentary Assembly of the Council of Europe (PACE) should suspend BiH's voting rights in the CoE if *Sejdić-Finci* has not been resolved in time for the next general election in 2018.

*To the United States Government:*

- Until a functional and accountable governance system replaces the current structure, the U.S. must ensure that the current order is enforced and maintained. It is highly likely that Canada, Japan, the Netherlands, Spain and Turkey would support an American declaration that it intends to interpret "condition 2" of the 5+2 objectives and criteria this way.
- The U.S. should lead the PIC SB in an effort to identify and nominate a new and credible High Representative with the task of reforming the OHR into a last resort enforcer of Dayton, while also restoring its role as an effective coordinator of international actors in BiH.
- Recognizing the need for a popularly accountable solution to BiH's governance problem, the U.S. should support efforts to develop bottom-up alternatives that can garner support throughout BiH.

*To individual EU member states:*

- Those member states that are concerned by the near-complete absence of conditionality from the German-British initiative should make it clear that they will not accept BiH candidacy for EU membership (which requires unanimity among the 28 member states) without full implementation of the *Sejdić-Finci* ruling. Member state parliaments must take the lead on this issue.
- They should also state clearly, echoing the Venice Commission, that BiH under the Dayton constitution cannot enter the EU as a member. An EU-compatible constitutional order must ensure functionality and political accountability, as well as citizen equality.

## Introduction<sup>7</sup>

Following the failure of the April Package of 2006 and of the Prud and Butmir talks which followed, constitutional reform became a nearly untouchable topic in Bosnia and Herzegovina. For several years now, the only “acceptable” discussion of constitutional reform has been centered on the increasingly narrow and limited effort to address the 2009 “*Sejdić and Finci v. Bosnia and Herzegovina*” ruling of the ECtHR. Unwillingness to discuss more extensive constitutional reform has favored the status quo, in spite of its evident faults. Those individuals or groups who have advocated for more sweeping constitutional and structural reforms have found little fertile ground to even start a discussion in international circles or BiH politics (except for HDZ calls for a third entity or its equivalent), let alone make progress in catalyzing a constituency for reform from the bottom-up.

Three trends have been evident. First, the conflation of *Sejdić-Finci* reform with the notion of broader constitutional changes has allowed these words – and the concept itself – to be hijacked. Second, there has been significant inconsistency among key actors in terms of suggesting whether such reforms are indeed needed, and whether they are non-negotiable. Third, as the words “constitutional reform” have been uttered less, the words “coordination mechanism” have been uttered more; ironically it appears that this effort to establish a new (and superfluous) coordination mechanism will turn the EU integration process into a lever to essentially confederalize the state.

Through the public statements of four key international actors in BiH, this paper considers the extent to which the grail of EU integration has (intentionally or unintentionally) disavowed the normative powers of institutions such as the Council of Europe and benefitted from an inconsistent international strategy and messaging on the country’s constitutional structure. The review of public statements is not comprehensive, but it is telling: the new initiative has succeeded in turning what was an initial wavering on the need for constitutional reform into what now appears to be complete denial. Rather than openly and honestly telling the people of the country that nearly every EU member state has had to amend its constitution to prepare for membership,<sup>8</sup> the EU appears determined to continue treating BiH as an exception, which also implies that everything related to the integration process is negotiable.

The review below aims to demonstrate these divisions and inconsistencies in public discourse over the past five years.<sup>9</sup>

## The Council of Europe

BiH’s fragmented, divisive and discriminatory constitutional structure has been the object of intense scrutiny from the CoE and in particular the Venice Commission (VC),<sup>10</sup> its advisory body on constitutional and legal matters. In 2005, the VC issued an opinion on the BiH constitution in which it addressed issues related to discrimination (including the electoral limitations brought to light by *Sejdić-Finci*), but also to the functionality of the country.<sup>11</sup>

“Further constitutional reforms, changing the emphasis from a state based on the equality of three constituent peoples to a state based on the equality of citizens, remain desirable in the

medium and long term. If the interests of individuals are conceived as being based mainly on ethnicity, this impedes the development of a wider sense of nationhood. In this context the people of BiH will also have to decide whether they want to replace their present Constitution negotiated as part of a peace treaty by an entirely new Constitution which would enjoy full democratic legitimacy as the fruit of a democratic constituent process in BiH.”<sup>12</sup>

Following a comprehensive review of the human rights and functional weaknesses of the constitution, the VC went on to say:

“With such a weak state, BiH will not be able to make much progress on the way towards European integration.”<sup>13</sup>

The 2005 opinion was used as the foundation for the 2005-2006 April Package talks, which sought to address reforms related to both human rights and functionality.<sup>14</sup> The practical importance of such scrutiny became clear in December 2009 through the widely anticipated *Sejdić-Finci* judgment of the ECtHR which itself echoed the Venice Commission opinion.<sup>15</sup> The judgment required BiH to ensure equal political rights of “Others,”<sup>16</sup> guaranteeing their ability to be elected to the House of Peoples and the Presidency.

