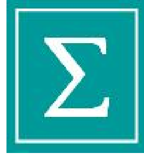

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MONTENEGRO

PUBLIC SERVICE AND THE ADMINISTRATIVE FRAMEWORK

ASSESSMENT JUNE 2007

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Introduction

This report updates portions of the June 2006 Sigma report on the State Union of Serbia and Montenegro, but it now focuses exclusively on the new independent state, the Republic of Montenegro, that was established as a result of the referendum of 21 May 2006. Few changes have occurred since last year's report in terms of civil service reform, human resources management and fundamental laws on the public administration. Efforts now seem to be focused on drafting a new constitution.

A new constitution is under discussion in parliament. The Venice Commission of the Council of Europe, in its Opinion (No. 392/2006) of 7 December, had urged the approval of a new constitution, as required by the new independent status of the country. The Commission on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe also urged the adoption of a new constitution aligned with European principles (Doc. 11205 of 12 March 2007), as the Charter of the State Union of Serbia and Montenegro is no longer in force.

The draft constitution does not pay any particular attention to the civil service or public administration, as it has not changed the rather short references provided in the current 1992 Constitution. It would be a positive development to take this opportunity to include some principles in the Constitution concerning the public administration and civil service, in particular equal access to public employment based on merit through transparent and competitive procedures and impartiality as an obligation for the administration. Ethnic proportionality in the administration should not be a constitutional imperative, as all citizens are to be considered equal regardless of race, sex, religion, ethnic group or personal orientation.

1. Legal Status of Civil Servants

1.1 Does an appropriate legal basis exist, defining the status of civil servants in a way that is compatible with prevailing standards in EU Member States?

Constitution

The Constitution of 12 October 1992 contains some scattered provisions regarding the civil service. Article 41 prohibits policemen and judges from being members of political parties. Article 54 forbids employees of the state administration and the police from striking. Article 73 guarantees proportional representation of national and ethnic groups in the public services, authorities and local self-governments. Article 99 signals that state administration affairs are to be conducted by ministries and state administration authorities. Public officials must consciously and honestly perform their duties and are to be held responsible for their performance (article 13).

The constitutional model of civil service is very limited, as important tenets, which in many EU Member States are enshrined in constitutions, are absent from the Montenegrin model, such as impartiality and recruitment based on merit through competitive and transparent procedures.

Ordinary legislation

The main pieces of legislation regulating the civil service are the Law on Civil Servants and State Employees (LCSSE) of 26 April 2004 (in force since 1 October 2004, it superseded a civil service law of 1991) and the Law on Salaries of Civil Servants and State Employees of the same date (26 April 2004). Most secondary regulations have been enacted: on Internal Announcements to Filling Vacancies (3 December 2004); Method and Procedure for Appraisal of Probationary Work (18 March 2005); Rewards (31 March 2005); Performance Appraisal of Managers (28 April 2005); Professional Examination for Work (9 May 2005); Competence for Performance of Tasks (3 June 2005); Supplements to the Salary (15 April 2005); Allowances and other Income (15 April 2005). The Law on State Administration of 26 June 2003 also contains some provisions establishing the obligations of civil servants. For example, article 9 of the law prohibits civil servants from expressing political opinions while on duty.

Implementation

The implementation of this legislation has been patchy, uneven and somehow incoherent, especially concerning recruitment. The result is that the implementation of the law is not satisfactory, partly due to cumbersome or unclear regulations and partly due to simple non-application resulting from the absence of sanctions, since the central management facility – the Human Resources Management Authority (HRMA) – lacks monitoring capacities in practice, albeit not *de jure*. The merit system is not legally recognised and remains unimplemented.

A first review of the law was already carried out in 2004 and some amendments were introduced in May 2005. Further amendments will be necessary to improve the implementability of the law, e.g. regarding recruitment and promotion, to ensure that the guiding principles of equal access, merit and professionalism are truly respected. A new proposal containing amendments to the law has been announced by the EAR-sponsored project PARIM-CB, to be launched in May 2007 to respond to the request of the Ministry of Interior and Public Administration, which is now (since January 2007) the parent ministry to HRMA.

Scope of the Civil Service

The scope of the civil service, as defined in the Civil Service Law, is problematic and confusing in its regulation, as provided by articles 2, 3 and 4. Article 2 defines a civil servant as synonymous to a state employee by indicating that "a civil servant, i.e. a state employee, is a person employed in a state authority". This article goes on by saying that a "civil servant is a head of state authority and a person that has been employed by appointment". The law feels the need to make the precision that "a civil servant is not a member of parliament or a person elected or appointed by parliament". Article 3 of the law makes a functional definition of a civil servant by saying that "a civil servant performs administrative, professional and other affairs for the realisation of competences of the state authority", whereas a state employee performs "administrative, accounting –financial and ancillary—technical affairs…of a state authority". Finally, article 4 states that general labour regulations, with regard to rights, obligations and responsibilities, that are not otherwise regulated by this law or other regulations, are to apply to civil servants, i.e. state employees.

These articles do not distinguish clearly between civil servants and other state employees, except somehow in terms of the tasks respectively assigned to them by article 3. However, even this distinction of functions, which could be clear from the wording of article 3, is blurred in article 2, leading to a situation where only those responsible for a state authority are civil servants, while the remaining public employees are not. The picture is further confused by article 4, as labour law applies to both of them on a supplementary basis. Finally, it seems that by now both groups have been equalised in practice by giving them the same rights and obligations, therefore making rather useless the legal differentiation between civil servants and public employees.

The definition of the civil service is further blurred by article 2 of the Law on Conflict of Interest of 2004, which uses the term state official (functionary) to define its scope. State official is referred to as those either directly elected in political elections or appointed by parliament, by the government or by municipal councils. This regulation raises doubts as to whether it applies to civil servants, as they are "employed by appointment, i.e. nomination in a state authority" (article 2 of the Civil Service Law).

The Civil Service Law does not apply to municipal employees, except "where relevant" [sic], which breaks the logic of a civil servant being a holder of public powers.

The scope of the Civil Service Law formally includes all of the non-judicial staff in court offices and the police, although in practice the latter are regulated by specific statutes.

It is quite surprising that financial and accounting responsibilities are seemingly entrusted to public employees and not to civil servants by article 3, while financial and accounting responsibilities have an undeniably strong civil service-public authority dimension, particularly when it comes to internal financial control functions.

The evolution of the distribution of public employment in numerical terms is provided in Table 1.

Table 1. Changes in Public Employment in Montenegro, 2002-05

	2002	2003	2004	2005
Education	12,272	11,914	11,746	11,872
Police & Prisons	7,846 `	7,191	7,063	7,116
Defense	7,080	6,860	6,164	3,830
Other Functions	7,111	6,592	6,713	6,739
Subtotal	**34,309**	**32,557**	**31,686**	**29,557**
Health		8,341	8,524	8,656
TOTAL	**34,309**	**40,898**	**40,210**	**38,213**

Source: Montenegrin Ministry of Finance[1].

Other sources suggest the figure of 10,000 in March 2007 for the "state bureaucracy", while the total public employment would be around 30,000, excluding local self-governments and health care. PARIM-CP[2] has noticed a recent tendency towards new hiring after independence, partially explained as a consequence of independence but also due to EU integration needs. An inefficient allocation and redistribution of public human resources is also suggested in this respect. Given the unclear staffing figures, the conclusion is that Montenegro has between 7,000 and 10,000 staff in the civil service (other functions in the table), covered by the Civil Service Law, and that the total public employment is about 30,000 in wider public services, including education and excluding health care. Public wage costs in Montenegro were about 13.4% of GDP in 2005, compared with a 10.4% average for EU-25. These expenditures are concentrated (87%) in defence, police, education and health care. All other institutions operate with the remaining 13% (World Bank).

