



SIGMA

Support for Improvement in Governance and Management

A joint initiative of the OECD and the European Union, principally financed by the EU

MONTENEGRO

ASSESSMENT MAY 2009

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Democracy and the Rule of Law

The economic situation and consequent fiscal difficulties will have a negative impact on the timing and feasibility of PAR actions. The authorities may rely more heavily on donor funds to pursue PAR activities, thus making donor co-ordination even more necessary.

One major reason for the public governance shortcomings is the lack of respect of the law and democratic institutions by major actors, whether they be parliament, the executive or the judiciary, or civil society and its organisations. This is a matter of democratic and legal culture.

The small size of the country (population) and its social structure makes impartial public administration difficult to attain. European integration mobilises a significant proportion of available capacities, in a context where institutions are still being established.

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 ensuring the efficiency of the public sector. However, in small states, transparent and fair decision-making processes, including in personnel matters, are conditions that are just as essential as they are in larger states for ensuring efficiency gains – and trust – in the public sector. Internationally, 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 reliability and efficiency.

Parliament

Parliament has a role in law-making and in controlling the government, but its effectiveness is to be questioned. The instruments available to parliament are not used sufficiently or effectively. Much more could be done in committee if MPs really wanted to oversee the activities of the government. Increasing the technical capacity of parliamentary administrative services would be crucial in ensuring a better parliamentary performance, both in producing legislation and, especially, in controlling the government.

The regulation of the immunity and inviolability of MPs is up to international standards. The conflict-of-interest regulation may have problems of constitutionality. In any event, it has many loopholes and unjustified exceptions for parliamentarians, which makes the newly adopted regime almost ineffectual. A more transparent salary scheme would imply raising MPs' salaries. It should include the elimination of allowances for committee participation as well as the abolition of the unjustified exception of article 9 of the Law on Conflict of Interest (which allows MPs to act as members of boards and managers of public enterprises).

Government

In addition to the formal consultations required by the Rules of Procedure, all laws are prepared by inter-ministerial working groups. These working groups provide a forum for detailed consultations during the early stages of preparation. The new requirement that all laws must be preceded by policy documents also contributes to the opportunities for consultation. In practice, some of the consultations remain formal and occur too late in the process, i.e. after the legal draft has already been prepared.

However, the quality of legislation is 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.

Public Administration

The merit system in civil service management 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. The Human Resources Management Authority 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 rather limited. Some by-laws and guidelines are in place, but their implementation varies widely and for the most part remains rather limited.

The lack of a comprehensive approach to financial management is most probably due to the lack of awareness that good governance requires sound and close pragmatic working relationships of the main stakeholders, such as the Ministry of Finance and the State Auditors Institution, and to the weak understanding of the concept of managerial accountability. Managing the change to accountability, as outlined in the PIFC Policy Paper and the PIFC Law, will require time and technical capacity, long-term political commitment and effective arrangements, including within the Ministry of Finance.

Montenegro has participated in all steps of the creation of ReSPA since 2006 and has signed, but not yet ratified, the international agreement. Montenegro, as host country, has invested heavily in ReSPA's establishment.

Judiciary

Human resources management arrangements within the judiciary may compromise the judiciary's independence from politics. Personnel management rules are in place (recruitment, promotion, performance appraisal, salary levels, and disciplinary arrangements) and are aimed at guaranteeing judicial independence as well as the accountability of judges, but the institutional and legal set-up makes the judicial and prosecutorial services vulnerable to politicisation.

The administrative justice system requires strengthening to protect the rule of law.

Anti-corruption Policy

Montenegro's anti-corruption legislative activity is significant, and the country is in the process of bringing national legislation in line with international standards, in particular with regard to criminal legislation and law enforcement capacities, but the institutional landscape that is emerging may be overly complex for a small administration. The internalisation of new values is doubtful, which makes the sustainability of the reforms uncertain. It is a matter for concern that the anti-corruption effort may be driven by international institutions to such a degree that it will be unsustainable and place too heavy a burden on local institutions.

Concerns remain about the likely ineffectiveness of the Conflict of Interest Commission and the enforceability of the conflict-of-interest provisions in respect of politicians.





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MONTENEGRO
EXTERNAL AUDIT
ASSESSMENT MAY 2009

Summary

Main Developments since last year

The main developments in external audit since last year's assessment were the increased number of audits and the increased number of staff in the State Auditors Institution (SAI). The SAI has joined the network of heads of supreme audit institutions of EU candidate and potential candidate countries supported by the European Court of Auditors. It also became a member of EUROSAI at its meeting in Cracow in June 2008.

Main Characteristics (strengths and weaknesses)

The SAI is a young institution, established in 2004. It has opted for a sound step-by-step approach whereby it gradually improves its capacity and performance. The SAI is a constitutional entity, and the institutional legal framework supports its independence. External audit in Montenegro has a sound legal basis.

The institution has also taken a real place in the checks and balance system of the state. The audited entities seem to respond to audit recommendations. The SAI follows up on the implementation of its recommendations. The media shows interest in the SAI's reports.

Since its establishment the SAI has gradually improved its audit capacity and audit coverage by increasing both the number and the professional capacity of its staff. A strategic development plan is being drafted (with bilateral technical assistance).

These elements constitute a good step forward in strengthening the SAI's capacity to contribute to building a sound public finance base in Montenegro and to ensuring the validity and efficacy of accountability mechanisms.

The SAI is making good progress in meeting INTOSAI and EU good practice auditing standards. The development of a supreme audit institution takes time, however. The SAI performs audits and transmits audit reports to the auditees as a continuous process throughout the year; however, consideration could be given to presenting the audit reports to parliament earlier. It will still be some years before the SAI will be in a position to undertake the full range of audits envisaged in the legislation and to contribute to an improved discussion of the execution of the state budget.

It is positive that the SAI closely follows the development of the budget process. However, the evolution of the audit process will also be dependent on improvements in the quality of budget execution, public internal financial and control, the newly broadened internal audit practice as well as parliament's administrative capacity to discuss its reports. The secretariat of the Parliamentary Committee on Economy, Finance and Budget has very few staff. At the time of writing the Committee should be scrutinising the budget proposal for fiscal policies, the medium-term framework and medium-term priorities for next year's budget.

Recommendations for Reform

The SAI is committed to further building its administrative capacity to conduct the efficient external audit of the government. However, as the SAI is quite small, technical assistance support should be aligned with the SAI's administrative capacity to both absorb the assistance given and implement any recommendations.

The strategic development plan, which is being drafted, will help the further development of the SAI by providing a strategy for institutional strengthening, staff and professional skills development, public relations, and development of an internal information system. Institutional strengthening is an important part of enabling the SAI to comply with INTOSAI standards. However, INTOSAI standards are general and need adaptation to national circumstances. The audit remit in Montenegro is quite large compared to the existing resources in the SAI, and there is no strategic audit plan to ensure that all budget entities are regularly subject to audit.

A strategic audit plan should therefore be developed to ensure that all budget entities are regularly subject to audit, e.g. covering a period of up to two or three years. This is particularly important, as a

small institution like the Montenegrin SAI needs to develop a sound approach to determining the volume of work that could be reasonably expected of the institution given its limited resources, professional skills and capacities, while ensuring the fulfilment of its legal audit mandate according to generally accepted EU and international auditing standards. Consideration should therefore be given to developing the methodology for implementing and regularly updating the strategic audit plan. The specific methodology for developing the strategic audit plan should be included in the audit manual.

1. Legal Framework

No changes have been observed in the legal basis for external audit in Montenegro. The State Auditors Institution (SAI) was established in April 2004¹. The Law on the State Auditors Institution (hereafter referred to as the “SAI Law”) was drafted with assistance from the German Agency for Technical Co-operation (GTZ).

The SAI’s status is guaranteed in the Constitution, adopted by parliament on 19 October 2007, as an autonomous and supreme state audit entity reporting to parliament.

The SAI follows the collegial model; the SAI Senate, which presides over the institution as a whole, is appointed by parliament, in accordance with the SAI Law. Parliament also selects the SAI President from among the members of the Senate. The President is appointed by parliament for a period of nine years, with a non-renewable mandate. At the end of this period, the President takes office as one of the members of the Senate, whose appointments are permanent.

The SAI Senate is composed of five members. A member of the SAI Senate cannot be a member of parliament, hold any other office or be engaged in any other professional activity (article 35). A member of the Senate cannot be a member of “any body” of a political party (article 36). This provision is interpreted as meaning that a member of the SAI Senate cannot be a member of a political party or hold a leadership position in a political party. This provision is also supported by the Constitution (article 54).

The SAI’s budget is submitted to parliament (SAI Law, article 51). The SAI budget is included in the state budget and hence channelled through the Ministry of Finance in the consolidated budget process prior to submission of the state budget to parliament. However, as the SAI’s budget is submitted to parliament, it can be treated separately by parliament in the event that negotiations are necessary. Since its establishment, the SAI has only from time to time suffered from problems in obtaining the budget funds requested. This was mainly linked to the need for an increase in staff resources. The SAI has not experienced any other major difficulties in receiving the budget funds needed for its activities. Its financial independence thus seems to be preserved.

The audit remit of the SAI comprises the authorities and budget-users managing the budget and property of the state and local self-government units, as well as the Central Bank of Montenegro and other legal entities in which the state holds a share.

The SAI reports to parliament, the audited entity and, if appropriate, other authorities whenever the SAI deems it necessary. In practice, the reporting to auditees on the review of the implementation of the budget is carried out regularly. The SAI’s annual report on its activities is to be submitted to parliament and to the government by the end of October (article 19). This report should include an overview of the SAI’s findings on the budget and state property, pointing out the causes and consequences of the major findings, together with suggestions of remedies.

The annual SAI report is made public. However, the President of the Republic, the President of Parliament and the Prime Minister are to be informed of circumstances of a confidential nature.

The SAI should inform parliament and the government of particularly important issues through special reports.

On the basis of the SAI Law, Rules of Procedure and the Instruction on the Methodology of Work were established and approved on 10 January 2005. The Rules of Procedure were amended in January 2008 to reflect the creation of new staff positions. These rules regulate the organisation, working methods and operations of the SAI.

The constitutional independence of the SAI is in place, and its financial independence seems to be respected in practice. However, its operational independence might be reduced, as discussions are ongoing to place the Audit Authority (AA) for the Instrument for Pre-accession Assistance (IPA)²

¹ *Official Gazette of the Republic of Montenegro*, no. 28/2004.

² Council Regulation (EC) No. 1085/2006 dated 17 July 2006; for the implementation of this regulation, Commission Regulation (EC) No. 718/2007 was published on 12 June 2007.

funds within the SAI. Practice has shown that wherever the AA has been placed within a supreme audit institution the EU requires the AA to operate as a special department of the institution, with its own head.

There are many factors that need to be analysed before such a decision is taken, as there are several risks that would have an influence on the institution as a whole and on its capacity to fulfil its audit mandate in an independent and objective manner.

First of all, there would be automatic pressure from the EU on the organisation of the institution to ensure that there is sufficient capacity to audit EU funds. For example, the AA submits the annual audit plan to the European Commission and to the National Authorising Officer (NAO) - which in Montenegro is the deputy minister of the Ministry of Finance responsible for the Treasury sector – and requirements for amendments to the audit plan seem to be of a rather imposed nature. The AA reports primarily to the NAO, the Competent Accrediting Officer (CAO) – who in Montenegro is the Minister of Finance – and the EC.

A conflict of interest would also be created, as the SAI Senate (and the President of the Senate) presides over the institution as a whole. The independence of the AA seems rather artificial, as the SAI will hardly be able to independently carry out its core obligations, i.e. to review implementation of the national budget, which also includes the totality of activities financed by EU funds, the activities of the AA included. In addition, there is a risk that the audit mandate of the national budget would not be sufficiently met, given the overall constraints on resources that generally exist in a small administration.

The sheer appearance of independence is not the same as the view of this independence from an operational perspective, including solutions for it to be safeguarded in reality. Credibility and reputation are core features of the notion of operational independence. It would be difficult to argue that the decision to establish the AA in the SAI would safeguard the SAI's operational independence, especially in a newly established institution such as the SAI in Montenegro.

The SAI is a constitutional authority that has a broad audit remit and the authority to audit public and statutory funds and resources in line with the INTOSAI Lima Declaration. It will be important to continue to transpose the notion of its constitutional independence into operational independence, i.e. by promoting sound financial management, which constitutes the main *raison d'être* of a supreme audit institution.