The October 2010 general elections were based on an unlawful election system, given that the six-month deadline for the implementation of the judgment was ignored. However, Mary Ann Hennessey, head of the Council of Europe Office in BiH, explained that flexibility prevailed at the time:

“It was felt that the time required to implement that judgment made it [...] not really fair to have such an ultimatum such a short time before the elections, which were being called just a few months after the judgment was delivered.”<sup>17</sup>

Yet more years passed. The continued failure of BiH politicians to reach agreement on implementation of *Sejdić-Finci* has been and remains a source of concern for the CoE. There is, however, still the issue of functionality that the VC addressed in its opinion. In a talk given by Hennessey in 2012, she was vocal about the limitations of Dayton in terms of EU accession:

“The ship which was given to BiH in Dayton we already know is basically unseaworthy if you want to sail to Brussels.”<sup>18</sup>

The Committee on the Honouring of Obligations and Commitments by Member States of the CoE warned in a report issued in September 2013 that “if this judgment is not implemented in good time before the 2014 elections, [the Parliamentary Assembly of the CoE (PACE)] will consider imposing sanctions against the delegation of Bosnia-Herzegovina.”<sup>19</sup> PACE Recommendation 2025 (2013) stated the following:

“The Assembly [PACE] will not tolerate yet another election in blatant violation of the *Sejdić-Finci* judgment.”<sup>20</sup>

The Committee on the Honouring of Obligations and Commitments by Member States hinted that the possible consequences of non-compliance might consist of taking action against the credentials of the representatives of BiH in the PACE, as well as asking the Committee of Ministers “to consider suspending Bosnia and Herzegovina from its right of representation.”<sup>21</sup>

The 2014 general elections *were* held on October 12 without the necessary constitutional amendments, and rather than sanctions or other consequences,<sup>22</sup> the new EU initiative pushed reform further down the road. In February, CoE Secretary General Thorbjørn Jagland welcomed the adoption by the BiH parliament of a written reform commitment, noting, “I hope it will also enable the country to fulfill its commitments as a Council of Europe member state, including the implementation of all judgments of the European Court of Human Rights, so as to ensure equal rights for all its citizens.”<sup>23</sup> While supporters of the new initiative insist that the bar has not been lowered and it is just a matter of “re-sequencing,” it in fact focuses almost exclusively on the new “coordination mechanism,” which suggests that the 2005 Venice Commission opinion, and in fact broader CoE norms, have been relegated to being merely desirable rather than essential.<sup>24</sup>

### The European Union

Contrary to the normative language and support for constitutional reforms from the CoE, the EU has seemingly bent over backwards to avoid any impression that constitutional reform (beyond *Sejdić-Finci*) might be required.

The first two EU Progress Reports on BiH (in 2005 and 2006) noted the need to initiate a transition towards a state grounded on citizenship, and not only ethnicity.<sup>25</sup> The EU’s Stabilization and Association Agreement (SAA) with BiH was initialed in 2007, signed in 2008, and ratified by all EU member states and BiH by 2011. Successful implementation of the 2009 *Sejdić-Finci* ruling of the ECtHR was, until autumn 2014, a requirement for the SAA to come into force.<sup>26</sup> Following on the failure of Parliament to agree on a *Sejdić-Finci* remedy in 2011 and 2012, the EU worked closely with leaders of the main political parties to engineer a compromise. While this was the only element of constitutional reform the EU was engaged in promoting, it was far from the sole focus of the EU’s work in BiH (as the current narrative implies).

The language used by the EU during this time showed constructive ambiguity at best, and at worst policy incoherence. At an event in Brčko in April 2013, EU Special Representative (EUSR) Peter Sørensen was asked whether the EU would recognize the 2014 elections if the *Sejdić-Finci* issue was not resolved. (Then-Commissioner Füle intimated that they might not be.<sup>27</sup>) Sørensen’s answer was ambiguous:

“For the European Union [...] you are not living up to the standards that are a prerequisite for us to put our contractual relationship with you into place, namely the Stabilization and Association Agreement. And therefore you are not in a position to credibly apply for membership with us. That answers your question about whether we [would] recognize the elections.”<sup>28</sup>



In other statements, the EUSR seemed to try to strike a balance between saying that many EU member states have complicated internal structures and a need for BiH to address these weaknesses:

“Bosnia and Herzegovina has a complex constitutional structure, enough words have been said about that. But there are internal arrangements in EU Member States that can also be considered very complex. As I have said many times before: the EU fully respects the security, territorial integrity and constitutional order of Bosnia and Herzegovina. Despite this complexity we believe – based on our own experiences – that there are ways that Bosnia and Herzegovina can withstand the economic, social and political and other pressures that eventual membership will bring upon the country. However, it requires that Bosnia and Herzegovina steps up to the challenge and addresses some of the current apparent weaknesses in the way that governance and reforms are conducted.”<sup>29</sup>

As Sørensen himself acknowledges in this quote, this is far from being an anecdotal, one-off statement. In recent years, the EU Delegation has explicitly professed full respect (and even “support”) for BiH’s current constitutional order on several occasions,<sup>30</sup> suggesting that its complexity is not necessarily an impediment to BiH’s EU membership:

“First of all, I think I should underline that the EU recognises that Bosnia and Herzegovina has a specific constitutional order. We support this, and please remember that there are also different types of internal structure within many of the existing Member States.”<sup>31</sup>

Such (perhaps intentionally) vague statements suggest that the EU is still not objectively certain whether constitutional reforms will be needed once accessions negotiation begin – or ever. When referring to the conditions laid down by the EU in the *acquis* chapters, deputy head of the EU Delegation Renzo Daviddi said that “constitutional changes may be required to meet these benchmarks but we will know if this is the case in BiH only after the accession negotiations open.”<sup>32</sup> Sørensen left open the possibility that such reforms might not be needed at all:

“We do not have, at this point of the time, any sort of designs on constitutional changes.<sup>33</sup> That’s not what we are looking at now. What we are looking at is to get the Stabilization and Association Process going. When we get that going, we start interacting with BiH in all the chapters we have of legislation. That interaction will lead to changes; there are things that need to change in BiH when it comes to legislation, but it’s not necessarily constitutional change.”<sup>34</sup>