A better legal definition of the scope of the civil service would help to clearly establish the rights and obligations as well as the accountability and liability of civil servants, even if some special complementary regulations for the police, border guards, prison wardens, and so forth may be needed. However, other state or public employees should be either fully regulated by labour law or considered as civil servants. This would reduce the confusion and legal uncertainty that appears in the Civil Service Law, which regulates both groups together and nearly identically, while awarding them different legal statuses. Those employees in municipalities holding public authority powers should be legally considered as civil servants.

2. Professionalism of the Civil Service

2.1 Are civil servants' recruitment, rights and obligations defined, regulated and enforced in such a way as to ensure their commitment to constitutional and public law values, such as legality, impartiality, political neutrality and integrity?

Recruitment and Promotion

Article 16 of the Civil Service Law establishes the general requirements to enter the civil service, which is configured as mainly a position-based system (article 17). The law (article 8) also establishes the principle of equal access to the civil service, but it does not mention a commitment to merit-based selection. This

[1] As published by the World Bank: Report No. 36533: *Republic of Montenegro: Public Expenditure and Institutional Review*, Volume I, page 20, released on 3 November 2006.

[2] PARIM-CB stands for an EU-funded project on Public Administration Reform in Montenegro-Capacity Building. See PARIM-CB, *First Survey on Human Resources Management Practice in the Organs of the State Administration*, March 2007.

lacuna, together with recruitment procedures that are not really competitive and an ample discretionary leeway given to managers in deciding upon recruitment, results in a civil service system and public employment that are not based on merit. This recruitment system does not guarantee professionalism in public employment.

Recruitment is to be made through public announcement "in accordance with the general labour legislation" and carried out through a procedure of qualification assessments (examination as stated in article 41), aimed at progressively reducing the number of candidates (article 23). It is to be stressed that "public announcement" is not equal to competitive, merit-based recruitment. It has to be said that article 41 of the Civil Service Law allows for an exceptional waiver of the test. The appraisal of this exception is discretionary, which has led to abusing this exceptionality legal clause to the point of almost turning the exception into the general rule. Neither in formal legal terms nor in practice is the recruitment scheme sufficiently transparent and merit-based. Moreover, it seems that terms of reference for recruitment are often tailor-made to fit the desired candidate.

HRMA is responsible for managing the recruitment procedure if a public vacancy announcement is necessary. HRMA prepares a shortlist of candidates, which is submitted to the head of the recruiting body. The shortlist is essentially the list resulting from checking whether or not applicants meet the general recruitment conditions established in the announcement and that have passed a written test, as those in the shortlist shall, as a general rule, undergo a written test (see below). The final decision on recruitment/appointment remains with the head of the recruiting body. He/she may appoint anyone on the shortlist and has only to give a reason for the decision if all shortlisted candidates are rejected.

The content and procedures of the test for recruitment are regulated by a government decree of May 2005 (20/05). The decree concentrates on testing the candidate's knowledge, thus repeating to a large extent the university examinations, while completely neglecting the checking of aptitudes and skills that are necessary to professionally and efficiently perform a post in the public administration. Likewise, the decree does not give enough importance to civil service values, such as service orientation, responsiveness, and absence of any conflict of interest.

The entry tests need to be reviewed. The score obtained in the test can only be "apt" or "not apt", without any further scoring specification or ranking. The test is inefficient, as very rarely does someone not pass it. The test could be considered as a mere routine formality. As the superior can choose freely amongst those candidates who passed the test, too large a number of candidates passing coupled with a non-ranking system easily lead to nepotism and politically motivated appointments. In fact it is very difficult to be recruited or promoted without having personal or political connections with those in the ruling party. As the current party has been in power for some 17 years now, a strong patronage web has developed, which dominates any recruitment and promotion processes in the state administration.

There is a complaints procedure foreseen for those candidates who are discontent with the results of the recruitment procedure. Very few complaints are registered (some five each year), which may show either good quality recruitment (which is unlikely) or more probably a generalised lack of trust in the system.

A probationary period is not required on a general basis. Internal rulebooks may establish a probationary period as well as its duration (article 28). The probationary period will end by a performance appraisal of the incumbent (article 29) which, if negative, leads to the termination of the civil service relationship. This regulation of the probationary period is problematic as it undermines the principle of "equal access" established in article 8 because if undergoing a probationary period depends on internal institutional rulebooks, the conditions of access to a public employment position vary depending on the institution where the position is located. The Civil Service Law, not internal regulations, should establish homogeneous rules on probation for all those entering the civil service or state employment. Findings by PARIM-CB reveal that only 11% of the institutions impose probationary periods on all of their recruits, while 70% of the institutions never do it and 19% impose it sometimes for some positions. Some organisations (e.g. Customs or the Procurement Directorate) prefer using short-term contracts as a substitute for probation.

Recruitment is for an indefinite duration, except concerning those appointed for management positions (assistant minister, secretary to a minister, head of an administrative authority and head of service, as stated in article 9 of the Law on Salaries), whose appointment is for five years. However, managerial staff can be reappointed indefinitely for renewed five-year periods (article 34). Managerial staff (arts. 31-35) are appointed and released by the government on the basis of a proposal by the head of the state administration authority (art. 34). The requirements for appointment of managerial staff are a university degree, five years' work experience and successful completion of the professional examination. As these requirements are rather limited, they allow wide interpretation and arbitrary decisions and in practice the merit principle is not observed.

Recruitment procedures are very lengthy and cumbersome as they are made post-by-post and there may be various stages of testing. Some 800 posts were announced in 2006. As the forecasting of personnel needs is generally not undertaken, recruitment procedures are carried out for each individual vacancy, which absorbs a considerable amount of HRMA's time as well as that of the HRM units (known as "contact persons", who are different for different human resource management matters) in the administrative authorities. There seems to be little balance between the costly recruitment procedures and the results of the procedures, given the fact that the head of an institution may select anyone from the shortlist.

Promotion is theoretically based on performance appraisal (articles 84 and ff.), but no competitive merit-based mechanism for promotion is established in the Civil Service Law. With regard to promotion to non-managerial positions, the law gives priority to internal announcement and transfer (article 18). Only if no internal candidate can be appointed will a public vacancy announcement be issued. As concerns managerial positions (secretary to the ministry, assistant minister, etc. – art. 31), a public vacancy announcement is obligatory.

It could be argued that in a small state-small society situation, such as the Montenegrin one, patronage and nepotism are unavoidable ways of life. One could certainly argue that small states need to adapt the basic democratic principles of public institutions, such as a merit-based civil service, to the realities of smallness by modelling those principles accordingly, especially when it comes to securing the efficiency of the public sector. However, in small states, transparent and fair decision-making processes, including in personnel matters, are as essential conditions as in larger states for ensuring efficiency gains –and trust – in the public sector. Internationally[3] there is an increasing recognition of the central importance of good governance and capacity development in enhancing overall competitiveness and an awareness that small states are more vulnerable to bad governance, political instability and corruption than larger states. Small states should give a reinforced priority to good governance as a matter of survival by soundly securing badly needed public sector efficiency.