2. Institutional Framework

Parliament deals (in the year 0) with the draft Final Accounts Act (year -1) together with the draft Budget Act (year +1). Thus parliament receives the proposed annual budget by end-November in respect of the fiscal year beginning the following January, and the budget needs to be adopted by end-December. Consequently, parliament only has one month to scrutinise fiscal policies, the medium-term framework and medium-term priorities.

According to the (Organic) Budget Law, the government is required to attach the SAI's audit report to the annual budget execution statement. The government (Ministry of Finance) attaches this audit report to the annual budget execution statement and forwards the entire package to parliament in July. In addition, according to the SAI Law (art. 19), the institution is also required to submit an annual report on its activities to parliament by the end of October.

During the period October 2007 – October 2008, the SAI audited the Republic's annual financial statement for 2007. In October 2008 the President of the SAI submitted the SAI's fourth annual report to parliament. In practice, the annual report is a compilation of the SAI's report on the annual budget execution statement together with the other audit reports that it has issued since its last annual report. The SAI has the discretion to submit its audit reports to parliament in this way.

Consequently, during the above-mentioned period the SAI submitted the annual budget execution statement and conducted individual audits on the annual financial reports of nine ministries, as well as one audit of the final budget account of a municipality. In 2007 only five audits had been performed

in addition to the audit of the annual budget execution statement. This is a significant increase in the number of audits and is mainly a result of the increase in the number of audit staff since last year.

There is an audit plan for 2009 and 17 audits are planned, which is also an increase from the 2008 figures. Three of these audits started as preliminary audits during 2008. The SAI audits entities on a rotation basis and in any one year it audits entities that account for around 70% of the consolidated public expenditures. However, there is little guidance as to how audit risks should be identified. In addition, there is no medium-term strategy indicating how the institution is to fulfil its mandate, i.e. to regularly audit all entities within its mandate.

The Instruction on the Methodology of Work requires audits to be conducted in accordance with INTOSAI auditing standards. Whilst the Instruction contains the basic elements of sound audit approach, these instructions are still quite general. There are some internal documents describing the audit methodology and indicating how audits should be done in practice, starting with audit planning and ending with audit reporting, with the aim of ensuring that all audits are carried out, documented and evaluated in the same manner with minimum quality requirements.

All audit reports contain audit recommendations. There are signs that the management of the audited entities, including the Ministry of Finance, responds to these recommendations. The SAI also follows up on its own recommendations and reports on the results to parliament, e.g. the SAI comments specifically on the follow-up or implementation of the recommendations made in its previous annual report. The media has also shown an interest in the SAI audit reports.

The SAI's audit reports are submitted to the Parliamentary Committee on Economy, Finance and Budget. Reports are used by parliament in its discussions on the adoption of the annual financial statements. For example, parliament's conclusions regarding the Financial Statements of 2007, which were issued in the *Official Gazette* no. 75 of 8 December 2008, drew on the SAI's findings and recommendations. However, there is an important time lapse between the end of the period audited for the annual audit report and the audits of the individual reports of ministries, as some audits are not reported to parliament in the same year as they are carried out. It is therefore not clear that all audit recommendations are made and followed up on a timely basis.

In addition, the secretariat of the Parliamentary Committee on Economy, Finance and Budget has only two staff members. It is obvious that there is not enough capacity within the legislature to perform a detailed analysis of either the proposed budget or the annual audit report, given the amount of work expected of this committee.

To date only regularity audits have been performed, although the law also provides for effectiveness and efficiency audits. The Ministry of Finance is moving towards programme budgeting, and for this purpose the ministry has set up a working group in which the SAI has a representative. This work would allow the SAI to prepare for audits, including aspects of performance audits, but the institution does not currently conduct any performance audits.

According to the Rules of Procedure, the SAI is foreseen to have a total staff of 66. Approximately two-thirds of the SAI staff are auditors and one-third is comprised of support staff. The total number of staff currently employed is 39, including the five members of the Senate. Of these, 23 are auditors and the plan is to employ eight new auditors in 2009. The auditors have civil servant status. To become state auditors, the auditors must pass a general professional examination and a state auditor's examination. The SAI Senate has established a Commission for the State Auditors' Examination. The members of this commission are the members of the Senate. Professionals outside the SAI have drafted the training and examination curricula. During the past year 37 candidates sat the state auditor's examination, and by the end of the year 23 auditors had passed the examination.

The SAI auditors have a relevant professional background for carrying out regularity audits, i.e. as tax experts, economists, and a few as certified accountants from the commercial sector.

Since last year's assessment, the SAI has also held a number of seminars for its staff to ensure continuous professional development. The seminars covered topics such as public procurement, public accounting, audit report drafting, IT audits, auditing of public enterprises, and audit

management (efficient team work and job analysis). A list has also been compiled of the staff's training demands, and the SAI has started work on a strategic development plan for the institution.

The SAI has been a member of INTOSAI since its XIX Congress held in Mexico in November 2007. The SAI also became a member of EUROSAI at its meeting in Cracow in June 2008 and it has joined the network of heads of supreme audit institutions of EU candidate and potential candidate countries supported by the European Court of Auditors.

The execution of the budget is regularly audited by the SAI, and individual audits are decided upon in an annual work plan. There is, however, neither a methodology for the development of a strategic audit plan nor guidance on the development of longer-term audit planning to ensure that all budget entities are regularly subject to audit in a more strategic perspective (e.g. every two to three years). Consideration should be given to shortening the delay before the annual reports are sent to parliament so that it can act on them more quickly.

3. Capacity for Reform and External Assistance

The Government of Montenegro has proposed a significant number of laws designed to facilitate reforms required by the EU. The government adopted a Public Internal Financial Control (PIFC) Policy Paper (20 December 2007) for the enhancement of financial control and internal audit, together with an action plan for implementation. The first step of the action plan was to develop the Public Internal Financial Control Law, which was adopted on 29 November 2008.

The development of a system cannot take place in isolation, and therefore the further development of the PIFC system is also dependent on the development of the supreme audit institution, as the main *raison d'être* of a supreme audit institution is to promote sound financial management of the execution of the budget. In the annual audit plan for 2009, the SAI therefore also decided to draft a strategic development plan (SDP) for the institution to enable it to undertake an efficient external audit of the government with high quality standards. The SDP should include the strategy for institutional strengthening, staff and professional skills development, international co-operation and partnership, public relations, and the development of an internal information system. The German Ministry for International Development and Economic Co-operation, through the German Agency for Technical Co-operation (GTZ), has provided technical assistance for the creation and establishment of a supreme audit institution since July 2002. German bilateral support will continue this assistance and help the SAI to further improve its administrative capacity.

The SAI is steadily developing its administrative capacities to ensure the efficient external audit of government activities. However, some time is still needed to ensure that all of these efforts are consolidated in the institution.





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MONTENEGRO
PUBLIC INTEGRITY SYSTEM
ASSESSMENT MAY 2009

Summary

Main Developments and Main Characteristics (strengths and weaknesses)

- 1. Shortcomings persist in the new conflict-of-interest legislation.** A new Law on Preventing Conflict of Interest was passed on 27 December 2008 (*Official Gazette*, no. 01/09 of 9 January 2009). This law is of poor quality, however, and has important shortcomings, like the previous law, which prevent it from providing a meaningful solution to the problem of conflicts of interest and incompatibilities. On the positive side, the new law introduces post-employment restrictions for one year after leaving office. However, given its flaws, the law will be enforceable on civil servants and public employees but probably not on politicians, for whom the effectiveness of the law and of its monitoring mechanism is questionable.
- 2. New legislation on financing politics is improved, but control mechanisms are still flawed.** The legal regime of financing political parties and electoral campaigns has undergone significant changes in 2008 and 2009. The new legislation identifies illicit sources of funds for political parties and electoral campaigns and sets the framework for transparent state budget funding of parties. Anonymous donations to parties and candidates are forbidden. Campaign expenditures are capped. Financial reporting obligations of political parties and candidates for election are spelled out in legislation, including in-kind and private donations, as well as penalties for non-compliance, but there is significant room for circumventing the rules. In addition, it is doubtful that the Ministry of Finance is the correct institution for checking and auditing financial reports of political parties and election candidates. Either the State Auditors Institution or a national electoral commission should be legally mandated and empowered to do so, if they are given the necessary resources and capabilities.
- 3. The judiciary and prosecutors are not sufficiently protected from politicisation.** The Law on Courts (2001) and the Law on the State Prosecutor's Office (2003), both amended in 2008, together with the Law on the Judicial Council, enacted for the first time in February 2008 (*Official Gazette*, no. 13/08), complete the legal framework for the judicial and prosecutorial services. The Judicial Council was established on 19 April 2008. Personnel management rules on judges and prosecutors are in place (recruitment, promotion, performance appraisal, salary levels, and disciplinary arrangements) to guarantee judicial independence as well as the accountability of judges and to ensure that the institutional management of the judiciary is independent of the government and parliament, but the current institutional and legal arrangements make the judicial and prosecutorial services too vulnerable to politicisation, as explained below.
- 4. Progress is visible in producing legislation, but implementation mechanisms are weak.** Apart from the already mentioned laws on conflict of interest and political party and electoral campaign financing, and the reform of judicial and prosecutorial services, other pieces of legislation or amendments relevant to anti-corruption have recently been passed. Reforms of the 2003 Penal Code were introduced in 2004, 2006 and 2008 (*Official Gazette*, no. 40/08). The Criminal Procedure Code of 2003 was also amended in 2004 and 2006 and at the time of writing is in the process of being amended again in parliament. The Law on International Legal Assistance in Criminal Matters was passed on 17 January 2008 (*Official Gazette*, no. 04/08). The Law on Free Access to Information was passed in 2005 and a new Law on Public Procurement in 2006. Finally, a Law on the Prevention of Money-Laundering and Terrorist-Financing was passed in 2007 and amended in 2008, while a Law on Witness Protection was passed in 2004. The July 2008 amendments to the Law on Civil Service and State Employees (*Official Gazette*, no. 50/08) introduced some measures to protect civil servants who denounce or provide information on corruption offenses (whistle-blowers).
- 5. Alignment of legislation with European standards is noticeable, but the institutional landscape that is emerging may be overly complex, as internalisation of the new values represented by those standards is doubtful, making the sustainability of reforms very uncertain.** Montenegro's legislative activity is significant and the country is in the process of bringing national legislation in line with international standards, in particular with regard to

criminal legislation and law enforcement capacities. It is, however, a matter for concern that the anti-corruption effort may be driven by international institutions to too high a degree, which poses questions concerning both the internalisation of the new values that those standards represent and the sustainability of reforms. At the same time, there are uncertainties as to whether in the medium term all of the resources and institutional structures that may be required to implement the action plans will actually be available, and if so, whether the resulting institutional landscape will be overly complex and difficult to deal with.

Recommendations for Reform

- Strengthen and ensure the effectiveness of measures regarding incompatibilities and conflicts of interest for politicians;
- Increase the technical capacity of parliamentary administrative services to produce legislation and, especially, to control the government;
- Establish more precise rules and more effective controlling mechanisms concerning the financing of political parties and electoral campaigns;
- Enact human resources management rules and procedures so as to minimise the risk of politicisation of judicial and prosecutorial services and especially to guarantee that judicial and prosecutorial appointments are merit-based and carried out transparently;
- Adopt the amendments to the Code of Criminal Procedure that are still pending, especially those related to the seizure of crime proceedings;
- In general, strengthen the capacities of all mechanisms and administrative units that have been created to monitor and control the implementation of new legislation.

Introduction

This report provides an analysis of some key elements of the public integrity framework of Montenegro. The report should help orient reforms and assistance. To delineate the “integrity framework”, we have drawn on concepts provided by OECD³, the Council of Europe⁴ and the European Commission⁵. The public sector elements of the framework comprise constitutional arrangements, the judiciary (including the prosecution), parliament, political campaigns and party financing, political accountability and responsibility, the public service and the administrative legal framework, external audit (including mechanisms to combat fraud), public procurement, the public expenditure management system, public internal financial control, policy-making and regulatory processes. These elements apply to all levels of the state, including municipalities and state enterprises.

In this report, we assess the extent to which institutional arrangements underpin, or undermine, integrity in parliament, the government (in its European continental meaning, i.e. the Council of Ministers as a constitutional body) and the judiciary. We also look at how political arrangements, especially financing of political parties and electoral campaigns, affect the integrity system. We then turn to national policies and institutions aimed at fighting corruption. Finally, we list the incorporation in Montenegro of the main international instruments for harmonising anti-corruption policies and legislation.

