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PUBLIC SERVICE

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Introduction

This report updates the June 2007 Sigma assessment report on the public service and administrative law framework in Montenegro. Except for the adoption of a new constitution, 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.

A new constitution was passed by parliament on 19 October 2007. The Venice Commission of the Council of Europe, while considering that the constitution deserved "a generally positive assessment", regretted that it "[did] not contain any indication as to the status of civil servants"¹.

It is true that the new constitution does not pay much attention to the civil service or the public administration. It would have been a positive development to include some principles concerning the public administration and the civil service, in particular equal access to public employment based on merit through transparent, competitive procedures and the obligation of impartiality for civil servants.

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 2007 Constitution contains some scattered and indirect provisions that could be understood as referring to the civil service. Article 17 states that all persons "shall be deemed equal before the law, regardless of any particularity or personal feature", which could indirectly be interpreted as establishing the right of equal access to public office. Article 24 foresees the possibility of the law restricting the constitutional rights granted to citizens, which could be indirectly interpreted as grounds for limiting the involvement of civil servants in political or economic activities that are normally permitted to other citizens. Unionisation and professional association rights are recognised in article 53. Article 54 prohibits membership in a political party for policemen, judges and other officials. Article 66 forbids employees of the state administration and the police from striking, a ban for the entire body of civil servants and public employees which is unjustified; there is a need to recognise exceptions. Article 79-10 guarantees proportional representation of national and ethnic groups in the public service, administrative authorities and local self-governments, a provision which somehow seems to contradict article 17 on equality before the law. Article 111 signals that the affairs of the state administration are to be conducted by ministries and other administrative authorities. The Constitution does not make a difference between civil servants and other public employees.

However, some references contained in the 1992 Constitution have regrettably disappeared from the 2007 Constitution, such as the obligation of public officials to perform their duties conscientiously and honestly

¹ Venice Commission, Opinion No. 392/2006: CDL-AD(2007)047 of 20 December 2007 (www.venice.coe.int).

and their responsibility for their performance. As a result of the limited concern of the constitution drafters for the civil service and the public administration, the constitutional model of civil service is incomplete, as important tenets enshrined in the constitutions of many EU Member States are absent from the Montenegrin Constitution, such as the duty of impartiality and the obligation of public authorities to carry out merit-based recruitment 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), as amended in 2007 to increase the salaries².

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.

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

² Law on Amendments and Additions to the Law on Salaries of Civil Servants and State Employees [OG 17/07 of 31 December 2007].

undeniably strong civil service - public authority dimension, particularly when it comes to internal financial control functions.

Regarding the number of public employees, the 2007 state budget contained 29,515 job positions. If healthcare (which some sources calculate to be more than 8,500-strong), education (11,739), police (5,360), defence (3,330), the judiciary (1,444) and local governments were excluded, the state civil service in ministries and other public agencies would be approximately 7,600-strong.

Implementation

The implementation of the civil service legislation has been patchy, uneven and somehow incoherent, especially concerning recruitment. The result is that the implementation of the law is unsatisfactory, 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 was announced in 2007 to respond to the request of the Ministry of Interior and Public Administration, which since January 2007 is the parent ministry to HRMA.

Allocation of Staff

The allocation of staff across institutions is surprising if compared with publicly-stated government priority policies. The data provided by the Central Registry of Public Employees of the HRMA show an average of 20% vacant positions in key reform areas. Figures are surprisingly even higher in institutions expressly created to support strategic reform areas, such as international/European relations or public administration reform. Thus the Ministry of Foreign Affairs has 75% of positions vacant, and the Secretariat for European Integration or the Secretariat for Legislation 45%. Key institutions for economic reform and public financial management and control are understaffed: the Supreme Audit Institution has 65% unoccupied vacancies and the Ministry of Finance over 30%.

Other important institutions that are supposed to drive the reform processes are also clearly understaffed. Thus the HRMA has 22 posts, but only 70% are currently occupied. The Commission for Determination of Conflict of Interest has budgeted for eight posts, but 50% are vacant. The Agency for Anti-Corruption Initiative has 10 job positions, but 60% are vacant, while the entire Ministry for Human and Minority Rights Protection has 11 posts, 65% of which are vacant.