After attempts to achieve *Sejdić-Finci* implementation definitively collapsed in February 2014, the EU gradually shifted from blaming BiH politicians for being uninterested in reform, to a revisionist and quasi self-critical (and conveniently liberating) view of its own policy: the decision to make *Sejdić-Finci* a requirement for the SAA to enter into force.<sup>35</sup> This tactical retreat won the day with the joint British-German initiative of November 2014, which dropped the precondition with the stated rationale “to avoid the impasse resulting from addressing intractable issues too early in the process.” On December 15, 2014, the EU’s Foreign Affairs Council formally adopted the initiative,<sup>36</sup> releasing this rather nebulous statement about the role *Sejdić-Finci* is destined to play from now on:

“When requesting the Commission's Opinion on the membership application, the Council will ask the Commission to pay particular attention to the implementation of the *Sejdić-Finci* ruling.”<sup>37</sup>

### **The Office of the High Representative**

Although the OHR began its slide to becoming utterly inert in 2006,<sup>38</sup> a brief review of some of its comments on these matters merits attention.

In 2007, the PIC SB announced that the OHR would be closed in June 2008. However, in February 2008 the PIC SB reversed its decision and decided to extend the OHR's mission indefinitely until a set of specific objectives and conditions are fulfilled. These five objectives and two conditions have come to be known as the “5+2 agenda.”<sup>39</sup> An eventual departure of the OHR would satisfy the recommendations made in the 2005 VC opinion, according to which the powers of the High Representative, albeit historically useful, are “fundamentally incompatible with the democratic character of the state and the sovereignty of BiH” and should “gradually be abandoned, preferably in parallel with a constitutional reform making the legislative process in BiH more efficient.”<sup>40</sup> Some analysts have argued that the OHR is already “clinically dead.”<sup>41</sup> Yet, legally it remains the case that the High Representative is the “final authority in theatre” for interpretation and enforcement of the Dayton Peace Agreement. It stands to reason that as long as Dayton is the law of the land, there should be a credible High Representative as enforcer.

High Representative Valentin Inzko's remarks have lacked consistency, and have even been erratic. The following excerpt of a speech he delivered to the UN Security Council in November 2010 sent an illogical message related to the legitimacy of the elections:

“The elections were held on the basis of the current Election Law, which is not in line with the European Convention for [sic] Human Rights. This does not affect the legitimacy of the elections, but this problem must be addressed urgently.”<sup>42</sup>

Inzko has, in addition, expressed his dissatisfaction with some provisions of Dayton that facilitate the ethnocentric power games that have driven BiH into gridlock. In 2011, still dual-hatted as EUSR, he stated that “in order to function – and in order to enter the European Union – Bosnia and Herzegovina needs to overhaul its Dayton constitution.”<sup>43</sup>

“The Dayton Agreement is an agreement on peace, and the Constitution was agreed upon there only as an annex. The creators of Dayton were aware of this, that the Constitution was not perfect. For example, they forgot then to envisage the institution of the Supreme Court.”<sup>44</sup>

Both before and after the de-coupling of the posts of High Representative and EUSR in September 2011, he has manifested repeatedly that BiH would need to reform its Constitution (beyond *Sejdić-Finci*) to meet the EU's requirements, as “every EU country had to do it.”<sup>45</sup>

However, Inzko and former Principal Deputy High Representative Roderick Moore have also further justified the transformation of the *Sejdić-Finci* case from one focused on the country's "Others" to one focused on the status of the Croats:<sup>46</sup>

"The *Sejdić-Finci* case could also be used for the Croats as an opportunity to improve their status. Why not? But at the moment it is foremost about the implementation of a ruling by the European Court of Human Rights."<sup>47</sup>

"Croats believe that in this country they cannot exercise their rights adequately. I believe that we need to take those concerns seriously, and look for a way to deal with that institutionally and in other ways."<sup>48</sup>

"Let's be clear, Croats are one of the three constituent peoples in BiH and nothing will change that. There is no BiH without Croats – that would be like a crown without its jewels."<sup>49</sup>

Inzko was vocal in his criticism of the EU's approach even when he was EUSR, and his statements about the issue have been relatively frequent and detailed, as evidenced by this quote from 2011:

"The obstacles to progress in Bosnia and Herzegovina can be eliminated – however, we will need a different and more proactive approach from the EU if this is to happen. The standard Stabilisation and Association process will not work in Bosnia and Herzegovina."<sup>50</sup>

Inzko asserted (correctly, in the authors' view) that the pull of Euro-Atlantic integration had not produced the desired effect and that a new strategy must be conceived, which must consist of establishing a constructive partnership with the people and "confronting more directly political parties and actors who block or undermine reforms and who promote division."<sup>51</sup>

The High Representative has sent strong signals that conditionality must be reinforced. Back in 2011, Inzko said that "domestic partners must not be led into the mistaken belief that they can bend EU rules"<sup>52</sup> and "any attempt to water down the conditions would mean watering down the subsequent benefits."<sup>53</sup> In 2013, Inzko defended the idea that the conditionality strategy should link financial assistance more closely to progress.<sup>54</sup>

However, even prior to the EU's adoption of the German-British initiative in December 2014, Inzko applauded it.<sup>55</sup> Given the predominance of EU members in the PIC SB, it could hardly be otherwise.