The merit system in recruitment is neither recognised in legislation nor applied in practice, although formalities seem to window-dress a public competition scheme. Patronage networks, clientelism and politicisation dominate recruitment and promotion practices.

Minorities and Gender Equality Issues in Recruitment

As indicated above, the current legal framework stipulates equal access to jobs in the public administration. It also stipulates that HRMA, when administering selection procedures for the civil service, is to take into account proportionally the ethnic composition of the Montenegrin State (article 48 of the Law on State Administration). Some specific programmes to foster the integration of minorities in

[3] See "Toward an Outward-Oriented Development Strategy for Small States: Issues, Opportunities and Resilience Building. A Review of the Small States Agenda Proposed in the Commonwealth/World Bank Joint Task Force Report of April 2000", by Lino Briguglio, Bishnodat Persaud and Richard Stern. This paper was presented to the 2006 Small States Forum, World Bank Group/International Monetary Fund, Singapore, September 2006.

municipal administration have been implemented. According to PARIM-CB, it is impossible to evaluate how this provision is implemented. Recruitment processes, as currently regulated, take in fact no official notice of the candidate's ethno-national community, and there are no official mechanisms to ensure that representatives of any particular community are included on the lists of those eligible for appointment. While it is possible for minority candidates to have been favoured occasionally, no straightforward mechanism is available[4].

Apart from Montenegrins (44%), Montenegro has rather large Serbian (32%), Muslim Serb (4%), Bosniac (8%), Albanian (5%) and Roma (3%) minorities[5]. Overall, complaints by minorities of alleged discrimination or claims to further support integration into the public sector workforce seem to be rare. Judicial review of such complaints is foreseen by law.

Gender issues do not seem to be on the forefront of the agenda in Montenegro. At first sight it seems that far more women are in top management positions than in pre-2004 EU Member States. Findings by PARIM-CB suggest that management positions were occupied mostly by women in 28% of the institutions that they reviewed (in 13% of the institutions women constituted 100% of the management). In non-management positions 81% of the staff are women. The police (5170-strong) show an unbalanced proportion of men (93%).

According to the National Commitments Follow-up Commission of the Parliamentary Assembly of the Council of Europe (Doc. 11207 of 29 March 2007), Montenegro does not have comprehensive and general legislation on non-discrimination that reproduces domestically article 14 of the European Convention of Human Rights, although relevant provisions are dispersed throughout several laws and regulations.

Classification of the Civil Service

The 2004 Civil Service Law distinguishes the civil servant and the public employee by the work to be performed (art. 3). The classification also differs, although in either case it is based on a combination of required education diplomas and number of years' experience. The classification of civil servants, contained in article 38, comprises three categories. The classification of public employees, provided in article 40, comprises five categories. All of these classifications have to be reflected in the rulebook.

The existing systematisation of staff positions was never really centrally monitored when it was introduced. The Human Resources Management Authority (HRMA) does not have enough capacity to evaluate whether the classification of individual positions is justified and whether a given job description reflects real job content. Comparisons of classifications across institutions with regard to the job content, aimed at ensuring the consistency of classifications, have not taken place; HRMA can hardly monitor the process and it serves more as a registration office. With regard to the co-ordination and monitoring of the classification, HRMA does not seem to be aware that its task is not limited to a comparison of the job description with the legal text but it should also include a verification of whether the job description reflects the job content.

Due to the recent merger of a number of ministries, HRMA now has to deal with a large number of new rulebooks (staffing plans, including classifications); this opportunity seems to be taken by HRMA to review the systematisation and classification of positions, with a view to unifying the classification across the civil service. In practice, however, the grading is adjusted to the incumbent rather than to the position in order to ensure better salary treatment for position-holders.

Finally, strategic planning and personnel forecasting are not well developed and the current system reduces the ability of the administration to quickly adapt staffing levels to government priorities and to

[4] See the above-cited survey of PARIM-CB.

[5] These percentages are an elaboration by the GDM (*Groupement pour les Droits des Minorités*) based on data of the 2003 census carried out by the Statistics Office of the Republic of Montenegro.

implement reforms in a timely manner. The requirement to submit a new rulebook whenever the content of a given position is changed or a position is transferred to a different sector of the institution in practice implies a rather lengthy procedure.

Rights and Obligations, especially those preserving constitutional and public law values

Article 5 of the Civil Service Law imposes the obligation of political neutrality, impartiality and serving the public interest. The principles of legality and personal liability are established in article 6 and the obligation to abide by the ethical and conflict-of-interest rules is imposed by articles 6 and 49. However, in practice, the well-entrenched patronage system that exists in the country affects all public administration layers and undermines all efforts geared towards introducing these values in the public service.

The right to refuse illegal instructions and orders is recognised in articles10 and 46. The law gives the right to ask for a written order if the order given orally might imply an illicit action; a civil servant or public employee may only refuse the order if performance of the task would represent a criminal act (art. 46). This regulation and the possibility to appeal decisions and have a judicial review represent certain safeguards against arbitrary decisions. However, since in practice the civil service is rather politicised and these safeguards are not totally operational, they may not have too much of an impact.

Conflict of interest is regulated by the June 2004 Law on Conflict of Interest and by the Civil Service Law. The Law on Conflict of Interest includes rules on the disclosure of assets. It was adopted in 2004 and considerably amended in March 2005. The law covers elected and appointed persons (under the generic denomination of public officials or functionaries, a group totalling 1737 individuals, according to the Commission on Prevention of Conflict of Interest), and thus includes management staff, as defined in article 31 of the Civil Service Law. These two laws have different and unclear delimitations of their scopes, causing confusion and affecting negatively their application, mainly because the legal differentiation between civil servants and public officials and public employees is unclear and open to interpretation. The Civil Service Law regulates (art. 49) conflict of interest in a rather general way and is not implemented in an equal manner across the administration. The law does not contain clear rules on incompatibilities for civil servants. In addition, the 2004 Law on Conflict of Interest further increases the confusion by regulating together state officials (functionaries) and certain civil servants, but not others. Different pieces of legislation should apply to politicians (state officials) and to civil servants, as these two groups represent different realities.

Records on conflict of interest declarations of public officials are available online at www.konfliktinteresa.cg.yu and are to be updated yearly or whenever an asset variation over €2000 occurs. According to the Commission on Prevention of Conflict of Interest, this obligation is generally met by those who are obliged to do so, although a political party seems to be rebelling against this obligation. The law contains quite lenient sanctions for those who do not comply with the legal requirements in matters of incompatibility.

GRECO[6] recommended enlarging the scope of the Law on Conflict of Interest to fully cover all civil servants and to include the banning of any profits gained from their participation in management boards of public enterprises. This is a big loophole in the current law, which only forbids membership in boards of commercial entities and does not include public enterprises, which pay their board members generously, especially the Health Care Fund, the Development Fund, and the Unemployment Agency, among others.

The recommendation to encompass civil servants and politicians within the same regulation is perhaps ill-advised, because regulations on conflict of interest should be distinct and different for politicians and for civil servants. As indicated above, politicians and civil servants represent different domains and realities in public life, and their respective personal conflict of interest situations may bear very different

[6] Report adopted by GRECO in its 30th Plenary Session on 9-13 October 2006 [GRECO Eval I-II Rep (2005)4F]

consequences for the public interest. Likewise, the mechanisms designed to account for non-compliance should also be different (e.g. a civil servant should not be scrutinised by a parliamentary commission, whereas an MP or a government member should be). Conflict of interest involving civil servants should be regulated in the Civil Service Law, because the avoidance of conflict-of-interest situations should be one of the obligations imposed by the civil service status and enforced through disciplinary action and administrative judicial review.