In other reports, we have assessed elements that have an impact on the integrity framework in public administration. The separation between these elements is not clear-cut because of overlaps in certain aspects – for example, rules concerning asset declaration may address civil servants, judges and/or politicians in the same legal instrument. The public administration elements that we have assessed were selected by the European Commission.

Sigma regularly produces assessments on: a) Public Service, b) Administrative Legal Framework, c) External Audit, d) Public Expenditure Management, e) Public Procurement, f) Public Internal Financial Control, and g) Policy-Making and Co-ordination. This report should be read together with these other assessment reports.

1. Integrity in Parliament

Inviolability of Members of Parliament and Parliamentary Immunity

The immunity of members of parliament is protected by article 86 of the 2007 Constitution, which confines this immunity to opinions expressed or votes cast in the performance of their duties as parliamentarians. The same provision also allows MPs inviolability, except in the case of *flagrante delicto*, for which a punishment of at least five years’ imprisonment is foreseen in the Penal Code. The Parliamentary Rules of Procedure (article 58) specify that requests for lifting immunity are to be forwarded to the Administrative Committee by the President of Parliament and that the Committee is to propose its recommendation on the matter at the next parliamentary session.

Article 82-15 of the Constitution establishes in a vague way that parliament “decides on immunity rights”, although it is unclear whether these immunity rights are only those of parliamentarians or also include the others mentioned in article 86 as enjoying the same immunity as MPs, such as the President, the Prime Minister and members of the government, the President of the Supreme Court, the President and judges of the Constitutional Court, and the Supreme State Prosecutor.

³ For example, from OECD: *Public Sector Integrity: A Framework for Assessment* (2005); *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences* (2003); *Trust in Government: Ethics Measures in OECD Countries* (2000); *Ethics in the Public Service: Current Issues and Practice* (1996).

⁴ “Twenty Guiding Principles for the Fight against Corruption”, Resolution (97)24 of the Committee of Ministers of the Council of Europe of 6 November 1997.

⁵ “The Ten Principles for Improving the Fight against Corruption in Acceding, Candidate and Other Third Countries”, contained in the Annex to the Communication of 28 May 2003 of the European Commission to the Council of the European Union and European Parliament and the European Economic and Social Committee on a Comprehensive EU Policy against Corruption.

This potential meddling of parliament in other state powers would be detrimental to the separation of powers. The point was raised by the Venice Commission, which indicated that “there is no reason to involve parliament in decisions on the immunity of other office holders”, and continued by stating that “it seems not justified to regulate immunity for the President, members of government and especially judges in the same manner as immunity of members of parliament. Immunity of the Head of State should be regulated separately, having regard to the impeachment procedure. Judges should not enjoy general immunity and there is no justification for involving parliament in waiving their immunity”⁶. No constitutional case law has emerged so far that would clarify the issue, especially the limits of parliament’s competence in lifting immunity, although article 128-5 of the Constitution further deals with the issue by stating that the Judicial Council is to decide on the immunity of a judge, which seems to clarify the issue for judges but not for judges of the Constitutional Court.

Apparently most requests for lifting immunity are based on libel, defamation or slander, which are manifestations of the free speech specifically protected by article 86 of the Constitution. In March 2007 the immunity of a parliamentarian was lifted on a basis other than libel.

Once immunity has been lifted by parliament, there are no special rules for the prosecution and trial of MPs or any other government officials protected by the immunity regime, but the general criminal procedure rules apply.

Incompatibility, Conflict of Interest and Asset Declaration of Parliamentarians

The conflict-of-interest regime in Montenegro was first established in 2004 with the Law on Conflict of Interest. The system had numerous shortcomings that were repeatedly pointed out in various international reports, including by Sigma. The major problems included laxity in permitting the exercise of multiple public functions, an imprecise definition of public official leading to conflicting interpretations, and inadequate provisions for control and sanctions.

A new Law on Preventing Conflict of Interest was passed on 27 December 2008 (*Official Gazette*, no. 01/09 of 9 January 2009)⁷. On the positive side, the new law introduces post-employment restrictions for one year after leaving office, which may nevertheless be difficult to enforce, especially for politicians. This law is of poor quality and continues to have important shortcomings that prevent it from providing a meaningful policy solution on conflict of interest and incompatibilities. The legal notion of public official is still too broadly defined. Sanctions for non-compliance in the form of financial penalties may face enforceability difficulties, which will perhaps be insurmountable. Article 9 allows considerable scope for interpretation as to what may constitute “exceptional” circumstances, and grants members of parliament the possibility to serve as members of a supervisory or managing board and even as executive directors of a public company or any other public institution of the state.

Another problematic issue that remains in the new law is the system of appointment of the seven-member Commission for the Prevention of Conflict of Interest, the supervisory body responsible for monitoring compliance with this law. The members of the Commission are appointed by a simple parliamentary majority on the proposal of the parliamentary Administrative Committee. It is questionable that a commission that has been politically appointed by parliament will be able to carry out any meaningful control of conflict-of-interest situations and asset declarations of parliamentarians who in turn elect the members of that commission. The arrangement is especially problematic as article 24 of the law establishes that the procedure for deciding whether there has been a violation of the law is to be initiated by the Commission on the request of the authority where the public official is performing or has performed his/her public function. The Commission may initiate this procedure *ex officio*. As parliamentarians do not have any hierarchical superior in the meaning of article 24, and in view of the way in which members of the Commission are appointed, it is hardly convincing that there will ever be any conflict of interest investigated by the Commission, except if such an investigation fits a political argument.

⁶ See Venice Commission opinion on the Draft Constitution of Montenegro, adopted at its 73rd Plenary Session on 14-15 December 2007 at [http://www.venice.coe.int/docs/2007/CDL-AD\(2007\)047-e.pdf](http://www.venice.coe.int/docs/2007/CDL-AD(2007)047-e.pdf).

⁷ We use in this report the English translation of the law in the version provided on the website of the Commission for the Prevention of Conflict of Interest at <http://www.konfliktinteresa.cg.yu/obraci/Zakon-Engleski.htm>.

The procedure terminates with the recommendation of the Commission to the relevant authority to dismiss the official (article 38), a possibility that is only pertinent for civil servants and not for parliamentarians, or to refer the issue to the prosecutor if there is a suspicion of a criminal offense having occurred.

This problematic arrangement also highlights the inappropriateness of regulating conflict of interest in a homogeneous way for politicians and civil servants, as pointed out in previous Sigma reports. Regulations on conflict of interest should be distinct and different for politicians and civil servants because these two groups represent different domains and realities in public life, and their respective 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; an MP is not to be scrutinised by a hierarchical superior, because he/she does not have a superior in the meaning of article 24 of the law, etc.).

As indicated above, the new conflict of interest regime permits an MP to serve as a member of the managing board of an enterprise where the state has an ownership stake of 25% or more. However, the law itself (article 9) suggests that the possibilities are wider and that the permissible additional function includes being “a president or a member of the management or supervisory board, executive director or a member of management board of public company, public institution or any other legal entity in a public company or public institution in which the state, i.e. local government is owner.”

This large exemption is problematic, not only with regard to the incompatibility of holding both legislative and executive functions, but also in terms of being able to devote the appropriate attention to legislative activity. Most importantly, it is questionable that parliamentarians holding executive powers in public companies or executive agencies will have the capacity to bring those entities to account before parliament, thereby diluting the oversight role that has been entrusted to parliament by the Constitution, especially concerning the control of expenditures (article 82-5), which are to be controlled by the State Auditors Institution reporting to parliament (article 144). The problem is aggravated by the poor capacities of the Parliamentary Service, which lacks the expertise needed to support parliamentarians’ reviews of legislation or scrutiny of executive bodies’ reports.

Articles 19 to 21 of the Law on Preventing Conflict of Interest regulate the disclosure of income and property and its register, which is to be made available to the general public and maintained by the Commission for the Prevention of Conflict of Interest. MPs and other officials included within the scope of the law have to file a report to the Commission, providing accurate data on their property and income, as well on the property and income of their spouses and children if they are still part of the same household, within 15 days of taking up office. The declaration is to be made recurrently every year and every time a change occurs in the MP’s/official’s situation, as well as at the end of the relevant mandate. Formal compliance with the asset declaration requirements seems to have improved since 2004, and the declarations are beginning to reflect the true financial situation of officials. However, the lack of an adequate review mechanism does not guarantee the full truthfulness of the declarations, as we will explore below.

The Commission’s sanctioning powers are a legally problematic issue. It is doubtful whether the Commission will be able to impose the fines foreseen in articles 49 to 51 of the law, as the entitlement to impose them is not among the Commission’s competences, as listed in article 40 of the law. It is in fact unsure whether a punishing power is granted to the Commission by article 40-1, which confers upon it the powers of “conducting the procedure and making decisions regarding any violations of the provisions” of the law. This uncertainty is reinforced by the wording of article 34 of the law, which also refers to the decision-making powers of the Commission. Article 34 only authorises the Commission to state “whether the public official violated the law by his act, activity or omission”, but does not enable the Commission itself to impose sanctions. The Commission may subsequently refer the issue to the hierarchical superior of the concerned official to take disciplinary action, a solution that is not applicable to politicians, as indicated above.

It is questionable that the notion of “decisions” employed in articles 40-1 and 34 implies sanctioning powers, as the power to impose administrative sanctions is to be expressly conferred by law. In this

regard, article 11 of the Constitution states that “power shall be limited by the Constitution and the law” and article 16 refers to the law as the only way of limiting human rights and liberties, a protection that is further set out in detail in article 24 of the Constitution, which states that “guaranteed human rights and freedoms may be limited only by the law”, while article 10 states that “in Montenegro anything not prohibited by the Constitution and the Law shall be free”. Considering that legal provisions restricting constitutionally protected rights have to be interpreted restrictively and that there is a constitutional right to be punished only by a public authority that has legally awarded and explicit powers to do so, it follows that the Commission for the Prevention of Conflict of Interest has no sanctioning powers. The Commission seems to have no power beyond “naming and shaming” public officials. Consequently, the control mechanism at the disposal of the Commission is relatively ineffectual, while the conflict of interest legislation for parliamentarians and others becomes practically unenforceable.

Article 85 of the Constitution contains a rather enigmatic provision concerning the nature of parliamentary duty and the legal consequences that might follow from it, including the issue of incompatibility and conflict of interest. According to that provision, “a member of the Parliament shall have the right to perform the duty of an MP as an occupation”. One question would be whether parliamentarians have a labour relationship with parliament, which may lead to overtly absurd consequences, not only in terms of incompatibility but also in terms of hierarchical working relationships, including dismissal.

There seems to be no specific interpretation of this constitutional clause by the Constitutional Court, except a ruling that pre-dates the current Constitution, which seems to point in the direction of a constitutional rather than a labour, law-based relationship. According to that ruling of 18 June 2004 (*Official Gazette*, no. 45/04), “the right to undisturbed discharge and undisturbed enjoyment of term of office includes a free term of office, immunity and establishing the reasons for cessation of term of office to deputies, as a protection from arbitrary revoking of term of office” (among others, by political parties). This Constitutional Court precedent renders article 85 still more unfathomable, unless it aims to reintroduce the possibility for political parties to dismiss parliamentarians prior to the expiry of their tenure, which would be an unwelcome development for the country’s still young democracy.

Remuneration of Members of Parliament

The remuneration of parliamentarians – and government members – is defined in the Law on the Earnings and Other Income of State and Public Officials, as amended in 2008. The salary is calculated according to a formula of coefficients based on grades of functions and with additional increases based on years of employment.

The highest salary coefficient (14.84) is set for the President of Montenegro and the lowest (10.08) for the Deputy Secretary General of Parliament. The responsible body of the institution in which the official performs his/her function determines this coefficient. Parliament’s Administrative Committee determines the coefficients for the positions of President of Montenegro and the Deputy Secretary General of Parliament. The current value of a single coefficient is 75 EUR.

Increases based on years of employment are defined as follows: for each year up to 10 years of service, 0.5% per annum; between 10 and 20 years of service, 0.75% per annum; and between 20 and 30 years of employment, 1% per annum.

The law further provides for the possibility of an increase in the basic salary. A decision of the parliament’s Administrative Committee of June 2008 set the rate of increase at 30% for the President of Montenegro and MPs and at 15% for public officials defined by the law. The Administrative Committee has also defined additional compensation for members of parliament for their work in parliamentary “collegiums” and other working bodies (committees). It seems strange that parliamentarians are paid additional rewards to participate in the work of parliamentary committees because it is normally part of the regular parliamentary work already included in the MP’s salary.