These figures show the limited credibility of certain policies that have been publicly presented as a priority, perhaps under pressure from international donors, but have not been fully internalised by the domestic political elites. They also reveal the bad practice of creating institutions that are almost empty shells. Without adequate human resources, there is no possibility of implementing any policy, and less so in priority reform areas.

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. Figures show a mismatch between publicly declared priority areas and the human resources allotted to them.

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

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 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-CB³ 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. 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

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.

Brief Reflection on the Merit System and Small States

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. Internationally⁴ 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.

In 2007 we concluded that 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.

In 2008 most recruitment and promotion processes remain the same. Some minor legislative changes are planned to modify previous requirements to participation in recruitment procedures to some posts (decreasing years of experience required to allow younger people to participate). HRMA has also included minor aspects related to examinations, where a database has been created on multiple choice questions,

³ PARIM-CB stands for an EU-funded project on Public Administration Reform in Montenegro – Capacity-Building. See PARIM-CB (March 2007), First Survey on Human Resources Management Practice in the Organs of the State Administration.

⁴ See Briguglio, Lino, Bishnodat Persaud and Richard Stern (2006), "[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](#)", presented to the 2006 Small States Forum, World Bank Group/International Monetary Fund, Singapore, September 2006.

which are published on the internet to help candidates to prepare the exams. HRMA also claims that there is a higher percentage of posts published but fewer candidates.

Minorities and Gender Equality in Recruitment

The 2007 Constitution prevents direct or indirect discrimination on any grounds, but allows for affirmative action (article 8). The principle of equality is also recognised (article 17), and specific provisions are established on gender equality (article 18) and on the right of minorities to proportionate representation in public services, state authorities and local self-government bodies (article 79-10).

The legal framework 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 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 available⁵.

Apart from Montenegrins (44%), Montenegro has rather large Serbian (32%), Muslim Serb (4%), Bosniac (8%), Albanian (5%) and Roma (3%) minorities⁶. 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 political 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 (5,360-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 yet 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.

HRMA is keen 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. 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. However, improvements to the Central Register of Public Employees are expected, which could provide the better qualitative information that is necessary to improve civil service management.

⁵ See the above-cited survey of PARIM-CB.

⁶ 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.

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 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 and unnecessarily cumbersome procedure.

Rights and Obligations, especially those preserving constitutional and public law values: Assessment of the Protection of Integrity.

General obligations

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 effectively introducing these values in the public service.

The existing legal framework provides for the 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, which refers this issue to the General Labour Law (art. 15). However, the 2007 Constitution forbids civil servants from striking, as indicated above.

Refusing compliance with illegal instructions

The right to refuse illegal instructions and orders is recognised in articles 10 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, the possibility to appeal decisions, and 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

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 EUR 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.

GRECO⁷ 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

⁷ Report adopted by GRECO in its 30th Plenary Session on 9-13 October 2006 [GRECO Eval I-II Rep (2005)4F]

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 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 2005⁸), 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.

In an analysis of the current legislation on conflict of interest, Sigma⁹ indicated: 1) Given the numerous flaws, loopholes and shortcomings affecting the current Montenegrin legislation on conflict of interest, it would be appropriate to prepare a better designed and drafted law on conflict of interest, which would target only politicians, including parliamentarians, members of government, politically appointed officials, and members of municipal councils. 2) Conflict of interest and incompatibilities related to civil servants and state employees should be regulated in the Civil Service Law, which should enlarge its scope to include municipal civil servants. A thorough revision of the Civil Service Law is also necessary to address not only the conflict-of-interest issue, but also other crucial problems affecting the Montenegrin civil service. Sigma has already pointed out these problems, in particular in its yearly assessment reports.

Anti-corruption Policies and Institutions

Corruption is said to be a widespread phenomenon in the whole country, especially in high spheres. According to international observers¹⁰, Montenegro is one of the countries with the highest level of perception of corruption in Europe, which is fuelled by a culture of secrecy and confidentiality. Corruption, albeit existing, seems to be less widespread regarding civil servants and public employees. The most corruption-affected areas in the administration are the tax administration, licensing, urban planning in local self-governments in coastal areas, public procurement, and customs.