GRECO also recommended limiting the politicisation of the Commission for the Prevention of Conflict of Interest, which was set up in September 2004. The Commission consists of five members, including the President, who has a full-time remunerated position. The members of the Commission are politicians appointed by parliament and reporting to it. GRECO also recommended strengthening the protection of whistleblowers or "alert-givers" who denounce corruption cases. The Commission has a secretariat of six staff. In 2006 the Commission adopted 46 first-instance decisions (as compared to 13 in 2004 and 11 in 2005), declaring that as many public officials had incurred conflict of interest, and it sent four cases to the prosecutor. No final decision on these cases has yet been made public.

The Commission is not empowered to impose fines or other sanctions. It can only propose the removal of a public official, a measure that is problematic when it comes to elected officials who have, by definition, the legitimacy awarded to them by the electorate. In 2006 the Commission made 52 recommendations proposing the removal of public officials. Only one municipal councillor was effectively removed.

Corruption is said to be a widespread phenomenon in the whole country, especially in high spheres. Corruption, albeit existing, seems to be less widespread regarding civil servants and public employees. The Anticorruption Initiative, an independent body reporting to the Ministry of Finance, considers that corruption is a real problem in the judiciary, in local government (especially concerning licensing activities), health care services, tax inspectorate (where a rotation scheme is envisaged to be introduced), and police, as well as in activities such as public procurement, public-private partnerships and privatisation. The media tend to be sensationalist on corruption-related issues. Disciplinary sanctions for corruption are rarely used. However, according to many, a discrepancy can be observed between the visible standard of living of some civil servants and public officials and the publicised salary levels in the civil service. There is also an opaque salary supplement structure that allows for considerable perquisites and take-home-pay increases, which could explain such discrepancies.

There may not be a short-term solution to this problem, as public servants' salaries are extremely low and public decision-making procedures and mechanisms are opaque (some privatisation dossiers have been labelled "state secret" in order to prevent scrutiny, e.g. the *Kombinat Aluminijuma Podgorica*, a state-owned aluminium company. In addition, the fact that the underground economy is estimated to constitute 30% of the whole economy does not help to combat corruption.

A report on Montenegro, issued by the U.S. State Department on 6 March 2007 but referring to 2006, states that: "There was a widespread perception of government corruption, particularly in the executive and judicial branches. On July 28, the government adopted an action plan against corruption. There were widespread allegations of corruption affecting the privatization of industry. Observers noted that a lack of transparency prevented citizens from judging the validity of those allegations; an August 15 court order to make the contracts privatizing the largest state-owned industries publicly available was not fully implemented by the end of the year. Conflict of interest legislation requiring the disclosure of the salaries and property of state officials, including members of the Assembly, was not fully implemented, and many officials refused to comply. There was no legal penalty for noncompliance"[7].

The existing legal framework provides for social rights and fundamental freedoms of civil servants. Restrictions stated in the current legislation are basically similar to those in EU Member States. Neither the right to strike nor the obligation to ensure essential services is mentioned in the Civil Service Law,

[7] at http://www.state.gov/g/drl/rls/hrrpt/2006/81373.htm

which refers this issue to the General Labour Law (art. 15). However, the 1992 Constitution forbids civil servants from striking, as indicated above.

The Civil Service Law regulates the accountability of civil servants and state employees. However, implementation of this accountability principle is rather limited as still hardly any responsibility is delegated to the staff, i.e. the minister signs nearly everything and often takes responsibility for routine decisions. As civil servants generally are not empowered to take responsibility for their work, it may be some time before civil servants have the habit of feeling responsible and thinking in accountability terms. However, at least in some ministries the delegation of decision-making has started.

Disciplinary issues are regulated in a chapter on disciplinary liability (arts. 55-68) and in a specific chapter on material liability (arts. 69-75). Article 55 offers the possibility to regulate disciplinary liability for "certain civil servants" by law in a different way. As the Civil Service Law only applies to about 7,000 civil servants, this vague exception seems to be unnecessary, and at the same time it reduces transparency and legal certainty. In addition, the regulation of disciplinary liability in serious cases provides only two different sanctions, namely a fine of 20 to 30% or dismissal. This narrow band limits flexibility and restricts the possibilities to impose more proportional administrative penalties. A Code of Ethics for the civil service was adopted in December 2005.

Rights and obligations are too biased towards working discipline and are not sufficiently committed to public law values that are common in EU countries. Political corruption seems to be a problem, but it falls out of the scope of this assessment. Although corruption in the civil service exists, it is generally petty and uneven across the administration. The Civil Service Law regulates (art. 49) conflict of interest in a rather general way and is not implemented in an equal manner across the administration. The law does not contain clear rules on incompatibilities for civil servants.

2.2 Does the law fix the salary scheme and is the determination of individual pay transparent and predictable?

A Law on Salaries (LS) was passed in April 2004 and has been in force since January 2005. The law provides for 36 salary grades. The salary structure does not make any distinction in pay between public employees and civil servants with the same qualifications—even though the latter are assumed to bear higher levels of responsibility[8].

The highest positions covered by the LS (article 9) are the head of an administrative authority and service, the lowest an entry-level state employee. The compression ratio of the lowest to the highest salary is close to 1:6, with more than 36 salary grades fitting in between and with minimal difference between grades. This salary scheme has little motivating effect and does not help to retain staff (advancing from one grade to the next amounts to some €5, i.e. to a percentage of between 1.8 and 2.9 of the salary). As a consequence, state authorities tend to overgrade positions, thereby distorting any rationality that the system could have. As a result of overgrading, most positions are ranked at the upper end of their respective category, which reduces the employee's margin for promotion. This situation could contribute to explaining the relative high turnover of young employees in and out of the administration.

Salaries are determined by a coefficient system. The multipliers range from 1.55 for a junior state employee, 3.15 for a junior university graduate, 7.10 for an assistant minister to 8 for the head of a state authority. The multiplying base for 2007 is €52. Salary levels may vary considerably across the administration for similar jobs due to the use of special multipliers for certain groups, which are not always sufficiently justified.

[8] See World Bank Report 36533 cited above.

Generally speaking, salaries of staff in the public sector are low. The individual fixed part of the salary is determined by the basic salary for the position/grade and a seniority coefficient of 0.5% for each year of service up to 10 years; 0.75% for each year between 10 and 20 years; and 1% for each year over 20 years. In addition, there is a 13th month salary and a food supplement of €26 per month. Salaries are low and insufficient for a decent standard of living. For very senior and qualified civil servants (Grade I) the salary may range from €218 to €286 per month. For senior civil servants (Grade II) it may range from €208 to €239. For more junior civil servants (Grade III) it ranges from €163 to €200. For Grade IV the salary is from €81 to €151. Managerial staff, i.e. those in salary grades from 1 to 6 of article 9 of the LS or article 31 of the Law on Civil Service, may reach €416 per month.