Officials defined by this law are also entitled to holiday and other paid leave, professional development, meals during business hours, travel expenses for business trips, compensation for residing away from the family, moving expenses, pension contributions, and other financial assistance in special circumstances defined in other by-laws. No special tax regimes exist for public officials, including parliamentarians.

Parliamentarians consider their salaries to be low, and this is often alleged to be the main reason for allowing parliamentarians to exercise the function of a manager or board member of a public company or other public entity. It was also the assumed reason for the adoption of article 9 of the Law on Preventing Conflict of Interest of 2008 (see above). The adoption of a more transparent salary scheme would imply raising MPs' salaries if they consider such an increase suitable, but this should entail the elimination of allowances for committee participation as well as the abolition of the unjustified exception provided by article 9 of the above law.

Conclusion

The regulation of the immunity and inviolability of MPs is up to international standards. The conflict-of-interest regulation may lead to problems of constitutionality. In any event, its many loopholes and unjustified exceptions for parliamentarians makes the newly adopted regime almost ineffectual. A more transparent salary scheme would imply raising MPs' salaries if they consider such an increase to be suitable, but this should entail the elimination of allowances for committee participation as well as the abolition of the unjustified exception provided by article 9 of the Law on Preventing Conflict of Interest.

2. Integrity in Government

Immunity of Government Members

The immunity enjoyed by deputies is also enjoyed by members of the government. Similarly to MPs, members of the government are not subject to any special prosecution rules once their immunity has been lifted.

Incompatibility and Conflict of Interest

The Constitution (article 104) states that "the Prime Minister and Government members shall not discharge duties of a Member of the Parliament or other public duties or professionally perform some other activity".

As described above, however, the new Law on Preventing Conflict of Interest (article 6) stipulates that "the membership of a public official, appointed or elected, in permanent or provisional working bodies or mixed commissions, established by an authority, shall not be considered as an exercise of two or more public functions within the meaning of this Law," which in fact permits an accumulation of certain governmental functions. This provision fails to distinguish between inherent appointments *ex officio* and other assignments to perform duties in public bodies and other types of government commissions. This approach is unclear, because it fails to eliminate the concern that a multiplicity of such functions could constitute an inappropriate accumulation of functions, salaries and influence.

The regime of asset declarations is provided for in the same law, and an evaluation of its effectiveness has likewise been provided above.

Unlike parliamentarians, government members cannot be members of any management or supervisory board or serve as the executive director or member of the management of a public company, public institution or any other legal entity (article 9 of the Law on Preventing Conflict of Interest). Government members cannot be parliamentarians, as this is forbidden by article 104 of the Constitution.

The 2008 Law on Preventing Conflict of Interest introduces a novelty, namely the post-public employment incompatibility (article 13), whereby after leaving office there is a moratorium of at least one year for the government member or public official to carry out the following functions: act as a representative or attorney at law of a legal entity that is in a contractual or business relationship with

the authority where he/she had exercised public functions; represent a legal or physical entity for a case in which he/she had participated in decision-making while in office; audit or manage a legal entity over which he/she had exercised supervision while in office; enter into contractual relations with the authority in which he/she had exercised his/her functions; and use information that he/she had obtained while he/she was in function. The problem with this well-intentioned provision is that it may soon expose its enforceability difficulties.

Conclusion

Similar conclusions may be drawn for the regulation of the immunity of government members, although the regulations on incompatibility and conflict of interest have fewer unjustified exceptions, such as the one displayed in the above-mentioned article 9 for parliamentarians. Concerns remain about the likely ineffectiveness of the Commission for the Prevention of Conflict of Interest and in general the problematic enforceability of the conflict-of-interest provisions with regard to politicians.

3. Role of Parliament in Combating Corruption in Government

Political Accountability of Government to Parliament

Parliament does have at its disposal formal accountability mechanisms to hold the government to account. The Constitution (article 82) defines among the powers of parliament the power to adopt, upon the proposal of the government, the budget and the final statement of the budget, the national security and defense strategy, as well as the development and special plans. It can be argued that parliament would adopt these documents produced by the government only if they were of satisfactory quality.

Furthermore, parliament has the power to supervise the army and the security services; to elect and dismiss from duty the Prime Minister and members of the government; to elect and dismiss from duty the President of the Supreme Court, as well as the President and judges of the Constitutional Court; and to appoint and dismiss from duty the Supreme State Prosecutor and state prosecutors, the Protector of Human Rights and Liberties (Ombudsman), the Governor of the Central Bank and members of the Council of the Central Bank, the President and members of the Senate of the State Audit Institution, and other officials stipulated by law. The Constitution also empowers parliament to hold a confidence vote on the government and on individual ministers (article 107).

Parliamentary Inquiries, Questions and Interpellations

The Constitution further provides for two accountability mechanisms of the government before parliament: interpellations (article 108) – “[an] interpellation to examine certain issues regarding the work of the Government may be submitted by minimum 27 Members of the Parliament”; and parliamentary investigations (article 109) – “the Parliament may, at the proposal of minimum 27 Members of the Parliament, establish a Fact-finding Commission in order to collect information and facts about the events related to the work of the state authorities.”

The Parliamentary Rules of Procedure define the procedure for interpellations and introduce additional instruments: “control hearing”, “consultative hearing”, the Prime Minister’s Hour, and MP Question Time. Invitees to “control hearings” are “obliged” to accept the invitation. The practice of parliamentary committees shows that there are no registered cases of the non-acceptance of an invitation or a refusal to appear at control hearings. These hearings are always covered by the media and announced as important information about parliamentary political life. If parliament is not satisfied with the responses of government members in control hearings, it can initiate the no-confidence voting procedure against the government (article 107 of the Constitution).

Public Bodies Reporting to Parliament

A number of institutions submit annual reports to parliament — among them, the Chief State Prosecutor, the Judicial Council, and the Commission on Preventing Conflict of Interest (whose members are also elected and dismissed by parliament, as shown above), the State Auditors Institution

and the Ombudsman. The report of the State Auditors Institution on the budget execution is extensively reviewed and discussed before its adoption by parliament, apparently because a member of the opposition usually holds the chairmanship of the parliamentary Budget Committee.

Conclusion

Parliament has a role in law-making and in controlling the government, but its effectiveness is questionable. Overall, the instruments available to parliament are not used sufficiently or effectively. The Prime Minister's Hour and MP Question Time are held infrequently. Only a few committees have held control hearings, and almost none has held consultative hearings, with the focus remaining on activity in the plenary. Much more could be done in committee if MPs really wanted to oversee the activities of the government. Increasing the technical capacity of parliamentary administrative services would be crucial for a better parliamentary performance, both in producing legislation and, especially, in controlling the government.

4. Political Party and Electoral Campaign Financing

General Legal Framework

The legal regime on financing political parties and electoral campaigns has undergone significant changes in 2008 and 2009. The previous rules had a number of flaws, most notably the nearly complete lack of enforcement, and there was no mechanism in place to ensure the veracity of the information provided. Two new laws were recently passed, namely the Law on Financing of Political Parties (*Official Gazette*, no. 49/08 of 15 August 2008) and the Law on Financing Campaigns for the Election of the President of Montenegro, Mayors, and Presidents of Municipalities (*Official Gazette*, no. 08/09 of 2 February 2009).

Sources of Political Party Revenues

Political parties receive significant state funding. All political parties, coalitions, and groups of citizens that hold a minimum of one seat in parliament ("parliamentary parties") have the right to receive state funding for their regular activities and for the work of their MPs and members of municipal assemblies. All registered and confirmed (by the responsible electoral commission) electoral contestants (lists) have the right to benefit from state financing of their electoral campaigns, as do the individual candidates competing for the posts of President of Montenegro, mayor and president of a municipality.

State financing of the regular work of political parties in the national parliament ranges between 0.2% and 0.4% of the current state budget (excluding the capital budget and special funds). State funding for the regular work of parties in municipal assemblies ranges between 0.5% and 1% of a current municipal budget. Of this total figure, 15% is distributed equally to all political parties represented in parliament/assembly, and the remaining 85% is distributed proportionally according to the number of seats held.

Electoral Campaign Funding

The total state financing of electoral campaigns of parties amounts to 0.15% of the current budget of the year in which the campaign takes place. Of this amount, 20% is distributed equally among all of the submitted electoral lists within eight days of confirmation of the list. The remaining 80% is distributed proportionally according to the successful mandates within 15 days of the contestant party's submission to the responsible electoral commission of its report on the financing of the electoral campaign.

State funds supporting candidates competing for the posts of President of Montenegro, mayor, and president of municipality are distributed as follows: 10% equally to all certified candidates within 10 days of confirmation of their candidacy; 40% equally among candidates who win more than 10% of the votes within 10 days of the official declaration of electoral results; and 50% to the winning candidate.

The total amount of state funds available for financing the campaigns for President of Montenegro, mayor, and president of municipality is between 0.05% and 0.1% of the state budget corresponding to the election year. An additional 0.05% of the current budget is distributed proportionally to the number of successful mandates on those lists that have collected private funds equal to twice the amount to which they are entitled through the equal distribution of the initial 20% of available state funds. This “bonus” amount is proportionally reduced for parties/lists that fail to raise private funds to the level of the required threshold.

The state provides no other support for electoral contestants, except for announcing “all promotion rallies” free of charge and under equal conditions on the state-owned radio and television and in the state-owned newspaper *Pobjeda*. In fact, any other assistance is expressly forbidden in the Law on the Election of Counsellors and Representatives⁸.

The “submitter of the electoral list”⁹ is required to open a special bank account for the collection of all campaign funds and for the payment of all campaign expenditures; in the case of candidates for President of Montenegro, mayor, and president of municipality, the candidates are required to designate a responsible person. The same person is also responsible for submitting all specified reports and for overall compliance with the law, as applicable.

Donations and Private Financing

Political parties are also allowed to receive financing from private sources up to 100% of the amount of funds provided by the state. Non-parliamentary parties are permitted to finance their activities from private sources up to 5% of the total amount of state funding available to parliamentary parties. Private sources are defined as membership fees, donations, revenue from activities and assets, wills, non-profit activities, and gifts (stock certificate or other object with a value over 50 EUR).

Donations to political parties are prohibited from the following sources: foreign states; physical and legal persons residing outside Montenegro; anonymous donors; public/state institutions and enterprises, including those with a state minority share; trade unions; religious organisations; non-governmental organisations; casinos, gambling/betting establishments and organisers of games of chance; and enterprises that have received state contracts for two years before and after the duration of those contracts.

Cash donations are also forbidden. Annual individual donations are limited to between 2,000 EUR and 10,000 EUR for individuals and legal entities, respectively.

If the funds collected from private sources for the financing of electoral campaigns exceed the prescribed limit, the excess funds are to be transferred to the regular bank account of the party. If the total amount of funds in the regular bank account of a party exceeds the prescribed limit (amount equal to the available state financing in a given year), the party is obliged to return the excess amounts to the state budget. Similar restrictions apply for candidates for President of Montenegro, mayor, and president of municipality.

Financial Reporting and Sanctions

All electoral contestants are further obligated to submit reports indicating in detail the sources, amounts, and structure of the collected and expended funds, together with supporting documentation, to two bodies: 1) within 45 days of the date of the election, to the competent electoral commission, which in turn submits all reports to the National Electoral Commission; and 2) to the auditors in the Ministry of Finance, although the time frame for this submission is not specified in the law.

⁸ The English translation of the law is provided by the OSCE/ODIHR Legislation online service, available at www.legislationline.org/documents/action/popup/id/3765 and the Montenegrin version at www.izbori2009.me/wp-content/uploads/2009/03/zoioip.pdf.

⁹ The term “submitter of the electoral list” refers to the fact that electoral lists must be submitted by an authorised person, typically the person leading the list, and this individual assumes responsibility for compliance with all applicable laws.

Where the total amount of funds received from private sources exceeds 50,000 EUR, the authorised person is likewise obligated to engage an authorised auditor within 15 days of the date of the election and to submit the auditor's report. Parliamentary parties are further obligated to submit annual reports providing similar details. The National Electoral Commission is obligated to publish the reports received on its website and in the *Official Gazette*; on its website the Commission must also publish the names of the individual donors (physical and legal persons).