## The United States

It gradually became apparent that while the DPA ended the war, the constitutional structure that it created presented seemingly insurmountable obstacles to progress. In 2006, the U.S. Embassy took the reins of the closed-door political negotiations that led to the "April package," the most significant effort to date to bring about constitutional reform. The April package included a series of proposals that were very much in accordance with the 2005 VC opinion, but it narrowly failed to be adopted by the

Parliamentary Assembly.<sup>56</sup> Other rounds of talks took place between November 2008 and January 2009 in the village of Prud and in October 2009 as part of the “Butmir process,” but they did not produce positive results. Since then, the U.S. has played a back-seat supporting role on state constitutional reform matters.<sup>57</sup>

The U.S. has sent mixed signals about the reform potential or sacred immutability of the Dayton Constitution – perhaps not surprising as the U.S. was such a key broker in its creation. A joint op-ed written in 2011 by then-U.S. Secretary of State Hillary Clinton and her British counterpart, William Hague, shows the tensions between maintaining Dayton *ad infinitum* and addressing the structural and functional human rights concerns raised by *Sejdić-Finci*:

“There must be no doubt about the resolve of the international community to stand by the settlement agreed at Dayton which ended the conflict. Our message is crystal clear: we are committed to BiH as a single state, with two vibrant entities and three constituent peoples.”<sup>58</sup>

In 2012, a speech given by Clinton touched upon this issue once again, implicitly ruling out the possibility of fully exploiting the potential transformative power of *Sejdić-Finci*:

“The Dayton accords must be respected and preserved. Period.”<sup>59</sup>

At the same time, the U.S. Embassy has, as have all its partners in the international community, stressed the need to implement *Sejdić-Finci*, expressing regret over the slow pace of the process and the political leaders’ unwillingness to compromise. Ambassador Patrick Moon linked the processes in a speech in mid-2013:

“Most countries that have joined the EU in the last 25 years have had to make changes to their constitutions. Implementing a solution to respond to the ECtHR’s judgment in the case of *Sejdić-Finci* is an essential first step.”<sup>60</sup>

The U.S. Embassy constantly underlines the benefits brought about by the DPA, while also acknowledging that its provisions aimed at protecting the different “vital national interests” have acted as an obstacle to wider reform – and wider reform is required for BiH to join the EU. In 2013, Moon provided a clear statement of the situation:

“Dayton achieved its vital goals, and it has served the citizens of this country well. But while democracy and stability have taken root, provisions designed to bring peace and stability and afford protection to the different ethnic groups are being abused as a means to obstruct progress. Through efforts to address the *Sejdić-Finci* case, it has become clear that more changes to the Constitution will be necessary as Bosnia and Herzegovina progresses toward full integration into Europe.”<sup>61</sup>

Unlike High Representative Inzko, however, the U.S. does not seem inclined to let *Sejdić-Finci* open a door to any further ethno-territorial maneuvers. The following quotes from Patrick Moon and Philip Reeker, then-Deputy Assistant Secretary of State for European and Eurasian Affairs, were categorical:

“All citizens of BiH must accept that further changes to international boundaries and territorial organization are not acceptable.”<sup>62</sup>

“The third entity idea is stuck in the past. It has no future whatsoever. It will never be adopted in the Federation.”<sup>63</sup>

“I don’t think a third entity is what you need. I think you have enough trouble with two entities.”<sup>64</sup>

That being said, the U.S. State Department was developing an approach on the constitutional question which was, by all indications, again an elite-focused “let’s make a deal” approach, identifying Croat concerns as the first hurdle to clear.<sup>65</sup> The German-British initiative seemed designed and timed to outflank any such effort. Secretary of State John Kerry has declared American support for the EU initiative<sup>66</sup> despite there being a great deal of pronounced dissatisfaction at the working level with both the substance and style of the German-British approach. The U.S. has made no recent public statements on how it plans to proceed on the constitutional question – or on other reform priorities – in light of the EU initiative.

### Conclusion and recommendations

After five years of ceding leadership on what was a collective international goal to see the ECtHR’s *Sejdić-Finci* ruling implemented, the EU’s erstwhile international partners have effectively been abandoned. They are still expected to project an aura of unity without being treated as true partners by the EU institutions or larger member states. Many EU member states actually feel the same way.<sup>67</sup>

Instead of being (often reluctant) champions of an EU policy which leaves their central concerns unaddressed, the Council of Europe, the United States, and others dissatisfied with the substance and high-handed approach of the German-British EU initiative should take the opportunity to reassert their autonomy and clarify their own policy goals on BiH’s central constitutional handicap, to better shape and direct an EU policy that seems to be on “accession auto-pilot.” This problem has three main threads – lack of functionality, lack of adherence to human rights norms, and lack of political accountability mechanisms. Without all three addressed, BiH has scant chance of meaningful progress toward the EU or NATO, let alone being actually admitted.

Potential policy actors on the constitutional question have normative power (CoE), political heft (the U.S. and others on the PIC SB), or direct leverage (as member states of the EU). These should be employed independently from the EU institutions, though preferably with strategic coordination amongst themselves to achieve the aims of pressing for popular and durable constitutional change to address the three fundamental failings of the Dayton BiH constitutional order.

To this end, DPC recommends the following:

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- The EU, its member states, the CoE, the U.S. and OHR should refocus co-ordinated and coherent efforts toward constitutional reform by spelling out clear rewards for compliance (e.g., EU candidate status) and clear sanctions for non-compliance (e.g., suspension of EU funds, suspension of CoE membership).

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- They should also state clearly, echoing the Venice Commission, that BiH under the Dayton constitution cannot enter the EU as a member. An EU-compatible constitutional order must ensure functionality and political accountability, as well as citizen equality.

For too long the EU’s functionalist tendency – as once expressed to one of the authors: “we don’t care about outcomes, we only care about process”<sup>68</sup> – has led to a perpetual lowering of the bar on international conditionality in BiH, and in turn to political, social and economic stagnation and even regression in the new rules-free environment. The advent of the EU initiative, with its effective abandonment of any constitutional change as a goal, provides non-EU international actors – and EU member states as well – with the opportunity to reset the bar, to deliver more than empty promises to BiH citizens.