The Anti-corruption Initiative, an independent body reporting to the Ministry of Finance, also 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

⁸ Data for 2007 were not yet available at the time of writing.

⁹ See “SIGMA comments on the Montenegrin Legislation on Conflict of Interest”, as discussed at the Conference on Anti-corruption Legislation in Montenegro, organised by the UNDP Montenegro, held in Podgorica on 11 October 2007.

¹⁰ See Transparency International, but especially the report by the Chr. Michelsen Institute (September 2007), *Corruption in Montenegro 2007: Overview over Main Problems and Status of Reforms*, Bergen, Norway, at <http://www.cmi.no/publications/publication/?2733=corruption-in-montenegro-2007>.

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 – despite recent increases – are still 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. 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”¹¹.

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 7,600 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. Conflict of interest should be regulated separately for politicians and for civil servants.

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

Overall Description of the Salary Scheme

A Law on Salaries (LS), passed in April 2004, has been in force since January 2005 and was amended in 2007. 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.

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 EUR, 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.

¹¹ US State Department (March 2007), *Country Reports on Human Rights Practices 2006*, at <http://www.state.gov/g/drl/rls/hrrpt/2006/81373.htm>.

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 EUR. 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. 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 EUR 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.

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 that of 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 to avoid other serious difficulties. As the new classification of positions is decentralised and as HRMA does not really check the similarity of job content of equally classified positions, it may well happen that part of the salary reduction will once again 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 unacceptable consequences already described above.

Shortcomings and Reforms of the Salary Scheme

Generally speaking, salaries of staff in the public sector have been traditionally low, although a significant 30% increase, or even higher for certain posts, has been applied in 2008¹². In addition, the amended law includes allowances that were previously defined in a dispersed manner in various separate decrees, which has contributed to making the salary system more transparent. The remaining weaknesses of the current salary system have been analysed in detail elsewhere¹³, with the conclusion that “the present Law on Salaries is reasonably transparent, especially after the December 2007 amendments to the Law”.

However, in our view there are a number of shortcomings in the current system, as it is more complex than necessary. The current system for assigning jobs to salary grades is not well defined, and the regulations are contained in three separate pieces of legislation, with no clear connection between them (LCSSE, Law on Salaries, and Regulation on Groups of Affairs¹⁴).

The current system of variable pay (“variable part of salary”) does not provide an effective performance incentive. In practice few state bodies make use of the facility provided in the LS, article 13, to pay one month’s salary to staff whose performance appraisal mark is “excellent”. This may be partly due to the fact that several state bodies do not yet carry out performance appraisal, which is a problem because an effective variable pay system requires an effective and objective system of performance appraisal.

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 decisions¹⁵. This system, however, seems to have not yet been totally overcome, as unclear top-ups and

¹² Law on Amendments and Additions to the Law on Salaries of Civil Servants and State Employees [OG 17/07 of 31 December 2007].

¹³ See the proposal made by Hugh Grant, consultant to the EU project on Implementation of Budgeting and Salary Systems Reforms in his paper, “Proposed New Salary System for Civil Servants and Public Employees”, Podgorica, 21 March 2008.

¹⁴ Regulation on Groups of Affairs, Criteria for Internal Organisation and Systematisation, Nomenclature of Affairs and Tentative Number of Performers in State Administrative Authorities [OG 54/04 of 9 August 2004].

¹⁵ World Bank (2006), Report No. 36533: *Republic of Montenegro: Public Expenditure and Institutional Review*, volume I, released on 3 November 2006.

other perquisites, some of them unregulated, are still paid to some officials¹⁶. 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.

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.

Work will probably continue on the design of a new salary system, based on European principles, which would focus on improving the ability of the civil service to attract and retain good staff and to motivate staff to perform well. A better salary system would help to address the need to strengthen the capacity of the civil service to deliver high quality services to citizens and to meet the demands of the European accession process¹⁷.

In conclusion, despite a 30% salary increase in 2008, flaws in the salary system remain and the staff turnover remains high in junior positions. Recent changes may create the opportunity to increase attractiveness of public sector positions, but the salary reforms should continue.

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?