According to article 13 of the LS, the variable portion is paid by the Ministry of Finance out of a fund amounting to up to 10% of the total fixed wage bill in the state administration for the previous year. For individual staff, this variable part amounts to up to one monthly average salary and is determined by the head of the relevant institution and should be based on a performance appraisal. The variable part of the salary was to be implemented for the first time in 2006, but the majority of state bodies did not complete the appraisal and did not require from the Ministry of Finance the payment of the variable element. In any case, the necessary resources were neither forecast nor provided in the 2006 budget, and the Ministry of Finance sent deterring signals about the unavailability of funds for the variable pay, even if some institutions did receive funds earmarked for performance-related pay. This did deter managers from completing the performance appraisal exercise.

An important change in the right direction that was implemented was the centralisation of the pay system, giving the Ministry of Finance the authority to issue payment decisions for the fixed part of the salary for each civil servant and employee. Previously, these decisions were issued by each ministry and other administrative bodies separately, which led to a highly opaque system and permitted a level of subjectivity in pay decisions[9]. This system, however, seems to have not yet been totally overcome, as unclear top-ups and other perquisites, some of them unregulated, are still paid to some officials[10]. Some examples of these perhaps unjustified top-ups, usually approved by the government, are: participation in legislative and other commissions, overtime, provision of housing, and ad hoc premiums in cash (10 to 50 %). Providing civil servants with apartments or cars is a country-specific feature, which blurs the levels of take-home pay and further distorts the remuneration system. In other respects the LS allows for a number of supplements, which are similar to those used in other European public services, such as severance pay, holiday pay, and death or family illness benefits.

The LS is being implemented as far as the fixed part, but not the variable part, of the salary is concerned. However, the law has still not been implemented by some of those public bodies that used to have a separate and higher salary scale than the general civil service. The transition rules of the new LS are very strict and do not allow for applying the principle of "acquired rights", i.e. freezing the existing higher salary levels at the current level in order to prevent demotivation and serious difficulties. As the new classification of positions is decentralised and is not really checked by HRMA regarding similar job content of equally classified positions, it may well happen that part of the salary reduction will once more be balanced out by a higher classification of the position. This solution would be to the detriment of a unified and professional civil service and would violate the principle of equal pay for equal work, in addition to other perverse consequences already described above.

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[9] World Bank, op.cit.

[10] The World Bank reports that "outside of the Law on Salaries the government continues to operate a policy of distributing apartments or housing to civil servants. Although official notices are posted on the distribution of some apartments, the criteria on which the decisions are made do not appear to be transparent to most civil servants. Nor is there any assurance that some apartments are not given away without public disclosure." World Bank, op.cit., page 45.

Salaries of management staff have considerably increased; while they are not comparable with the private sector, they have now reached a more or less acceptable level. Salaries of junior staff (university graduates) up to the level of independent advisor remain low for attracting and retaining highly qualified professionals. However, given the high unemployment in the country (about 16 %), the number of applications for vacancy announcements is considerable.

In conclusion, flaws in the salary system remain. The salary system has been only partially implemented and has not changed much regarding salary levels for new recruits with university degrees. Salaries for the top levels have increased considerably; however, these positions – despite open announcements – are usually filled by politically affiliated persons who do not always have the necessary qualifications for the positions. The salaries for non-managerial positions remain low, and the staff turnover remains high in junior positions.

2.3 Do sufficient and reasonable mechanisms (basically mobility, training, and motivation) exist for good performance and career development within the civil service so as to make it attractive?

Performance appraisal is regulated by articles 79 to 83 of the Civil Service Law and by specific regulations on the appraisal of probationary work and on criteria for performance appraisal of management personnel. The Human Resources Management Authority (HRMA) prepared the appraisal form according to article 82 of the Civil Service Law for regular performance appraisal; the first performance appraisal using this form was due in February 2006. Training to carry out the appraisal was provided in the second half of 2005. However, as indicated above, performance appraisal according to the new system has not yet been applied in all ministries and administrative bodies. The calculation is that 30% of institutions have carried out a performance appraisal. Performance evaluation of managers, i.e. those in salary grades from 1 to 6 of article 9 of the LS, has not been initiated.

According to the Civil Service Law there are four appraisal marks, namely excellent, good, satisfactory and unsatisfactory. There are only two appraisal marks, namely satisfactory and unsatisfactory, for management staff. Pecuniary and non-pecuniary rewards can be given for outstanding performance or distinguished achievements, in accordance with the Regulation on Types of Rewards and Procedures of their Award to a Civil Servant and a State Employee.

The decision to give a reward is to be taken by the head of the state institution or – for management staff – by the authority responsible for the nomination. As “outstanding” is neither defined in the respective regulation nor included as a mark in the appraisal system, the reward system can obviously be used very arbitrarily and may therefore not provide an incentive or be a motivating factor for staff.

Difficulties in designing and implementing the system for the first time have proven to be enormous. As indicated above, HRMA developed the performance assessment procedures and conducted training in each ministry. Procedures were also developed for the review of the assessments and an appeal mechanism was developed. However, one of the key challenges for the future will be to ensure the credibility of the system and the fairness of the ratings Performance appraisal has been carried out for two years now in some institutions, with unsatisfactory results. Now the system is being reviewed and it is intended to further unify the system and continue training in performance appraisal. It is envisaged to introduce performance-related pay (PRP) components later in 2007.

In view of the demonstrated fact in most OECD countries that performance-related pay has little motivating effect on civil servants and of the difficulties associated with the design and implementation of a sound, credible and transparent performance appraisal and performance-related pay scheme, it would be worth reconsidering the Montenegrin legal provisions imposing PRP for every civil servant and public

employee. It would perhaps be advisable to restrict the application of such a scheme to those in managerial positions, as most OECD and EU Member States[11] that introduced this instrument have done.

The law foresees that institutions are to be given a training budget to pay HRMA for participating in training activities. However, many institutions have no earmarked budget for training, while others do (Tax and Customs Administration, Supreme Audit Institution). Nevertheless, many institutions send staff to various training courses, which are often provided outside the country. These activities are mostly paid for out of the operational budget (i.e. from a rather surprising budget line item called "contractual liabilities" under general running costs). There are some indications that such training is used as a special perk or as a means of topping-up salaries.

However, systematic training is still not in place. Training remains mainly supply-driven as neither are sufficient staff allocated to this task in HRMA nor are sufficient funds for training earmarked in the national budget. In 2007, for the first time, the national budget foresees €320,000 for training civil servants and public employees.

Career development almost exclusively depends on the individual staff member, as it is not yet supported by HRMA or by the administration through specific training or mobility schemes. The civil service remains attractive, however, because of the high unemployment rate in the country, currently at approximately 16%[12].

No government training institution for civil servants exists, but HRMA includes a training department, staffed with three persons. A training strategy has been adopted. Two studies on training needs assessments have been carried out and some training modules exist on five topics: Legal, Finances, Public Relations, EU Integration and IT. Induction training material also exists and basic training in all of these areas is being carried out.

Training remains mainly supply-driven, giving priority to "international" topics and often neglecting systematic substantive training that would help the staff in properly applying the new substantive legislation. This trend is supported by the fact that TA projects usually do not allow the payment of civil servants, and this rule includes fees for the delivery of training. In the past this restriction has led to delivering to civil servants programmes for the training of trainers, but without providing any incentive for the civil servants to subsequently deliver training since the funds available from the budget are insufficient.

There are approximately 100 trainers. Of these, 36 are practitioners – civil servants who participated in training of trainers programmes. The remaining trainers are provided by universities, NGOs and other bodies. About 1000 public employees were trained in 2006.