Responsibility for overseeing the implementation of these laws is, for the time being, with the Ministry of Finance. As these laws were applied for the first time to the 29 March 2009 elections, some time is needed to review how the new rules are functioning in practice. By law, the reports of the electoral contestants should have been filed by 13 May 2009, and the electoral commissions are responsible for making these reports public thereafter.

The State Auditors Institution (SAI) in principle has the authority to audit political parties but it is not obligated to do so, and it is difficult to predict when and if such audits may be incorporated into the SAI work plans. The SAI Senate is entirely independent in defining priorities for performing audit, and it adopts an annual Auditing Plan. The 2009 plan does not envisage, as a separate audit, the auditing of expenditures incurred by political parties, despite the fact that legislative elections were held on 29 March 2009, putting the new regulations to a first test. However, as the final budget accounts for 2009 will be audited, the public funds spent by political parties will be audited and revised while the final budget accounts are audited, and not as a separate performance of audit or as a separate item of expenditure.

The law lists a range of financial penalties for breaches of the campaign and party financing rules, both for responsible individuals (15 to 20 times the minimum monthly wage, currently set at 55 EUR) and for legal entities (100 to 200 times the minimum monthly wage); penalties can also be imposed on donors and on electoral commissions that fail to fulfil their obligations. No other sanctions are foreseen by the law, although detected fraud would be subject to relevant criminal penalties; no penalties in terms of loss of mandate are foreseen by the law.

Conclusion

The legislation clearly identifies licit and illicit sources of funds for political parties and for electoral campaigning and provides for a transparent state budget funding for parties. Anonymous donations to parties and candidates are forbidden. Campaign expenditures are capped. Financial reporting obligations of political parties and election candidates are spelled out in the legislation, including reporting on in-kind and private donations, as are the penalties for non-compliance.

However, it is dubious whether the Ministry of Finance is the correct institution for checking and auditing financial reports of political parties and candidates for election. Either the State Auditors Institution or a national electoral commission should be legally mandated and empowered to do so. On the other hand, there is significant room for breaching the rules, and the current system of control is yet to be fully tested. The new regime has difficulties in detecting unauthorised campaign fund-raising or spending incurred outside the dedicated bank accounts.

5. Integrity in the Justice System

According to the Constitution, the independence of the judiciary is assured, as the courts are "autonomous and independent" (article 118) and the State Prosecutor's Office is "a unique and independent state authority" (article 134). Both judges and prosecutors are prohibited from membership in political organisations (article 54). Concomitantly, the Judicial Council is the autonomous and independent authority that ensures the autonomy and independence of the courts and the judges (article 126), while the Council of Prosecutors is to ensure the independence of the state prosecution and the state prosecutors (article 136).

The Laws on Courts (2001) and the Law on the State Prosecutor's Office (2003), both amended in 2008, and the Law on the Judicial Council, enacted for the first time in February 2008 (*Official Gazette*, no. 13/08), complete the legal framework for the judicial and prosecutorial services. The

Judicial Council was established on 19 April 2008. The Judicial Council Law includes a procedure for the appointment of its members and sets out new competences related to the election of judges. The Law on the State Prosecutor's Office has resolved a previous conflict whereby the State Prosecutor had a double function – to prosecute criminal activities and to defend state interests in legal matters; the new law provides for attorneys to represent the state, and therefore prosecutors now deal only with criminal cases. All judges and prosecutors enjoy functional immunity, as awarded by the Constitution (articles 122 and 137).

Human Resources Management Practices affecting Judicial Independence

According to the Constitution, parliament has the power (by a simple majority vote) to “elect and dismiss from duty the President of the Supreme Court, the President and the judges of the Constitutional Court” (article 82). This constitutional design – whereby the President of the Supreme Court, who is also *ex officio* president of both the Judicial Council and the Nominating Commission to recruit judges, is not only elected but also dismissed from duty by parliament – is problematic from the standpoint of preserving the Supreme Court's independence from politics as well as the independence of the judiciary as a whole.

The Judicial Council is responsible for the recruitment of judges by defining a recruitment process, including specifying the procedures, the content of position advertisements, application forms, and criteria for selection. It appoints a three-member Nominating Commission with a one-year mandate, which selects judges throughout that period. The President of the Nominating Commission is always the President of the Judicial Council, and the majority of its members must be judges. The criteria for the selection of judges are defined in articles 32 through 35 of the Judicial Council Rules of Procedure, including the scoring guidelines (each criterion is given a weight of between 1 and 5 points).

The criteria concern technical knowledge (based on past academic performance, computer and language skills, and results of a written examination for applicants who have not previously served as judges); work experience, work results, publications and other relevant activities, and advanced education. The stated criteria provide a considerable level of detail, although there is insufficient clarity about how the weight of each of the criteria is determined. The scoring process could be more objective and competitive.

The appointment, dismissal, promotion, and disciplining of individual judges and of court presidents are the responsibility of the Judicial Council (article 125). The fact that judges and court presidents are no longer elected by parliament but appointed by the Judicial Council would seem to be suitable for preserving the autonomy and independence of the courts and judges, as stipulated in article 126 of the Constitution. However, the Judicial Council has ten members, four of whom are elected by judges, five by the government or the ruling party (Minister of Justice, President of the Supreme Court who is also President of the Judicial Council, one by the ruling party in parliament, two by the President of the Republic from among renowned lawyers), and one by the opposition party in parliament. This appointment scheme, in which the majority of appointments are based on political party quotas, is likely to further politicise the Judicial Council. Moreover, the recruitment system of judges is also politicised, as competitions to enter the judiciary are formally open and merit-based, but have severe limitations. Candidates are required to have a minimum of qualifications (5-15 years of career experience; law degree; Bar examination), but there are no criteria for ranking candidates or for motivating an appointment proposal.

Judicial institutions make appointment proposals, and the Council has ample discretion to choose from among the various proposals. There is therefore no guarantee of professional, merit-based appointment of the remaining four Council members appointed by the judiciary. As a result, the appointment of judges depends too much on parliamentary political bargaining.

The regular evaluation of judges is not specified in any of the laws or Judicial Council documents, and it appears therefore that it is not formally required, although the Law on Courts requires the

presidents of courts to report to the Judicial Council annually on the work of the courts (no details on the form and content of this report are specified, however)¹⁰.

The remuneration of judges and prosecutors is defined in the Law on Earnings and Other Income of Judicial and Constitutional Functions according to a formula of grades of functions and years of employment, with a 30% supplement applied across the board. The lowest judicial salary grade is that of a judge of a basic court or of a deputy state prosecutor, and it is calculated on the basis of a coefficient that is 10 times the standard monthly salary defined by the government.

The current value of the coefficient is 75 EUR, making the lowest judicial salary 975 EUR per month. The highest base judicial salaries (those of the Presidents of the Supreme Court and the Constitutional Court and of the Chief State Prosecutor) have the coefficient of 12.98. For each year up to 10 years of service, salaries are increased at 0.5% per annum; between 10 and 20 years of service, at 0.75% per annum; and between 20 and 30 years of employment, at 1% per annum.

Members of the judiciary receive additional benefits, such as meals during work days, assistance with housing rental through a reimbursement up to the amount of three basic monthly salaries, and life insurance, as well as a special form of unemployment insurance upon discontinuing employment for a period of up to one year or until either the pension or new employment begins.

Integrity and Accountability of Judges

The Judicial Council appoints a three-member Disciplinary Committee (president and two members) and their deputies. An Office for Reporting Corruption in the Judiciary was set up in May 2009, while the Office for Citizens' Complaints in the Supreme Court is still operational. Any physical or legal person has the right to lodge with the Judicial Council a complaint on the work and conduct of a judge, which may be anonymous but must be in written form. The Judicial Council forwards the complaint to the president of the court where the concerned judge works, and it is the president of the court who makes a preliminary assessment of the complaint's truthfulness prior to submitting it to the Disciplinary Committee of the Judicial Council together with a written recommendation, with justifications, as to whether disciplinary proceedings should be initiated.

A recommendation to initiate disciplinary proceedings is forwarded to the accused judge, who has eight days to respond and who may engage a defence attorney. A hearing is scheduled up to 15 days of receipt of the written response, and the Disciplinary Committee must reach a decision within three days of the hearing. The accused judge has the right to challenge the decision of the Disciplinary Committee before the Judicial Council (the member who took part in the Disciplinary Committee's review is excused from the proceedings), and the decision of the Judicial Council is further subject to review by the Administrative Court.

The Judicial Council has delivered official statistics on disciplinary proceedings for 2008. Six recommendations were made to initiate disciplinary proceedings against judges, two judges were dismissed and two judges resigned following notification of the initiation of disciplinary proceedings against them. Nine judges were temporarily suspended because they were under investigation.

Prosecutors

The Constitution (article 82) stipulates that parliament has the power (by a simple majority vote) to "appoint and dismiss from duty the Supreme State Prosecutor and State Prosecutors...", although the appointment of state prosecutors is made on the recommendation of the Prosecutors Council; deputy prosecutors are appointed and dismissed by the Prosecutors Council alone. The Venice Commission¹¹

¹⁰ The annual reports issued by the Judicial Council on the work of the courts (the last one available is for 2007) focus on the numbers, structure, and status of cases processed, with an emphasis on reducing a significant backlog, which is one of the priorities of judicial reform efforts. Available on the website of the Judicial Council: www.sudskisavjet.gov.me/LinkClick.aspx?fileticket=xdABqoFOEYY%3d&tabid=62&mid=400&forcedownload=true.

¹¹ Venice Commission, "Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro", CDL-AD(2008)005, [www.venice.coe.int/docs/2008/CDL-AD\(2008\)005-e.asp](http://www.venice.coe.int/docs/2008/CDL-AD(2008)005-e.asp).

expressed serious concern about the parliamentary appointment of state prosecutors (and of the Prosecutors Council) without a qualified majority, stating that it “remains convinced that these elements seriously endanger the independence of the prosecutor’s office because they could lead to a politicisation of the appointment process, and probably even more dangerously, to the politicisation of dismissals”. Other threats to the independence of prosecutors include the possibility of secondment of prosecutors without their agreement in exceptional circumstances and without the right to file a protest with the Prosecutors Council.

As stipulated in the Law on the State Prosecutor’s Office (articles 84 to 87), the Prosecutors Council consists of a president and ten members. The President of the Prosecutors Council is *ex officio* the Chief State Prosecutor. Members are appointed by parliament in the following manner: six among state prosecutors and deputy state prosecutors, appointed following a vote by secret ballot at an extended session of the Chief State Prosecutor’s Office (which includes the Chief State Prosecutor, his/her deputies, and high state prosecutors); one member is a professor from the Law Faculty in Podgorica, appointed on the proposal of the Podgorica Law Faculty; two are prominent lawyers in Montenegro, one of whom has experience in the protection of human rights and freedom, at the proposal of the President of Montenegro, with the advice of the Ombudsman¹²; and one is a representative of the Ministry of Justice, appointed on the proposal of the Minister of Justice.

The appointment procedure for state prosecutors is outlined in some detail in articles 31-36 of the same law (reiterated in the Rule of Procedure of the Prosecutors Council) and to a significant extent resembles the procedures set down by the Judicial Council. The formal emphasis is on professional qualifications—technical knowledge (based on past academic performance, computer and language skills, and results of a written examination for applicants who have not previously served as judges), work experience, work results, publications and other relevant activities, and advanced education. There are some scoring guidelines but, as with judges, these guidelines are insufficiently precise and leave considerable scope for subjectivity.

Disciplinary measures and complaints are considered by a three-member Disciplinary Commission, but complaints may only be lodged by “authorised” persons¹³. Decisions of the Disciplinary Committee may be appealed to the Prosecutors Council, and the Council’s decisions are further subject to administrative appeal. There are neither established obligations nor outlined procedures for an annual review and evaluation of prosecutors’ performance.

The Chief State Prosecutor is appointed by parliament and has no special status other than the role of presiding over the Prosecutors Council and the Nominating Commission. The Chief State Prosecutor is also responsible for initiating disciplinary proceedings against lower-level prosecutors and for proceeding before the Supreme Court, the Appellate Court, the Administrative Court, other courts and other state authorities, in accordance with the law, among other duties.

Conflict of Interest of Judges and Prosecutors

Judges and prosecutors cannot be members of parliament or have any other public duties or professionally perform any other activity (articles 123 and 138 of the Constitution). The Law on Preventing Conflict of Interest of 27 December 2008 also applies to judges and prosecutors.