## Endnotes

<sup>1</sup> See Elvira M. Jukić, “UK, Germany Launch Joint Initiative on Bosnia.” *BIRN*. November 5, 2014 at <http://www.balkaninsight.com/en/article/uk-germany-propose-bosnia-s-renewed-eu-perspective>. See also EU FAC Conclusions at “Press Release – 3361<sup>st</sup> Council Meeting, Foreign Affairs, Brussels, December 15, 2014,” at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/146293.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/146293.pdf)

<sup>2</sup> See “Written Commitment of Bosnia and Herzegovina” (February 2014), [http://europa.ba/documents/delegacijaEU\\_2015022513454549eng.pdf](http://europa.ba/documents/delegacijaEU_2015022513454549eng.pdf)

<sup>3</sup> See “SRNA News Roundup (III) January 12, 2015,” at <http://www.srna.rs/novosti1/270211/srna-news-roundup-iii--january-12--2015.htm>. German Foreign Minister Frank-Walter Steinmeier assured parliamentarians that there was no “hidden agenda” to push constitutional change in his address to the BiH Parliamentary Assembly in January 2015. See Srećko Latal and Elvira M. Jukić, “Bosnia Leaders Urged to Grasp Unique EU Offer.” *BIRN*. January 16, 2015. Available at: <http://www.balkaninsight.com/en/article/german-uk-foreign-ministers-come-to-bosnia-to-unblock-reforms>

<sup>4</sup> In a March 3, 2015 speech at Oxford University’s South East European Studies program (SEESOX), Former High Representative Paddy Ashdown noted some skepticism regarding the new approach: “[T]hrough economic reform is necessary it is not sufficient – unless it is part of – rather than a substitute for – functional reform. Absent that, any economic reform will inevitably be subverted – as so often in the past – by those who have an interest in maintaining the status quo because that is how they preserve their power and line their pockets.” The full speech is posted as delivered by the author here: <http://docdroid.net/upuz> ; a Bosnian translation is available at: <http://www.depo.ba/clanak/127198/evo-sta-je-tacno-u-svom-govoru-rekao-paddy-ashdown-nikad-bosna-nece-u-evropsku-uniju-je-r>. Keil makes a similar point in a forthcoming paper: Soeren Keil, “The Political Conditions of Economic Reform in the Western Balkans,” *Südosteuropa Mitteilungen* (forthcoming, 2015).

<sup>5</sup> This was one of the elements discussed in the PIC SB for inclusion in the requirements and conditions, which ultimately resulted in 5+2. See “How to stop Bosnia and Herzegovina from further deteriorating? Time for a new transatlantic initiative,” DPC-Heinrich Boell Stiftung Berlin Workshop proceedings, May 2010, at [http://www.democratizationpolicy.org/uimages/pdf/DPC-HBD\\_Berlin\\_Workshop\\_Report.pdf](http://www.democratizationpolicy.org/uimages/pdf/DPC-HBD_Berlin_Workshop_Report.pdf), page 4.

<sup>6</sup> Perhaps the most notable barrier to return remains the country’s divided education system, which effectively deters minorities from choosing to enroll their children in a school in which they will be a minority learning from the majority curriculum. See Valery Perry, “The Permanent Interim: Bosnia and Herzegovina’s Ongoing Educational Crisis.” *E-International Relations*. 12 October 2014. Available at <http://www.e-ir.info/2014/10/12/the-permanent-interim-bosnia-and-herzegovinas-ongoing-educational-crisis/>

<sup>7</sup> The authors would like to thank Soeren Keil, Senior Lecturer at Canterbury Christ Church University, for his comments on an earlier draft of this paper.

<sup>8</sup> “Comparative Constitutional Reform Chart: Amendments in Preparation for EU Accession.” Legal Memorandum. October 2013. Available at <http://www.mreza-mira.net/wp-content/uploads/Constitutional-Amendments-for-EU-Accession-Chart-Oct-2013.pdf>

<sup>9</sup> A more detailed examination of such public statements is available in Oscar Fernandez, “Creating Fertile Ground for Constitutional Reform? A Review of Public Statements of the International Community on Constitutional Reform in Bosnia and Herzegovina.” Unpublished paper. January 2015. Available at [https://www.academia.edu/11240218/Creating\\_Fertile\\_Ground\\_for\\_Constitutional\\_Reform\\_A\\_Review\\_of\\_Public\\_Statements\\_by\\_the\\_International\\_Community\\_on\\_Constitutional\\_Reform\\_in\\_Bosnia\\_and\\_Herzegovina](https://www.academia.edu/11240218/Creating_Fertile_Ground_for_Constitutional_Reform_A_Review_of_Public_Statements_by_the_International_Community_on_Constitutional_Reform_in_Bosnia_and_Herzegovina)

<sup>10</sup> Otherwise known as the European Commission for Democracy through Law.

<sup>11</sup> Venice Commission, “Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative” (2005), <http://www.venice.coe.int/webforms/documents/CDL-AD%282005%29004-e.aspx>

<sup>12</sup> VC, “Opinion on the Constitutional Situation in BiH,” 25.

<sup>13</sup> VC, “Opinion on the Constitutional Situation in BiH,” 26.

<sup>14</sup> Perry, Valery. “Not-So-Great Expectations: The EU and the Constitutional Politics of Bosnia and Herzegovina.” Keil, Soeren and Arkan, Zeynep (Eds): *The EU and Member State Building in the Balkans: European Foreign Policy in the Western Balkans*. Basingstoke: Routledge, 2015, pp. 163-187.