Performance appraisal is not working well. Training is not systematic and is only now starting to be funded from domestic funds. The public service is attractive for starting one's working life, especially in a country where unemployment is at the rate of about 16%. Low salaries, politicisation and patronage make it not attractive as a medium to long-term professional choice.

[11] See OECD-GOV (2005), *Performance-Related Pay Policies for Government Employees*, OECD, Paris.

[12] Montenegrin Investment Promotion Agency (MIPA): "Invest in Montenegro 2007"

3. Management of the Civil Service

3.1 Are systems for personnel management and a cross-government structure established so as to ensure the application of homogeneous standards across the administration?

As called for by the Civil Service Law, a Human Resources Management Authority (HRMA) was set up in September 2004, reporting to the Ministry of Justice. At the end of 2006 HRMA was placed under the responsibility of the Ministry of the Interior, Administration and Self-Governments.

According to the systematisation, HRMA should have 25 staff; currently there are only 18 full-time staff, and no budget has been provided in the systematisation for the other positions. Since its creation, HRMA has relied to a large degree on CARDS projects for its operation. Most of the existing staff are young (some are trainees) and inexperienced.

According to the Civil Service Law (articles 115 to 118), the competences of HRMA include monitoring the implementation of the law, giving opinions on organisation and systematisation of state authorities, issuing vacancy announcements, maintaining the civil service registry, preparing training programmes and advising the government on HRM issues.

The creation of HRM units in institutions is underway. Persons dealing with personnel issues in ministries are referred to by HRMA as "contact persons". In 2007 better staffed HRM units exist only in larger ministries; smaller ministries and authorities have a single HRM contact point. Adequate human resources development systems are not yet in place, although considerable training is ongoing to put functioning human resources management systems in place.

The Civil Service Law has also introduced an Appeals Commission (articles 110 to 112), which was set up in February 2005. Its members are elected for four years and reappointment is not possible. The Commission consists of six members and a chairperson; one of the members must be a representative of the trade unions. A decision of the Commission may be appealed to the Administrative Court.

Staff registries and statistics exist, but for the time being they are neither complete nor fully reliable; they do not include all of the data necessary to support modern human resources management. One of the primary tasks attempted by HRMA was to create a human resources database to track all public employees and civil servants. That activity has been delayed. As soon as the registry is functional, there will be more data available on the staff in the civil service, which should improve the performance of HRMA.

HRMA lacks the capacity and skills to fulfil its role in promoting and monitoring the implementation of the Civil Service Law and ensuring homogeneous human resources management standards across the state administration. Human resources management skills in ministries are still rather limited. Although they are of uneven quality, by-laws and guidelines are in place, but their implementation varies widely and for the most part remains rather limited.

3.2 Are staff numbers and personnel costs controlled and published?

As in all countries of former Yugoslavia, strict rules for staffing are contained in the rulebooks. Rulebooks have to be prepared by each public body. In addition, Montenegro has staffing plans that reflect the actual funded positions in each institution. These staffing plans are part of the budget, which usually leads to a strict but formalistic budgetary control of staffing numbers and also facilitates a tight control of budget funds. However, it is difficult to know the overall staff numbers in state institutions, as no comprehensive

staff registry exists. It is also true that neither the Ministry of Finance nor HRMA has the capacity to evaluate whether the classification of individual positions is justified and whether a given job description reflects the real job content. As a consequence, the justification of personnel costs is a formalistic routine.

The main control exercised over staffing is through the new staffing plans, which facilitate the tight, control of budget funds, but do not guarantee that the funds are spent soundly, as neither the Ministry of Finance nor HRMA has the capacity to evaluate whether the classification of individual positions is justified and whether a given job description reflects the real job content.

3.3 Do staff representatives participate in decision-making and control concerning personnel management matters?

The Confederation of Trade Unions of Montenegro (CTUM) includes the civil service trade union and the judiciary trade union. It seems that unions in the private sector are weak, and that it is the unions in the public sector that are defending the purchasing power in the country. Trade unions have considerable influence on the public workforce. This influence, coupled with the political and economic situation, has made it difficult to implement certain conditionalities set by the IFIs, e.g. staff and pay cuts. Nevertheless, a considerable reduction of staff and some reforms have been carried out in the defence and police sector. A specific EU-funded project is supporting the development of public sector trade unions.

Trade unions have no formal power whatsoever in the public sector as they were not included in the tripartite social dialogue between the government, the employers and the Confederation of Trade Unions of Montenegro (CTUM).

4. Legality and Accountability

4.1 Do administrative practices and the general legal administrative framework guarantee the principle of legality in administrative decision-making and are they sufficient and appropriate to guide civil servants and make them accountable for their performance?

The 1992 Constitution (article 4) establishes that the Republic of Montenegro is ruled by law. Everything is permitted if not expressly prohibited by law (article 13). Article 110, on the legality of individual enactments, prescribes that "the Court of law shall decide on the legality of particular enactments in an administrative suit, on the basis of which the state administration authorities and authorities with public authorisation are ruling on the rights and obligations, if for a certain matter no other judicial remedy has been prescribed. Exceptionally, in certain types of administrative matters, administrative suit may be dismissed by decree".

The ordinary legal administrative framework for the administration is made up basically of the following pieces of legislation: The Law on State Administration of 26 June 2003 regulates issues of organisation, manner of work and other issues related to the functioning of the state administration (*Official Gazette of the Republic of Montenegro* no. 38/2003). The Law on Inspection Control, also of 26 June 2003, regulates the status, responsibilities and authority of inspections in the performance of control (*Official Gazette* no. 39/2003). The Law on Administrative Disputes of 22 October 2003 regulates judicial control over administrative decisions of state administration authorities (*Official Gazette* no. 60/2003). An Administrative Court was created in 2005. The Law on General Administrative Procedure of 21 October 2003 regulates the relationship between the administration on the one hand and legal and physical entities

on the other, and the exercise of their rights and responsibilities in administrative matters (*Official Gazette* no. 60/2003).

A Law on Free Access to Information of Public Importance was passed in November 2005. The protection of personal data is still not regulated by special legislation but is generally guaranteed by article 31 of the Constitution: "Protection of secrecy of personal data shall be guaranteed. The use of personal data for purposes other than those for which they were compiled shall be prohibited. Everyone shall have the right of access to personal data concerning his own person and the right of judicial protection in case of their abuse".

A Law on the Ombudsman was adopted in July 2003, and the Ombudsman was elected by parliament in October 2003. The Ombudsman's term is for six years; he/she may be re-elected.

Administrative Procedures

The principal legislation is the Law on General Administrative Procedure of 2003, which is to be applied by state and municipal authorities when issuing decisions impinging upon rights, obligations and legal interests of any natural person or legal entity (article 1). One of the objectives of this law was to reduce the number of special procedures. Such an objective has not yet been attained.

The law is long, complex, excessively detailed and at times inconsistent, as it somehow confuses administrative procedures with judicial review proceedings, as can be inferred, for example, from article 99, an article that deals with keeping public order while an administrative procedure is ongoing. However, this confusion could be rooted in the old Austrian tradition that inspired the former Yugoslavian administrative law.

The principle of giving reasons is not among the general principles of the law set out in chapter I, but article 203-2 imposes the obligation of administrative bodies to motivate their decisions and actions by giving the factual and legal reasons on which their decisions are grounded. However, there are no legal consequences for not complying with this obligation; the lack of motivation of an administrative act is not considered (article 226) as a violation of the fundamental rules of the administrative procedure. Defective law-drafting is leading the Administrative Court to supplement legal loopholes by establishing a firm legal doctrine on motivating administrative acts and nullifying those decisions that do not comply with that obligation.