Accountability of the State for Defective Functioning of Justice

Article 38 of the Constitution provides that a “person deprived of liberty in an illegal or ungrounded manner or convicted without grounds shall have the right to the compensation of damage from the state,” while according to article 149, the Constitutional Court is responsible for deciding on

¹² It may be noted that the obligation, at a minimum, to consult with the Ombudsman on this matter was missing from the initial draft amendments and was added at the recommendation of the Venice Commission.

¹³ The Minister of Justice for the Chief State Prosecutor; the High State Prosecutor and the Basic State Prosecutor for their deputies; the Chief State Prosecutor for the High State Prosecutor and the Basic State Prosecutor; and the High State Prosecutor for the Basic State Prosecutor—within 15 days of the date on which he/she learns of the potential neglect/breach of duty and not later than 60 days of the date on which the reasons for the establishment of disciplinary responsibility emerged (article 42).

“Constitutional appeal due to the violation of human rights and liberties granted by the Constitution, after all other efficient legal remedies have been exhausted,” while “any person may file an initiative to start the procedure for the assessment of constitutionality and legality” (article 150). The Law on Obligatory Relationships provides a basis for seeking compensation from the state for damages caused by a defective functioning of justice.

Conclusion

Human resources management arrangements within the judiciary may compromise judicial independence from politics. Personnel management rules are in place (recruitment, promotion, performance appraisal, salary levels, and disciplinary arrangements) and are aimed at guaranteeing judicial independence as well as the accountability of judges, but the institutional and legal set-up makes the judicial and prosecutorial services visibly vulnerable to politicisation¹⁴.

6. Anti-Corruption Policies and Administrative Reforms

Anti-Corruption Strategy

The Programme for the Fight against Organised Crime and Corruption, also known as the National Anti-Corruption Programme¹⁵ (hereafter referred to as the National AC Programme)—is the government’s strategic framework for the fight against corruption. Adopted in July 2005, the National AC Programme addresses a number of general and specific preventive and repressive (law enforcement) measures, with a strong emphasis on international co-operation. An AC Action Plan for putting the objectives and measures outlined in the National AC Programme into operation, drafted by an inter-agency commission that included civil society representatives, was adopted by the government in late August 2006. The first AC Action Plan covered the period from 2006 to 2008. A second action plan, known as the “Innovated Action Plan”, covering the period 2008-2009, was adopted by the government in May 2008. This second action plan to a great extent reflects the first, but contains a number of more specific measures, including measures focusing on local governments, that demonstrate a positive evolution in thinking during the process of implementation and review. It suggests a more thorough understanding of the challenge of fighting corruption.

With regard to local governments, the Innovated Action Plan obliges each municipality to prepare and adopt specialised programmes for the fight against corruption and action plans for their implementation by the end of 2008 on the basis of models elaborated by a working group composed of representatives of the Ministry for Internal Affairs and Public Administration, the Union of Municipalities, local administrations and civil society; the working group is advised by experts from the Council of Europe and supported by UNDP. It seems that due consideration has been given to integrating anti-corruption measures into the larger process of local government reform, which is encouraging. However, the first report on implementation, issued in February 2009 by the Commission for Monitoring the Implementation of the Action Plan for the Fight against Corruption at Local Level, indicated that a number of municipalities had not submitted reports on progress and that only two municipalities had adopted anti-corruption plans. Nevertheless, these documents and actions may generate important frameworks for implementing reforms and for pursuing the fight against corruption if they are taken seriously and if the authorities give them a meaning that goes beyond a bureaucratic exercise.

Various institutions are responsible for implementing segments of the National AC Programme: a total of 54 institutions at central level, plus each of the local government units (19 municipalities, the capital city Podgorica, and the historic capital of Cetinje). The implementation process is overseen by the high-level National Commission for Monitoring the Implementation of the Programme for the

¹⁴ However, GRECO’s “Joint First and Second Evaluation Rounds Compliance Report on Montenegro”, adopted in Strasbourg on 1-5 December 2008, states that “GRECO is pleased to note that the recruitment and promotion of judges and prosecutors are strictly subject to objective criteria, such as professional experience and integrity”. The report is available at http://www.njegoskij.org/IMG/pdf_GrecoRC1_2_2008_5_ME_EN.pdf.

¹⁵ Available in English at www.gom.cg.yu/files/1125055411.doc and in Montenegrin at www.gom.cg.yu/files/1124287629.doc.

Fight against Corruption and Organised Crime, which was established by a decision of the government on 15 February 2007. The Commission is chaired by the Deputy Prime Minister for European Integration¹⁶, a secretary and its other members are the Minister of Interior and Public Administration, the Minister of Finance, the Minister of Justice, the President of the Supreme Court, the State Prosecutor General, two members of parliament, the Head of the Police Directorate, the Head of the Police Department for the Fight Against Economic Crime, the Director of the Directorate for Anti-Corruption Initiative, and two NGO representatives.

In October 2007, the National Commission established a Tripartite Commission (representative of the Supreme Court, State Prosecutor General, and the Police Directorate) for joint collection, reporting, and analysis of reports, investigations, and processes of corruption-related offences. The individual reports are analysed and prepared for submission to the Commission by an “Expert Body”, consisting of representatives of the Police Directorate, the Directorate for Anti-Corruption Initiative, the Ministry of Justice, the State Prosecutor General, and the Cabinet of the Deputy Prime Minister for European Integration. It is planned, however, that the Directorate for Anti-Corruption Initiative (DACI) will take over this function in 2009.

Conclusion

It is a matter of concern that the anti-corruption effort may be driven by international institutions to too high a degree. It is uncertain whether in the medium term all of the resources and institutional structures that may be required to implement the action plans will actually be available, and if so, whether the resulting institutional landscape will be overly complex and difficult to deal with.

Legislative Activity against Corruption

Apart from the above-mentioned laws on conflict of interest, the financing of political parties and electoral campaigns, and the reform of judicial and prosecutorial services, other pieces of legislation or amendments related to anti-corruption efforts have been passed recently. Reforms of the 2003 Penal Code were introduced in 2004, 2006 and 2008 (*Official Gazette*, no. 40/08). The Criminal Procedure Code of 2003 was also amended in 2004 and 2006 and at the time of writing it is in the process of being further amended in parliament, and important changes are expected (see below). The Law on International Legal Assistance in Criminal Matters was passed on 17 January 2008 (*Official Gazette*, no. 04/08). The Law on Free Access to Information was passed in 2005 and a new Law on Public Procurement in 2006. Finally, the Law on the Prevention of Money-Laundering and Terrorist-Financing was passed in 2007 and amended in 2008, while the Law on Witness Protection was passed in 2004. The July 2008 amendments to the Law on Civil Service and State Employees (*Official Gazette*, no. 50/08) introduced some measures to protect civil servants who denounce or inform concerning corruption offenses (whistle-blowers).

The Criminal Code and the Criminal Procedure Code have undergone a number of amendments, including changes that strengthen the role of the prosecution in cases of corruption and organised crime, reflected in the 2007 Constitution and the amended 2008 Law on the State Prosecutor. Additional amendments to the Criminal Procedure Code will include expanded seizure and confiscation of the proceeds of crime and inversion of the burden of proof in cases of suspicious enrichment of officials. These legal amendments are expected to be adopted by the end of 2009.

Further planned amendments to the Criminal Procedure Code, also foreseen by the end of 2009, include the provision to reverse the burden of proof in the prosecution of corruption offences, and the

¹⁶ The fact that the anti-corruption effort is linked to European integration, along with other signs, may indicate that the EU membership ambition of the country is the main driving force for combating corruption, which may raise questions about the degree of internalisation of this effort and about its sustainability in the long term. For example, the National Commission adopts reports on the implementation of the Action Plan two times per year and presents the findings “to the members of the international community.” The reports evaluate the extent to which each measure has been implemented and make some recommendations—generally reminders of ongoing obligations, but they also signal measures of particular significance in relation to the EC Progress Reports.

authorisation to use special investigative means for the investigation of all corruption-related offences. There have also been efforts to strengthen the capacities of law enforcement agencies and other corruption prevention bodies through training, provision of adequate premises and equipment, and increases in the number of staff. The salaries of judges and prosecutors have increased.

Montenegro has adopted in fact most of the key laws relating to corruption prevention, with some of these laws already of the second generation, e.g. the laws relating to the financing of political parties and electoral campaigns, the law on conflict of interest, and the public procurement law. Authorities consider that, other than the planned changes to the Criminal Code and the Criminal Procedure Code, the only remaining legislative gap will be filled in 2009 with the passage of a law on integrity, which is currently being drafted. This law will apparently address two issues: lobbying and the obligation for state institutions to institute integrity plans.

Main Institutions and Administrative Units Related to Anti-Corruption¹⁷

Ministry of the Interior (Police)

Specialised units for the fight against organised crime and corruption have been formed in the Police Directorate and in the State Prosecutor's Office, and specialised departments were established in 2008 in the high courts of Podgorica and Bijelo Polje, with capacities to more effectively adjudicate complex organised crime and corruption cases. The number of specialised personnel has grown over the years, and specific anti-corruption measures that have been undertaken are outlined in the Fourth Report on the Implementation of the National AC Programme. The report indicates that, for the three-year period 2006-2008, out of 776 reported complaints involving corruption offences received by the police, 277 were forwarded to prosecutors; of these, 133 resulted in indictments by prosecutors. With regard to courts, out of 157 indictments received, 105 were adjudicated. The Fifth Report is scheduled to be released in July 2009.

Some recent arrests suggest the increasing effectiveness of these specialised units within the police. These achievements are significant, but more evidence is needed to reach a decisive conclusion on the matter.

Directorate on Anti-Corruption Initiative (DACI)

The DACI is a unit within the Ministry of Finance that was established in 2001 and reformed in 2007 to absorb more competences. The DACI staff is 17-strong, most of whom have been hired recently. Its responsibilities are aimed at promoting preventive measures and legislation against corruption, raising awareness of the issue, and co-operating with private sector organisations, NGOs and other public bodies in the preparation of anti-corruption plans. DACI monitors the implementation of international conventions against corruption of which the country is a signatory as well as international recommendations on the issue, such as those provided by GRECO, SEE Stability Pact and others.

Several activities are taking place in DACI, including educational and research activities. As DACI is to be assigned the function of secretariat of the National Commission overseeing implementation of the National AC Programme, it envisages its deep involvement in the process of drafting the new National AC Programme and Action Plan based on the many diagnostic and research activities it has undertaken in 2008 and 2009.

Looking at the list of duties and the challenges, the goal for DACI could be to develop itself as a sort of national advisory or resource centre on anti-corruption, but it is uncertain whether DACI is sufficiently resourced to cope with the challenges ahead and to gather together the means that will be required in terms of human and expert capacities in anti-corruption. DACI resources seem to be very reliant on international and bilateral donors (UNDP, Norwegian Government, etc.), and this raises concerns about the sustainability of DACI's activities.

¹⁷ For the State Auditors Institution, see Sigma's 2009 assessment report on External Audit in Montenegro. We do not refer to the Ombudsman in this section because the Montenegrin Ombudsman institution has no relevance for the fight against corruption.

Impact of the Law on Free Access to Information¹⁸

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 e-mail. Bodies that have received requests for information must respond within eight days; this period can be extended for another 15 days. In case of emergency, responses must be provided within 48 hours. Exemptions can be made for the following reasons: 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.

An individual seeking free access to information must be “significantly harmed” if he is denied access 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. First instance appeals against access denials are to be made to the supervisory body of the agency concerned and in a second instance to court.

Government bodies are also required to create and publish lists of types of information held, including public registers and records. According to the law, the media ministry must publish a guide. There are sanctions for the refusal by agencies and officials to allow access to information. The law also includes a limited whistle-blower protection provision, which limits sanctions on public employees who publicly reveal misuse or irregularities and who also inform the head of the agency or relevant investigatory agency. The Ministry of Culture and Media is in charge of monitoring the implementation of the law.

There is no law on official secrets defining the nature of those secrets, which in practice means that every bit of information may be marked as a state secret. However, even if not precisely defined, the notion of an official secret is mentioned in article 51 of the Civil Service Law. This provision strongly emphasises 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. The Law on the Agency for National Security allows individuals to request their files but to date no files have 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 that 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. The July 2008 amendment to the Law on Civil Service represents an improvement of the protection to those civil servants and public employees who report suspicions of corruption in good faith, but this protection is unlikely to bring about more transparency in the administration, even if it is combined with the protection granted by the 2004 Law on Witness Protection.