<sup>15</sup> Grand Chamber of the European Court of Human Rights, “Case of Sejdić and Finci v. Bosnia and Herzegovina” (2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-96491>. On June 15<sup>th</sup>, 2014, the ECtHR’s judgment in the case of “Zornić v. BiH” reaffirmed the violations found in the Sejdić and Finci case. See: European Court of Human Rights, Fourth Section, “Case of Zornić v. Bosnia and Herzegovina” (2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145566>. A third case with similar dynamics, “Pilav v. Bosnia and Herzegovina,” is pending decision.

<sup>16</sup> The citizens of BiH who do not wish to define themselves as Serbs, Bosniaks or Croats (the three constituent peoples).

<sup>17</sup> “Sarajevo-Mary Ann Hennessey, ‘Neće biti općih izbora bez prava svih da se kandiduju’ 02:00.” Youtube video, 02:05. Posted by “SensServis Agencija,” April 22, 2012, accessed November 25, 2013. <http://www.youtube.com/watch?v=2IEKWM0e1fw>.

<sup>18</sup> “Mary Ann Hennessey on the Role of External Actors in Bosnia-Herzegovina.” Youtube video, 08:23. Posted by “IIEA1”, December 6, 2012, accessed November 25, 2013. <http://www.youtube.com/watch?v=sHRRILwYDIk>.

<sup>19</sup> Parliamentary Assembly of the Council of Europe, “Report – The Functioning of Democratic Institutions in Bosnia and Herzegovina” (2013): 4, <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20063&Language=en>.

<sup>20</sup> Parliamentary Assembly of the Council of Europe, “Recommendation 2025 – The Functioning of Democratic Institutions in Bosnia and Herzegovina” (2013): 2, <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20209&lang=en>.

<sup>21</sup> PACE, “Report – The Functioning of Democratic Institutions in BiH,” 4. See also: rule no. 8 of the “Rules of Procedure of the Assembly” (July 2014), accessed December 6, 2014, <http://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp>; and “Statute of the Council of Europe” (1949), accessed December 6, 2014, <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

<sup>22</sup> In fact, far from experiencing sanctions, BiH is set to take over the Presidency of the CoE’s Committee of Ministers in May 2015.

<sup>23</sup> “Secretary General Jagland Welcomes Bosnia Herzegovina’s Commitment to Undertake Necessary Reforms.” Council of Europe web site. 23 February 2015. Available at <http://www.coe.int/en/web/portal/-/council-of-europe-secretary-general-jagland-welcomes-bosnia-herzegovina-s-commitment-to-undertake-necessary-reforms>.

<sup>24</sup> It is worth noting that BiH was the first CoE member to be found to be in non-compliance with Protocol 12 of the European Convention on Human Rights by the ECtHR.

<sup>25</sup> See: European Commission, “Bosnia and Herzegovina 2005 Progress Report” (2005): 24, [http://ec.europa.eu/enlargement/archives/pdf/key\\_documents/2005/package/sec\\_1422\\_final\\_progress\\_report\\_ba\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1422_final_progress_report_ba_en.pdf); European Commission, “Bosnia and Herzegovina 2006 Progress Report” (2006): 17, [http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/nov/bih\\_sec\\_1384\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/bih_sec_1384_en.pdf).

<sup>26</sup> Together with adopting a law on state aid, and adopting a law on a statewide census.

<sup>27</sup> Nevena Šarenac, “Stefan Fule in Sarajevo-Next Elections Will Not Be Recognized As Long as ‘Sejdić-Finci’ is Not Implemented,” *Sarajevo Times*, April 11, 2013, <http://www.sarajevotimes.com/stefan-fule-in-sarajevo-next-elections-will-not-be-recognized-as-long-as-sejdic-finci-is-not-implemented/>.

<sup>28</sup> “HoD/EUSR Ambassador Peter Sorensen & EU HoMs visit, Brcko, 16 April 2013, press point,” Delegation of the European Union to Bosnia and Herzegovina, April 16, 2013, accessed November 2, 2013, <http://europa.ba/News.aspx?newsid=5668&lang=EN>. This is just part of the answer, with the remainder simply providing background information. It is fair to say that the EU has ended up recognizing the 2014 elections, at least implicitly.

<sup>29</sup> “Speech delivered by Head of EU Delegation to BiH and EU Special Representative, Ambassador Peter Sorensen at Krug 99 session,” Delegation of the European Union to Bosnia and Herzegovina, February 26, 2012, accessed November 2, 2013, <http://www.delbih.ec.europa.eu/News.aspx?newsid=93&lang=EN>.

<sup>30</sup> According to Sebastian, during the negotiations dealing with the April Package, “EU actors assured domestic forces that constitutional changes were not a prerequisite for EU accession.” See: Sofia Sebastian, “Leaving Dayton

Behind: Constitutional Reform in Bosnia and Herzegovina,” *FRIDE Working Papers* no. 46 (2007): 5, [http://www.fride.org/download/WP46\\_Dayton\\_Bosnia\\_Herzegovina\\_EN\\_nov07.pdf](http://www.fride.org/download/WP46_Dayton_Bosnia_Herzegovina_EN_nov07.pdf).

<sup>31</sup> “Interview with Ambassador Peter Sorensen for Infokom magazine of the BiH Foreign Trade Chamber,” Delegation of the European Union to Bosnia and Herzegovina, January 18, 2012, accessed November 2, 2013, <http://www.delbih.ec.europa.eu/News.aspx?newsid=46&lang=EN>.

<sup>32</sup> “Welcoming speech by the Deputy Head of Delegation at the Conference ‘The Role of Parliaments in the European Integration Process – Constitutional and Legal Changes,’” Delegation of the European Union to Bosnia and Herzegovina, October 29, 2012, accessed November 3, 2013, <http://www.europa.ba/News.aspx?newsid=5472&lang=EN>.