The Law on General Administrative Procedure takes on board modern computer technologies to ease the work of the administration, particularly in notifying an administrative resolution, which is a positive development. The law makes the personal notification to any interested party compulsory.

The law opts, in articles 37 and 39, for a notion of interested party in the procedure that is perhaps too narrow. Article 39 defines the interested party as a person interested in protecting his rights or legal interest. The notion of legal interest is too narrow because it means that in order to participate in a procedure the person has to show that a law protects his/her interest ("specify the nature of his interest in a petition"). The notion of interested party should be wider as it should include any natural person, legal entity or organisation declaring an interest in the matter, not necessarily a "legal interest" as article 39 requires. This would allow social organisations seeking to protect collective goods or rights (environment, human rights, wildlife, cultural heritage and so forth) to participate as an active party in any legal procedure. This would be more aligned with democratic values and with the tendency in EU Member States to enlarge and reinforce the possibilities of collective action by citizens. The Montenegrin law has opted to go in the opposite direction in order to prevent persons who do not have a legal interest in the procedure from partaking in it. The Montenegrin court jurisprudence is once more contributing to enlarging the legal notion of interested party, as whenever there is a doubt the Administrative Court tends to enlarge rather than restrict the notion of interested party.

An overhaul of the law to make it simpler and clearer would be useful for the users of the law and would help increase the transparency of administrative decision-making. At the same time, the law should be better aligned with European principles of administrative law.

Administrative Inspection

Administrative inspection is regulated by the Law on Inspection Control of 26 June 2003. The Administrative Inspection is responsible for controlling the legality of the administration fundamentally in a preventive manner (article 6). Nevertheless, inspectors can also impose fines (article 17) of up to 30% of the salary of a civil servant and can lodge court proceedings for criminal offences. Their decisions may be appealed before the minister (article 40). Inspectors have their own procedure, which is special with regard to the Law on General Administrative Procedure. They can act *ex officio* or at the request of any citizen. It is envisaged that the Administrative Inspection will co-ordinate all chief inspectorates as well as unify the internal procedures of administrative bodies so as to improve the transparency of the administration for the citizen. There are currently seven administrative inspectors.

Quality of Legislation

There is a Secretariat for Legislation, which is an independent body reporting to the Vice Prime Minister. Its main responsibility is to check the compliance of draft legislation with the Constitution and with the general legal order of the country. The poor quality of legislation is still a problem. The government seems to be aware of this problem and envisages introducing some remedies through external assistance projects, especially CARDS projects.

The quality of legislation is still poor as laws tend to be drafted in isolation and without reviewing the existing legal framework. This practice often leads to overlapping and contradictions and may result in confusing, unclear, redundant and internally inconsistent legislation. **Ex ante** ***impact assessment and cost-benefit analyses of the proposed legislation are rarely carried out.***

Judicial Review of Administrative Acts

Judicial control of administrative acts had been provided through the judicial review procedure before the Supreme Court. As a consequence of the adoption of the Law on Administrative Dispute of 21 October 2003, the Administrative Court was established on 1 January 2005. The Court inherited 840 unsolved cases from the Supreme Court, which constitutes a considerable backlog, and these are in the process of being cleared, but the backlog is ongoing as the number of new incoming cases is constantly on the rise. The Court has also competence in electoral disputes.

The Administrative Court started with three judges, but in September 2005 it had six judges; in March 2006 a seventh judge was recruited, and so the Court has now reached full staffing, with the President of the Court bringing the total to eight judges. In addition, the Court has four legal clerks who assist the judges in preparing the judgements. To shorten the time lapse between appeal and judgement, which currently averages one year, the Court has prepared a new systematisation. Given the backlog and the amount of newly arriving cases, the staff resources of the Court would need to be increased. As the Court – as well as most of the legislation on which it rules – is new, the judges still need training.

All administrative acts can be revised by the Court, including those of the central state administration and municipalities. However, the “acts of government” cannot be revised by the Court (article 220 of the Law on General Administrative Procedure). This overall exclusion of “acts of government” from the purview of the Court is becoming sub-standard with regard to many EU countries; although that exclusion was the

general rule in those countries some 50 years ago, government decisions nowadays are subjected more and more to judicial review.

The Administrative Court has full jurisdiction. It is the first and final instance in most cases. There are some cases for which an extraordinary legal remedy before the Supreme Court is possible, either on matters of procedure or substance. The Supreme Court has annulled only 15 rulings of the Administrative Court since the latter was established.

The Court has been building up its reputation, and it was reported that the administration in general complies readily with the Court's decisions. The Court has also worked on its visibility by giving a monthly press conference and on its accessibility by publishing its judgements as well as brochures for citizens. However, above all, the Court issued 3000 rulings in two years and 50% of them annulled administrative decisions. Most of the cases concerned customs, taxation, cadastre (property restitution issues), and free access to information, and 50% of the cases referred to local self-governments (licensing and authorisations).

However, even if the Administrative Court judges, according to its President, do not feel constrained in their independence, the independence of judges in general is not guaranteed, according to the Committee of Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (Doc.11205 of 12 March 2007). According to the Committee, the appointment of judges depends too much on parliamentary political bargaining.

Legal clerks with seven to eight years' experience earn approximately €250 per month. Judges earn considerably more since March 2006, when a new law on salaries was adopted for clerks in judicial offices and judges. Judges in the Administrative Court earn approximately €730 to €780 per month and the president of the Court approximately €830.

Access to Public Information[13]

The Law on Free Access to Information was adopted and came into effect in November 2005. The law gives any natural or legal person the right to access information held in any form by state and local authorities, public companies and other entities exercising public powers. Requests must be in writing, including via email. Bodies must make their decisions within eight days; this period can be extended another 15 days. In case of emergency, responses must be provided within 48 hours. There are exemptions for national security, defense or international relations; public security, commercial or other private or public economic benefits; economic monetary or foreign exchange policy; prevention and investigation of criminal matters; personal privacy and other personal rights; and internal negotiations. The interested party must be "significantly harmed" and the harm must be "considerably greater than the public interest in publishing such information". Information cannot be withheld if it relates to ignoring regulations, unauthorised use of public resources, misuse of power, criminal offenses and other related maladministration issues. Appeals for denials are to be made to the supervisory body of the agency. Appeals can then be made to a court.

Government bodies are also required to create and publish lists of types of information held, including public registers and records. The media ministry must publish a guide. There are sanctions for agencies and officials refusing access to information.

The law also includes a limited whistle-blower protection provision that limits sanctions on public employees who publicly reveal misuse or irregularities and who also inform the head of the agency or relevant investigatory agency.

There is no law on official secrets defining the nature of those secrets, which in practice means that everything may be marked as state secret. However, even if not precisely defined, the notion of official

[13] This section is partly drawn from http://www.freedominfo.org/countries/montenegro.htm.

secret is mentioned in article 51 of the Civil Service Law. This provision strongly emphasizes the public employees' obligation of confidentiality and secrecy for five years or more after leaving office. To disclose "official secrets" before a court, a civil servant needs to have the authorisation of his/her superior. Also, article 143 of the Law on General Administrative Procedure refers to state secrets as justifying a hearing behind closed doors rather than before the public.