Career development depends almost exclusively on the individual staff member, as it is not yet supported by HRMA or by the administration through specific management schemes. The civil service remains attractive, however, because of the high unemployment rate in the country, currently at approximately 16%¹⁸.

Performance Appraisal

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. 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. 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 only fail to provide an incentive or to be a motivating factor for staff, but may also exert a pressure that is detrimental to its impartiality or integrity. 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 staff member’s nomination.

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

¹⁶ 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.

¹⁷ See EU project proposal referred to in footnote 13.

¹⁸ Montenegrin Investment Promotion Agency (MIPA), “[Invest in Montenegro 2007](#)”.

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 three 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 also envisaged to introduce performance-related pay (PRP) components.

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 States¹⁹ that introduced this instrument have done.

In conclusion, the situation regarding the use of the performance appraisal instrument remains the same as it was in 2007, although it could improve in the future as a result of the increased budget funds allotted to human resources and the foreseeable improvements that the Central Register of Public Employees is likely to bring about. Performance-related pay should not be introduced.

Training

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 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 have sufficient staff been allocated to this task in HRMA nor have sufficient funds for training been earmarked in the national budget, although progress is being made. In 2007 for the first time the national budget foresaw 190,000 EUR for training civil servants and public employees, a budget which has been increased to 300,000 EUR in 2008.

There are approximately 100 trainers, 36 of whom are practitioners – civil servants who participated in training-of-trainers programmes. The remaining trainers are provided by universities, NGOs and other bodies. Combining Montenegrin domestic and donor resources, a significant quantitative increase has occurred, in terms of both the number of seminars organised and the number of trainees. In 2006 a total of 31 seminars were organised and attended by 623 public employees. In 2007 this data has increased by over 300% in terms of seminars organised (103) and by over 100% in terms of trainees (1,437). However, it is quite significant – in terms of the quality of the training or the incentives provided by training activities – that a high number of registered would-be trainees do not finally attend the relevant programmed training activities (out of a total of 2,375 registered in 2007, only 1,437 actually participated).

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. Some training courses on new issues, such as fighting corruption or gender equality, have also been introduced recently. 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, although gradually increasing, are still insufficient.

Training is not systematic and is only now starting to be gradually increasingly funded from domestic funds. The public service is attractive for starting one’s working life, especially in a country where

¹⁹ See OECD-GOV (2005), *Performance-Related Pay Policies for Government Employees*, OECD, Paris.

unemployment is at the rate of about 15%. Low salaries, politicisation and patronage make it not attractive as a medium to long-term professional choice.

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?*

Human Resources Management Authority (HRMA)

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 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 existed only in larger ministries; smaller ministries and authorities usually have had 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.

According to the systematisation, HRMA should have 25 staff. Since its creation, HRMA has relied to a large degree on CARDS projects for its operation.

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 of HRMA was to create a human resources database comprised of all public employees and civil servants, which now seems to be on track. As soon as the Central Register of Public Employees registry is functional²⁰, there will be more data available on the staff in the civil service, which should improve the performance of HRMA.

Appeals Commission

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.

Surprisingly, the decisions of the Appeals Commission, instead of being geared towards protecting the statutory rights of civil servants, are frequently biased in favour of the administration, and the Administrative Court quite often quashes any decisions of the Appeals Commission that recognise the infringement of employees’ rights by the administration. In 2007, of the 58 cases lodged in the Administrative Court 32 were annulled, most of them in connection with recruitment (55%). Considering that these cases had been previously analysed and a ruling made by the Appeals Commission, the question remains open whether the Commission actually protects civil servants’ statutory rights or rather the interests of state authorities. The question also remains open as to whether civil servants’ statutory rights would be better protected if the Commission were more independent from the government.

HRMA lacks the capacity 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.

²⁰ In March 2008, 13 of the 54 agencies are included in the Register, but that number is expected to steadily increase.

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 control 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.

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).

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 salary scheme needs to be reviewed so as to redress shortcomings that still exist in the present system, to reduce its unnecessary complexity, and to increase its transparency.
4. 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.
5. Performance appraisal should be developed in practice, but the implementation of performance-related pay should be put on hold.
6. Systematic in-service training should be pursued.
7. 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.