¹⁸ An assessment of this matter is provided in Sigma’s 2008 assessment report on the Administrative Legal Framework in Montenegro, at <http://www.sigmaxweb.org/dataoecd/49/10/41637656.pdf>.

Administration on the Prevention of Money-Laundering and Terrorist-Financing¹⁹

The Administration for the Prevention of Money-Laundering and Terrorist-Financing (APMLTF) was established in 2005, its staff is some 30-strong, and it is the central authority for combating money-laundering and terrorist-financing. Its powers and duties are confirmed in the 2008 Anti-Money-Laundering Law. APMLTF is an independent body whose administrative work is supervised by the Ministry of Finance. Otherwise, it has full operational autonomy. APMLTF has the legal authority to gain access to other agencies' information as well as having full access to publicly available databases maintained by government departments. APMLTF may also exchange information with foreign authorities having similar functions and which have equivalent secrecy rules, if such an information exchange is made with the purpose of preventing and combating money laundering and terrorist financing. Data held at APMLTF is securely protected and only disseminated in accordance with the AML law.

The main law enforcement bodies concerned with the fight against money-laundering and terrorist-financing are the Police Directorate and the State Prosecutor's Office. Both of these bodies, together with their relevant powers and the scope of their activities, have been established by law. A special department for the investigation of money laundering has also been established within the Police Directorate, which also investigates terrorism financing. A special department for combating organised crime, corruption, terrorism and war crimes has also been established within the State Prosecutor's Office.

The evaluators from the Council of Europe considered that measures are in place that provide law enforcement and prosecution authorities with an adequate legal basis for the use of a wide range of special investigative techniques when conducting investigations of money-laundering and terrorist-financing. However, due to the relatively low number of cases investigated and prosecuted, it was not possible to form a conclusion on the effectiveness of these provisions.

Simplification of Administrative Procedures and Licensing

The Programme to Eliminate Barriers to the Development of Entrepreneurship was adopted in October 2007 and its action plan was launched in April 2008, including a monitoring Council to supervise its implementation. The main thrust of the Programme is to simplify licensing procedures, which includes amending the current Law on Administrative Procedures, launching other actions aimed at reducing red-tape, and establishing one-stop-shop schemes. The Programme seems to have produced few concrete results so far.

Conclusion

Montenegro's legislative activity is significant and the country is in the process of bringing national legislation in line with international standards, in particular with regard to criminal legislation and law enforcement capacities. The institutional landscape that is emerging, however, may be overly complex, as the internalisation of the new values represented by these standards is doubtful, making the sustainability of reforms very uncertain.

7. International Co-operation against Corruption

The Montenegrin Constitution (article 9) states that "ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation".

¹⁹ This section is a quotation from the First Mutual Evaluation Report on Montenegro of the Council of Europe European Committee on Crime Problems (CDPC)/ Committee of experts on the evaluation of anti-money laundering measures and the financing of terrorism (MONEYVAL), adopted on 16-20 March 2009 at its 29th Plenary Session in Strasbourg. The full report is available on the website of the CoE: [http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round3/MONEYVAL\(2009\)10Rep-MNE_en.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/Evaluations/round3/MONEYVAL(2009)10Rep-MNE_en.pdf). As this report is very recent and has been prepared with a reliable peer review methodology, we refer to it as a good expert analysis and evaluation of the Montenegrin policy and administrative units on the persecution of money-laundering, a powerful anti-corruption mechanism.

Montenegro has not signed the 1997 OECD Convention on Combating Bribery of foreign public officials in international business transactions. It has, however, acceded to other relevant international conventions relating to anti-corruption, as follows:

- 2002 Council of Europe Civil Law Convention on Corruption: signature 7 April 2005, ratification 28 January 2008, and entry into force 1 May 2008;
- 2002 Council of Europe Criminal Law Convention on Corruption: ratification 18 December 2002 and entry into force 6 June 2006;
- Additional Protocol to the Council of Europe Criminal Law Convention on Corruption: signed 20 February 2008, ratified 17 March 2008, and entry into force 1 July 2008.²⁰

In addition, Montenegro ratified the 2003 United Nations Convention against Corruption (UNCAC) in October 2006.

International co-operation has been relatively high on the reform agenda, with Montenegro joining INTERPOL in 2006 and signing a Strategic Agreement on Co-operation with Europol in 2008. The Police Directorate has begun producing annual reports “On Police Directorate Work and Security Situation” in English. These reports contain a considerable amount of information including, for instance, the most significant achievements in international police co-operation. The Fourth Report on the Implementation of the National AC Programme also indicates that four such joint international actions were carried out in co-operation with the High and Basic Prosecutors’ Office and three in co-operation with the Special Prosecutor for Organised Crime and Corruption.

With regard to extradition, in 2008 six persons were extradited to Montenegro and 19 requests await the decision of the foreign states concerned; six persons were extradited from Montenegro to another state, with 17 more requests still under consideration.

General Conclusions

1. A number of laws related to anti-corruption have been passed and institutions have been established with a view to creating a more systemic framework for combating corruption. Several important integrity areas have been regulated for the first time: financing of political parties, conflict of interest, access to information, and transparency of government institutions. However, flaws in some of this legislation are apparent, which is likely to make its implementation difficult.
2. The regulation of the immunity and inviolability of MPs is up to international standards. The conflict-of-interest regulation may face problems of constitutionality. In any event, this regulation has many loopholes and unjustified exceptions for parliamentarians (article 9 of the new law), which makes the newly adopted regime almost ineffectual.
3. Similar conclusions may be drawn concerning the immunity of government members, although the regulations on incompatibility and conflict of interest have fewer unjustified exceptions like the exception provided in the above-mentioned article 9 for parliamentarians. Concerns remain about the likely ineffectiveness of the Commission on Preventing Conflict of Interest.
4. Much more needs to be done if MPs really want to oversee the activities of the government. If parliamentarians have the political will to do so, increasing the technical capacity of parliamentary administrative services would be crucial for improving parliamentary performance, both in producing legislation and especially in controlling the government.
5. The legislation clearly distinguishes licit from illicit sources of funds for political parties and for electoral campaigning and establishes a transparent state budget funding for parties. Anonymous donations to parties and candidates are forbidden. Campaign expenditures are capped. Financial reporting obligations of political parties and candidates for election are spelled out in legislation, including for in-kind and private donations, as are the penalties for

²⁰ Information on status with regard to Council of Europe Conventions can be found on <http://conventions.coe.int>.

non-compliance, although there is significant room for breaching the rules, and the current system of control is yet to be fully tested. Finally, it is doubtful that the Ministry of Finance is the correct institution for checking and auditing financial reports of political parties and election candidates. A more politically neutral institution outside the political direction of a minister should exercise this function, such as the State Auditors Institution or the National Electoral Commission, and it should be legally mandated, empowered and resourced to do so.

6. Personnel management rules for judges and prosecutors are in place (recruitment, promotion, performance appraisal, salary levels, and disciplinary arrangements), but they do not guarantee judicial independence from politics. The institutional and legal set-up is still too vulnerable to protect the judicial and prosecutorial services from politicisation. The continuation of justice reform is necessary and should be aimed at strengthening judicial and prosecutorial professionalism, efficiency, independence and accountability. In this respect, it would be important to ensure that judicial and prosecutorial appointments are merit-based, through transparent criteria and procedures.
7. Further progress is needed in the implementation of reforms in the judiciary and in adopting the still pending amendments to criminal legislation, in particular to the Criminal Procedure Code.





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MONTENEGRO

**PUBLIC INTERNAL
FINANCIAL CONTROL**

ASSESSMENT MAY 2009

Summary

Main Developments since last year

Since last year's assessment, a number of steps have been taken in Montenegro to align the PIFC system to EU standards. The PIFC Law was passed by parliament on 26 November 2008. The PIFC Law covers the users of the government budget, budget of municipalities, state funds, independent regulatory bodies, public enterprises and other legal entities in which the government or the municipalities have a controlling stake. It is a framework law which defines the internal control system, that is, financial management and control as well as internal audit. It establishes a semi-decentralised internal audit system throughout the administration. It sets the requirement for the establishment of a central harmonisation unit (CHU) responsible for the development of methodology. It defines the specific responsibilities of management in relation to PIFC. The aim of the law was to formalise and upgrade previous Directions and documents relative to financial control and internal audit.

The choice of a semi-decentralised internal audit system was the response to having a small administration such as the Montenegrin administration. The internal audit is functionally independent of the operational business and reports to the head of the entity under review.

The Government Decree (No/ 73/08) issued on 12 March 2009 identifies 23 institutions that are obliged to establish their own internal audit units. Besides these institutions, the Decree obliges other institutions and public enterprises that employ more than 200 staff or that have annual expenditures exceeding 5 million EUR to establish their own proper internal audit function.

The rulebook on the manner and procedure of internal audit was adopted in May 2009.

The Directions on State Treasury Operations were amended on 18 December 2008 (No. 06-3224/1). They are basically an update of the previous instructions and deal with the authorisation to line ministries, execution, accounting and control of expenditure. It also defines Treasury responsibilities with regard to the centralised responsibility of ex ante control and payment as well as keeping the general ledger, reporting and closure of the annual accounts, which is part of the government's internal control system.

Main Characteristics (strengths and weaknesses)

Montenegro is committed to making efforts to comply with the requirements put forward by the European Commission as far as PIFC is concerned. Putting in place a legal framework, whilst important, is only one aspect of developing an effective financial control system.

The (Organic) Budget Law addresses good governance procedures and the implementation of accountability measures, as does the PIFC Law enacted on 26 November 2008. The above-mentioned amended Treasury Directions are an implementing guide for the responsibilities of the managers in line ministries regarding financial management. The Directions in themselves provide for sensible internal financial control within the government, but they only refer to the (Organic) Budget Law and no reference is made to the recently enacted PIFC Law. The legal structure between the (Organic) Budget Law, the PIFC Law and the Treasury Directions have become unclear for the user they aim to serve. The treasury system is part of the government's internal control system. Because of the lack of logical connections between the different laws and the Treasury Directions, the PIFC Law seems to be an "add-on" to the financial control system. The logic would be that the Treasury Directions provide guidance to the PIFC Law. This might indicate various problems, such as the law-making structure itself, but it might also be an indication that the PIFC reform has not yet been fully understood and managed, even at the centre.

There is no formalised process for carrying out budget reforms, including the establishment of linkages to budget execution, which comprise relevant components of financial management and control as well as internal audit. So far developments in budget reform and in public internal financial control have generally been independent of each other. This piecemeal approach seems to continue.

There is, however, an emerging change in that greater and also more explicit responsibility is being given to line ministries for the achievement of target objectives through performance budgeting. This means a switch to a different culture in terms of the way in which public finance is managed and implemented. It also means that a greater ownership of implementation is needed. Although the PIFC Law is “owned” by the Ministry of Finance, and even within a specific department in the ministry, it was developed and seems to have been passed with not a lot of involvement within the wider circle of core institutions reliant on the law.

The PIFC Policy Paper includes a clear and coherent medium-term strategy. The aim should be to establish a genuine financial management and control culture alongside the further development of managerial accountability, financial management and control, and internal audit. This will not be an easy task and there is a need for broader connections amongst the different actors within the Ministry of Finance and between different stakeholders. The main challenge therefore lies in applying the new features expressed in the upgraded legislative framework.

In order to step up the implementation of reform as quickly as possible, recruitment of staff for the internal audit area is needed. However, with the current economic projections, the taking on of new staff poses problems and may negatively affect the commitment to reform. However, new internal audit staff is not a prerequisite for applying the other features related to governance and managerial accountability.

Recommendations for Reform

Managing the change to accountability, as outlined in the PIFC Policy Paper and the PIFC Law, will require time and technical capacity, long-term political commitment and effective arrangements, including within the Ministry of Finance. Special attention should be given to change management in particular, and the need to alter working methods in order to achieve the objectives spelled out in the PIFC Law.

One of the reasons for the lack of a comprehensive approach is most probably the lack of real awareness that good governance requires sound and close pragmatic working relationships both within the core sectors of the Ministry of Finance and other stakeholders such as, for example, the State Auditors Institution. As new approaches are very new to the administration at large, it would be advisable to carefully manage the change of the culture of governance and accountability and provide extensive efforts via coaching in order to contribute to raising awareness for key stakeholders, including ministers and senior officials, so as to ensure the successful implementation of this new system. Strategic planning is therefore necessary on how to reach these objectives, coupled with an extensive training agenda adapted to different groups of senior officials involved at various levels.