The Agency for National Security has issued a decree on the classification of state secrets, but it is reported to have refused to release it. The Criminal Code prohibits the disclosure of official secrets and military secrets.(2) The Law on the Agency for National Security allows individuals to request their files but to date no files has been requested.

These regulations, especially the regulations contained in article 51 of the Civil Service Law and in the Criminal Code, foster a culture of secrecy, opaqueness and confidentiality which is inimical to the idea of transparency and free access to information. It is no surprise that public authorities tend to arbitrarily deny access to their documents and to obstruct that access as much as they can and that this matter concerns a considerable number of cases brought before the Administrative Court[14].

The Ministry of Culture and Media is in charge of implementation of these regulations and has conducted some training of officials, but the perception of NGOs is that there is little political will to implement the law. The Network for the Affirmation of the NGO Sector (MANS) has filed several hundred requests and reported that agencies had responded on time in around 50% of the cases.

The US State Department has indicated that "the constitution and law provide for public access to information. In practice access to public information was mixed. Some ministries were reluctant to implement the law fully and publicly criticized requests for information, but others were supportive. Authorities usually gave reasons for denials and denials could be appealed to the courts. While the courts usually supported access to the information, their orders to the ministries were often ambiguous and consequently ignored. Citizens could inspect secret files kept on them by the former State Security Service (SDB), the precursor of the NSA, from 1945 to 1989; since 2001, 327 requests were made for inspection of SDB files, of which 90 were approved. In approximately half of the other cases, authorities responded that no file had been created. Nine requests were filed with the current NSA in 2006; two were approved and seven rejected (in three cases the stated reason for denial was that no such file existed; no reason was given in four cases)"[15].

Human Rights and Freedoms Ombudsman

The Human Rights and Freedoms Ombudsman is an independent institution entrusted with protecting and promoting human rights and freedoms when these have been violated by means of an enactment, act or failure to act on the part of state authorities, local self-government authorities, public services and other holders of public powers. In addition to this function, the mission of the Ombudsman includes awareness-raising regarding the importance of the rule of law and consistent protection of human rights and freedoms and, in general terms, bringing about legal certainty, lawful and impartial work of the state authorities before which citizens exercise their rights, freedoms, duties and legal interests. The institution of the Human Rights and Freedoms Ombudsman was established by law on 10 July 2003. The Ombudsman should perform his/her duties on the basis of the Constitution and laws and adhere to the principles of justice and fairness in the course of his/her work.

According to the US State Department, "the office of the ombudsman operates without government or party interference and the government provided the office with adequate resources. The ombudsman was generally considered to be effective. Upon finding a violation of human rights or freedoms, the ombudsman may initiate disciplinary procedures or dismissal of the violator. Failure to comply with the

[14] See Calovic, Vanja and Milena Deletic (November 2006), "Right to Know", MANS, Podgorica, and the case study by the same authors, "Behind the Closed Door: Free Access to Privatisation Information", MANS, Podgorica, 2006.

[15] At http://www.state.gov/g/drl/rls/hrrpt/2006/81373.htm

ombudsman's request for access to official data, documents, or premises, or with the ombudsman's request to testify at a hearing, is punishable by fines of 10 to 20 times the minimum monthly wage - $660 to $1,320 (500 to 1,000 euros). No fines were imposed during the year, since essentially all of the ombudsman's requests were respected. In March the ombudsman's office released its second annual report to the Assembly. The greatest number of complaints was about delays in the courts, protection of labor rights, and the work of local governments; only a few complaints involved police misconduct. In general the government and the courts implemented the ombudsman's recommendations"[16]. However, this opinion on the ombudsman is not shared widely, as there are critics in the opposition who think that the ombudsman is rather partisan of the currently ruling party."

The World Bank proposes enhancing the budgetary independence of the Ombudsman by giving to a parliamentary committee the responsibility for determining the Ombudsman's budget allocation[17].

Administrative Organisation

The main piece of legislation dealing with the organisation of the central administration is the Law on State Administration of 26 June 2003. It establishes the criteria and principles upon which administrative activity is to be based. This law determines the competences of the state administration (article 11 and ff.) and establishes the principle that these competences have to be carried out by civil servants (article 47). The state administration authorities are the government, ministries and other administrative authorities or agencies. The law sets certain management requirements and liabilities for the state administration (articles 41 and ff.) and regulates certain rights of citizens to access data, documents and information of state administration authorities. It also provides instructions on how to deal with citizens' complaints (article 51 and ff. and 95-98) and to resolve conflict of competences among state authorities (articles 99-100) and ways and means of co-operation and co-ordination among these authorities. Many provisions of this law overlap provisions already contained in other laws, which places legal certainty at risk.

The territorial organisation of the state is based on municipalities (article 8 of the 1992 Constitution). Article 66 of the Constitution guarantees local autonomy: "The right to a local self-government shall be guaranteed. Local self-government shall be exercised in the municipality and in the capital. Citizens shall decide through local self-government directly and through their freely elected representatives on certain public and other affairs of direct interest for the local population. Local self-government in the municipality shall consist of the assembly and of the president of the municipality. The Republic shall offer assistance to the local self-government." However, according to the Council of Europe's Parliamentary Assembly Commission following up Montenegrin commitments (Doc. 11207 of 289 March 2007), "the existing legislation on local autonomy is not aligned with the European Charter of Local Autonomy"; Montenegro has not yet ratified this charter.

Montenegro has 21 municipalities; the municipality of Podgorica has the statute of administrative capital city and the municipality of Cetinje that of historical or "royal" capital. All municipalities are organised according to the same principles and organs, with a council and mayor, have the same competences in terms of local public services and are under the tutelage and control of the state government. The municipalities are syndicated in the Montenegrin Municipal Union.

[16] At http://www.state.gov/g/drl/rls/hrrpt/2006/81373.htm

[17] World Bank, op. cit., page 50

Recommendations

1. The Civil Service Law and the respective by-laws should be reviewed and amended, with remaining flaws eliminated and implementability of the legislation improved, so as to introduce a full-fledged, merit-based civil service. The legislation should also establish a clear differentiation between civil servants and public employees.

2. The management capacity of the Human Resources Management Authority (HRMA) should be strengthened.

3. The ongoing constitutional reform should provide an opportunity to constitutionalise certain fundamental principles of the civil service and public administration, especially the merit system and impartiality or political neutrality.

4. The salary levels of non-managerial positions need to be reviewed and raised to an adequate level.

5. Job classifications should be reviewed, as job contents have not been compared across the various administrative bodies when reclassifying positions, which has most likely contributed to the persistence of salary differences for the same type of work.

6. Performance appraisal should be developed in practice, but the implementation of performance-related pay should be put on hold.

7. Structures and staffing of ministries and agencies should be reviewed to ensure that tasks are not duplicated and that they are carried out in a professional and efficient way.

8. Systematic in-service training should be pursued. In particular, the curriculum for the administrative examination should be reviewed and adapted to public administration reform requirements.

9. The Law on General Administrative Procedure needs to be simplified and adapted to general European standards. This exercise should be coupled with the review of special administrative procedures and either their abrogation or reduction to an absolute minimum number.

10. Conflict of interest and incompatibilities for civil servants need to be better and specifically regulated in the Civil Service Law and separated from the regulations for politicians.

11. Administrative openness and transparency should be improved by facilitating access to public information. Transparency should be the rule, and confidentiality and secrecy the exceptions.

12. Strengthening the Secretariat for Legislation would help foster the production of better quality legislation, especially administrative legislation.