<sup>33</sup> It is worth noting that this was in fact *untrue*, since the EU had discussed an “electoral college” option for presidential seats with BiH political parties. Commissioner Füle’s talks with parties on *Sejdić-Finci* continued until February 14, 2014. See “Sorensen: I Have No Document on a Proposed Solution for the Case ‘Sejdic-Finci,’” *The Bosnia Times*, October 24, 2013 at <http://www.thebosniantimes.com/en/sorensen-document-proposed-solution-case-sejdic-finci/>. This is carefully worded to state that no document was produced, not that there were no EU proposals.

<sup>34</sup> “Peter Sorensen o referendumu – Al Jazeera Balkans.” Youtube video, 05:05. Posted by “AJBalkans,” January 22, 2012, accessed November 14, 2013. <http://www.youtube.com/watch?v=XcFgkqWRLs>.

<sup>35</sup> The European Stability Initiative (ESI) actively promoted the dropping of this conditionality in, “Lost in the Bosnian Labyrinth – Why the Sejdic-Finci Case Should Not Block an EU Application” (2013):11, [http://www.esiweb.org/pdf/esi\\_document\\_id\\_143.pdf](http://www.esiweb.org/pdf/esi_document_id_143.pdf). Soeren Keil addressed the false foundations of ESI’s argument in, “Legal Misunderstandings, False normative Hopes and the Ignorance of Political Reality A Commentary on the recent ESI Report ‘Lost in the Bosnian Labyrinth,’” *Democratization Policy Council New Series* no. 4 (2013), at <http://democratizationpolicy.org/uimages/DPCPolicyNoteNewSeriesSejdicFinci.pdf>.

<sup>36</sup> “Council Conclusions on Bosnia and Herzegovina.”

<sup>37</sup> *Ibid*, 2.

<sup>38</sup> While the OHR has remained operational and the Bonn Powers have been employed since 2006, the nature of the activity has shifted from being a reform driver to a safety net or actor of last resort. See Bart M.J. Szewczyk, “The EU in Bosnia and Herzegovina: Powers, Decisions and Legitimacy,” EUISS Occasional Paper 83, March 2010, at <http://www.iss.europa.eu/uploads/media/OccasionalPaper83.pdf>.

<sup>39</sup> “The 5+2 agenda”, Office of the High Representative, accessed November 13, 2013, [http://www.ohr.int/ohr-info/gen-info/default.asp?content\\_id=46773](http://www.ohr.int/ohr-info/gen-info/default.asp?content_id=46773).

<sup>40</sup> VC, “Opinion on the Constitutional Situation in BiH,” 22.

<sup>41</sup> See: “Dnevni Avaz: Interview with HR Valentin Inzko,” Office of the High Representative, August 29, 2013, accessed November 17, 2013, [http://www.ohr.int/print/?content\\_id=48178](http://www.ohr.int/print/?content_id=48178); and “Dnevni Avaz: Interview with Principal Deputy High Representative,” Office of the High Representative, November 11, 2013, accessed November 17, 2013, [http://www.ohr.int/print/?content\\_id=48290](http://www.ohr.int/print/?content_id=48290).

<sup>42</sup> “Speech by High Representative Valentin Inzko to the UN Security Council,” Office of the High Representative, November 11, 2010, accessed November 18, 2013, [http://www.ohr.int/ohr-dept/pressopresssp/default.asp?content\\_id=45493](http://www.ohr.int/ohr-dept/pressopresssp/default.asp?content_id=45493).

<sup>43</sup> “Speech by High Representative and EU Special Representative Valentin Inzko ‘Bosnia and Herzegovina between Dayton & Europe: Current & Future Challenges’ French Institute for International Relations,” Office of the High Representative, May 2, 2011, accessed November 19, 2013, [http://www.ohr.int/ohr-dept/pressopresssp/default.asp?content\\_id=45976](http://www.ohr.int/ohr-dept/pressopresssp/default.asp?content_id=45976).

<sup>44</sup> “Interview with High Representative Valentin Inzko,” Office of the High Representative, November 16, 2011, accessed November 17, 2013, [http://www.ohr.int/ohr-dept/pressopressi/default.asp?content\\_id=46588](http://www.ohr.int/ohr-dept/pressopressi/default.asp?content_id=46588).

<sup>45</sup> “Interview with High Representative Valentin Inzko,” Office of the High Representative, August 8, 2012, accessed November 19, 2013, [http://www.ohr.int/ohr-dept/pressopressi/default.asp?content\\_id=47389](http://www.ohr.int/ohr-dept/pressopressi/default.asp?content_id=47389). Although Inzko’s statement is not completely accurate - there are some exceptions like Poland - a vast majority of them did, which the EU is not

stressing nearly enough. See: “Comparative Constitutional Reform Chart: Amendments in Preparation for EU Accession.”

<sup>46</sup> This was the direction the EC/EUD-brokered talks on *Sejdić-Finci* implementation actually went, hijacked completely by the “Croat question.”

<sup>47</sup> “Interview with High Representative Valentin Inzko,” Office of the High Representative, August 11, 2012, accessed January 19, 2014, [http://www.ohr.int/ohr-dept/preso/presi/default.asp?content\\_id=47389](http://www.ohr.int/ohr-dept/preso/presi/default.asp?content_id=47389).

<sup>48</sup> “Večernji list: Interview with PDHR Roderick Moore,” Office of the High Representative, September 24, 2012, accessed November 18, 2013, [http://www.ohr.int/print/?content\\_id=47514](http://www.ohr.int/print/?content_id=47514).

<sup>49</sup> “Interview with HR/EUSR Valentin Inzko,” Office of the High Representative, July 20, 2011, accessed November 21, 2013, [http://www.ohr.int/ohr-dept/preso/presi/default.asp?content\\_id=46203](http://www.ohr.int/ohr-dept/preso/presi/default.asp?content_id=46203).

<sup>50</sup> “Remarks by High Representative and EU Special Representative Valentin Inzko At a Meeting of the European People’s Party Panel on ‘EU Responsibilities in Region,’” Office of the High Representative, March 4, 2011, accessed November 21, 2013, [http://www.ohr.int/ohr-dept/preso/presssp/default.asp?content\\_id=45832](http://www.ohr.int/ohr-dept/preso/presssp/default.asp?content_id=45832).

<sup>51</sup> “Rethinking the International Community’s Approach,” Office of the High Representative, June 25, 2013, accessed November 21, 2013, [http://www.ohr.int/ohr-dept/preso/presssp/default.asp?content\\_id=48121](http://www.ohr.int/ohr-dept/preso/presssp/default.asp?content_id=48121).

<sup>52</sup> “Remarks by High Representative and EU Special Representative Valentin Inzko At a Panel Discussion on the European Perspective of the Balkans,” Office of the High Representative, June 16, 2011, accessed November 21, 2013, [http://www.ohr.int/ohr-dept/preso/presssp/default.asp?content\\_id=46132](http://www.ohr.int/ohr-dept/preso/presssp/default.asp?content_id=46132).

<sup>53</sup> Ibid.

<sup>54</sup> Speech by High Representative Valentin Inzko at the “Conference of the Parliamentary Committees of EU Member States Maintaining Momentum in the EU’s Enlargement and Neighbourhood Policy,” Council of the European Union, June 25, 2013, accessed December 5, 2014, <http://www.parleu2013.ie/wp-content/uploads/2012/12/Valentin-INZKO-EN.pdf>.

<sup>55</sup> See Inzko’s report to the UN Security Council on November 12, 2014 at <http://www.sarajevotimes.com/remarks-high-representative-valentin-inzko-united-nations-security-council/>. See also “Press Conference following the session of the PIC Steering Board,” December 10, 2014, available at: [http://www.ohr.int/ohr-dept/preso/prespb/default.asp?content\\_id=48908](http://www.ohr.int/ohr-dept/preso/prespb/default.asp?content_id=48908)

<sup>56</sup> See Perry 2015.

<sup>57</sup> In 2013, the U.S. assembled a “civic” initiative for Federation reform (see <http://www.sarajevotimes.com/american-ambassador-to-bih-on-the-need-for-reform-in-the-fbih/>). However, the proposals had neither a political nor popular constituency, and went nowhere. See Elvira Jukic, “Bosnia Federation Parliament Starts Constitutional Reform,” Balkan Insight, June 25, 2013.

<sup>58</sup> “Joint OP-ED on Bosnia and Herzegovina by Foreign Secretary William Hague and Secretary of State Hillary Clinton,” Embassy of the United States Bosnia & Herzegovina, June 8, 2011, accessed December 1, 2013, [http://sarajevo.usembassy.gov/speech\\_20110608.html](http://sarajevo.usembassy.gov/speech_20110608.html).

<sup>59</sup> “Remarks With Bosnian Presidency Chairman Bakir Izetbegovic and EU High Representative Lady Catherine Ashton,” Embassy of the United States Bosnia & Herzegovina, October 30, 2012, accessed December 1, 2013, [http://sarajevo.usembassy.gov/speech\\_20121030.html](http://sarajevo.usembassy.gov/speech_20121030.html).

<sup>60</sup> “Bosnia and Herzegovina: Moving the Country towards Its Euro-Atlantic Future,” Embassy of the United States Bosnia & Herzegovina, June 25, 2013, accessed December 1, 2013, [http://sarajevo.usembassy.gov/speech\\_20130625.html](http://sarajevo.usembassy.gov/speech_20130625.html).

<sup>61</sup> “Bosnia and Herzegovina: Moving the Country towards Its Euro-Atlantic Future.”

<sup>62</sup> “United States Ambassador to Bosnia and Herzegovina Patrick S. Moon Speech to the University of Sarajevo, Faculty of Political Science,” Embassy of the United States Bosnia & Herzegovina, April 7, 2011, accessed December 1, 2013, [http://sarajevo.usembassy.gov/speech\\_20110407.html](http://sarajevo.usembassy.gov/speech_20110407.html).

<sup>63</sup> “Recite Al Jazeera – Patrick Moon – Al Jazeera Balkans.” Youtube video, 27:07. Posted by “AJBalkans,” January 15, 2013, accessed January 20, 2014. <http://www.youtube.com/watch?v=mZn5e8UhxLI>.

<sup>64</sup> “Recite Al Jazeera – Philip Reeker.” Youtube video, 25:06. Posted by “AJBalkans,” December 25, 2011, accessed December 1, 2013. <http://www.youtube.com/watch?v=bf0alsD2tI8>.

<sup>65</sup> Author discussions with Western diplomats, May – December 2014.

<sup>66</sup> See “Press Releases: Remarks with EU High Representative Federica Mogherini After Their Meeting,” OfficialWire, January 21, 2015 at <http://www.officialwire.com/pr/press-releases-remarks-with-eu-high-representative-federica-mogherini-after-their-meeting/>.

<sup>67</sup> Discussions with EU member state diplomats, Sarajevo and Brussels, November 2014 – February 2015.

<sup>68</sup> Conversation with EU official, Sarajevo, 2008.