In addition, it is crucial that the various departments within the Ministry of Finance agree on the comprehensive governance system that they aim to set up through the existing laws. Therefore the departments of budget, treasury, internal audit and the CHU also need to improve their internal communication and professional dialogue to ensure that they are all striving towards the same objective, that the different systems support each other, and that the small administration in Montenegro has a clear, basic and comprehensive approach to the development of the budget process and PIFC reform.

1. Legal Framework

The (Organic) Budget Law, adopted in August 2001 (as amended in November 2007), the Public Internal Financial Control (PIFC) Law passed by parliament on 26 November 2008, together with the Directions of Treasury Operations amended on 18 December 2008 (No. 06-3224/1) govern public finance in Montenegro. Public finance comprises arrangements for budget preparation, adoption of the annual budget, management, execution, internal control, accounting and auditing of the budget. The scope of the Budget Law covers the government budget and the budgets of municipalities (Art. 1 of the Budget Law). The Budget Law is being amended to reflect amongst other items the new Law on PIFC. Before the PIFC Law was passed, internal audit was a centralised service established within the Ministry of Finance.

The PIFC Law covers the users of the budget of Montenegro, budget of municipalities, state funds, independent regulatory bodies, public enterprises and other legal entities in which the government or the municipalities have a controlling stake.

It is a framework law which defines the internal control system, such as financial management and control as well as internal audit systems, and it establishes a semi-decentralised internal audit system throughout the administration. It sets the requirement for the establishment of a central harmonisation unit (CHU). It also defines management's specific responsibilities in relation to PIFC. The aim of the law is to formalise and upgrade previous directions and documents relative to financial control and internal audit, which were developed through assistance from the international community.

The head of the entity is thus responsible for the proper functioning of the financial management and control system, and for the preparation and implementation of strategic planning and action programmes for achieving the objectives set in the strategic plans. The head of the entity is also responsible for risk management and compliance with laws, economic, efficient and effective use of available funds, and reporting, as well as introducing internal rules and procedures for the financial management and control systems. He/she is also responsible for the establishment of the internal audit function.

The internal control procedures developed aim implicitly to prevent fraud and irregularities. The head of the entity is also responsible for undertaking the actions necessary and for informing the responsible public authorities should fraud or serious irregularities be discovered. Similarly, the head of the internal audit unit is responsible for reporting cases of fraud or serious irregularities to the head of the entity in writing.

Under the PIFC Law, article 18, the internal audit system has been upgraded from a centralised internal audit system to a semi-decentralised internal audit system. The semi-decentralised internal audit system has been carefully chosen as a response to a small administration. Internal audit units should therefore be established in larger line ministries and in spending units, where it would make sense to have at least three staff (head of internal audit included). Smaller spending units would be dependent upon the internal audit of the line ministry in which they were established and to which they reported. A provision has also been made for a third category of institution to ensure that internal audit can be established also in smaller administrations, for example, outside the executive, such as the judiciary, the supreme audit institution or the Office of Parliament. These smaller institutions would avail themselves of the internal audit services, of a common unit for internal audit, or of other internal audit services, subject to approval of the Ministry of Finance.

A Government Decree (No. 73/08) was issued on 12 March 2009 to further define the mandatory establishment of internal audit. This means that 23 institutions have been identified as major institutions which will have their proper internal audit function. Of those 23 budget units, 11 refer to ministries, such as the Ministry of the Interior and Public Administration, Ministry of Defence, Ministry of Finance, Ministry of Economic Development, Ministry of Transport, Maritime Affairs and Telecommunications, Ministry of Agriculture, Forestry and Water Management; some others refer to other major administrations such as Customs and Tax Administrations, Transport Directorate and Public Works Directorate, as well as the extra-budgetary funds, such as the Pension and Disability

Fund, the Health Insurance Fund, the Employment Office and the Development Fund. The only municipality identified in the list is the capital city, Podgorica.

The same decree also obliges other administrations or institutions to establish internal audit. Thus any institution or public enterprise that has more than 200 employees or that has annual expenditures exceeding 5 million EUR are subject to the establishment of internal audit.

According to the PIFC Law, the internal audit unit is functionally independent of the operational business under which it operates and it reports to the head of the entity under review.

The PIFC Law also prescribes that risk management should be carried out. A rulebook is being drafted for further guidance.

The PIFC Law was developed by a working group consisting of members of three departments of the Ministry of Finance (internal audit, budget, and state treasury). Sigma provided assistance and expertise throughout the drafting process.

The PIFC Law informs the user that implementing legislation is to follow. A first step was the amendments to the Directions on State Treasury Operations, which were amended on 18 December 2008. However the Directions make reference only to the Budget Law; they do not make any reference to the PIFC Law, although article 9 of the PIFC Law requires that control activities be established, such as those described in the Directions.

The Directions define line ministries' authorisation, execution, accounting and control of expenditure from the budget of Montenegro. They also define the Treasury's responsibilities with regard to the centralised responsibility of ex ante control and payment as well as keeping the general ledger, reporting and closure of the annual accounts. The essence of these rules is sensible and the rules define financial control and form the core of the financial management and control system as defined in the PIFC Law.

As the single treasury system is part of the internal control system of the government, it should therefore follow the descriptions and the obligations defined in the Public Internal Financial Control Law as well as the overall responsibilities for the Ministry of Finance provided for in the Budget Law.

The lack of connections between the different legal documents does not give a clear picture to the user and makes the entire PIFC system seem unclear. Cross-references need to be made, at least to the PIFC Law, to ensure that the legal framework is comprehensive and that inconsistency in its implementation is reduced.

The Directions have not changed in essence and they are basically an update of the previous instructions. Some of the changes made relate to revenue collection and recording, some of them to the use of the Instrument for Pre-accession Assistance (IPA)²¹ funds, and others to the removal of redundant (old) articles. However, the most important change has not been made; the guidelines should at least also refer to the PIFC Law rather than only to the (Organic) Budget law.

The Treasury Directions clearly define the roles and responsibilities of the key persons in budget-spending units exercising financial tasks; they also define the hierarchical structure of control in the authorisation process of undertaking expenditures and their payments. The Chief Finance Officer, appointed *ex officio*, represents the budget executor. The second in line is the finance officer who is personally liable for the due performance of financial tasks and may be held financially responsible for any losses, inaccuracies or errors during the performance of those financial tasks (art. 11). However, there is no time limit set for this personal liability. All pecuniary obligations should nevertheless be subject to time limits. Even the money due by the state should be subject to time limits and, depending on the EU Member State, this time limit ranges normally from between three and seven years. Obviously it should be possible to challenge the allocation of blame before the court, but consideration should be given to redrafting this article to bring it more in line with respect to individual rights.

²¹ Council Regulation (EC) No1085/2006 dated 17 July 2006. For the implementation of this Regulation, a Commission Regulation (EC) No: 718/2007 is published on 12 June 2007.

The Directions also ensure the segregation of duties; an official cannot at the same time have responsibility for authorisation, execution, accounting and control, and thus officials such as the certifying officer, the authorising officer, the officer for control of requests for payment, the receiver and the cashier are defined.

However, the Directions are somewhat unbalanced in nature. In some parts they resemble a guide and in some others they are quite detailed, for example, indicating where instructions are to be given, what information the statements for collection of revenue should include, including salaries and allowances. However, hardly any other guidance is given with regard to assurances to be provided in the ex ante control and authorisation process of other types of commitments or spending of government money.

In addition, article 40 sets some requirements for completing payment requests and it is stated that a “copy should be retained at the spending organisation as written evidence used for audit purposes, and must be attached to the supporting documentation” [of the payment]. The objective for audit purposes is rather strange as the primary objective would rather be the obligation for the organisation to have sufficient assurance of its own control procedures than the obligation to show what has been done at the time of external review.

With regard to implementing legislation for internal audit, the rulebook on the manner and procedure of internal audit was adopted in May 2009. It describes the need for an internal audit charter, audit planning, fieldwork, documentation, reporting and follow-up of the audits. The Internal Audit Charter and an Internal Audit Manual adopted in February 2004 are still applicable but will need revision due to the evolution of the legal framework on PIFC. This is already foreseen as one of the actions defined in the action plan attached to the PIFC Policy Paper adopted on 20 December 2007. The current manual sets up a framework for internal audit and gives guidance on good audit practices. It sets out audit requirements and procedures, provides an overview of approaches to performing audits, and describes how the methodology relates to relevant auditing standards and guidelines. It also outlines key issues to be considered when using the methodology.

Progress is being made in upgrading the PIFC system to EU standards. The passage of the PIFC Law and efforts to align the related Decree and Directions on State Treasury Operations for implementation of the law are examples of commitment. Necessary prerequisites for establishing internal audit throughout the administration have recently been put in place. However, the Directions on State Treasury Operations seem to stand apart from the PIFC Law and a logical, comprehensive approach seems to have been somewhat lost. In addition, consideration could be given to developing a manual for further guidance on details of what is to be controlled and authorised through the ex ante control process. Such a manual would help to ensure that laws and rules are understood and it would contribute to improving the quality of their application throughout the administration, the local administration included. However, the logic of the core legal framework needs to be sorted out first.

2. Institutional Framework

The Ministry of Finance is divided into six main functional areas, each of which is headed by a Deputy Minister – Treasury; Budget; Tax and Customs; Economic Policy and Development, International Co-operation and EU Integration; Internal Audit; and Corporate Services and Property-Legal Obligations.

An organisational change has taken place since last year’s assessment to better respond to the need for further economic development and to requirements for the use of IPA funds. Thus two departments were established, the Department for Economic Policy and Development as well as the Department for Finance and Contracting of EU Funds.

The total number of staff currently employed in the most relevant areas for public finance (budget, treasury and internal audit) is approximately 66. Sixteen of these staff work in the Budget Sector, 30 in the Treasury and seven in Internal Audit. This staffing is quite modest when compared to that of

most European countries. However, the number of staff seems to be in proportion compared to the staffing levels in other ministries.

Programme budgeting has been on the agenda for a number of years and the ministry is continuing its gradual approach to a step-by-step implementation. Hence the ministry decided to use a method less complicated and more easily understood by the administration. This improvement is welcome and is an indication of commitment to adopt a framework that also works in reality. The previous requirements developed by international donor assistance were deemed too sophisticated and difficult to understand and apply. A Decision was issued on 20 June 2008 (No. 38/08) on the new, more basic method of developing programmes for budget contents and programme indicators. The entire 2009 State Budget is described in terms of programmes for the first time. However, all budget users' activities are defined as one programme, although in some cases there are two programmes: one for the core activities and the second for administrative activities. Programme indicators will be developed for the 2010 budget

The Treasury department responsible for cash and debt management also performs ex ante control of all payments. Administrative decentralisation does not mean losing control, but it does require different structures and guidelines for devolving authority and responsibility. There is a shared responsibility for ex ante control of payments between line ministries and the Treasury, which is explained in the above-mentioned Directions on State Treasury Operations. However, as the new system settles, with additional guidance and training ex ante controls would improve over time. Consideration could therefore be given to setting a threshold on the ex ante controls performed by the Treasury, with the aim of controlling cash management and with fewer ex ante control checks of individual transactions, thereby making line ministries fully responsible for decisions taken through the ex ante control procedures. This should be a process over time, set in various stages to manage the change. In this way the Ministry of Finance and the Treasury would also show how the new features of accountability apply to the general administration. This development would also go hand in hand with the establishment of internal audit units in line ministries and would thus provide extra assurance that necessary internal control procedures are in place and indicate whether they function satisfactorily.

The Internal Audit Unit of the Ministry of Finance is still formally responsible for internal audit in the ministry and also in other ministries, spending units, and municipalities as a transitional measure. However, according to the PIFC Law, and also to the above-mentioned Decree, users of State Budget funds and the capital city (Podgorica) are obliged to establish internal audit within 12 months. Other units are to establish internal audit within 24 months. The main challenge will be the appointment of internal auditors as required by the new PIFC Law, as the economic trend has put any further recruitment in the administration on hold until further notice.

The CHU function is established and the head of the department has been appointed. This function is carried out by two sub-sections, with one unit responsible for the financial management and control system and the other for internal audit. The Systematisation Act provides for, in addition to the head of department, three staff in the Financial Management and Control Department but only two positions have been filled, and four staff in the Internal Audit Department, where only three positions have been filled. The Financial Management and Control Department is closely linked to the Treasury Department and draws upon the Treasury's experience, although the Treasury remains responsible for some financial management and control procedures. During a transitional period, the staff in the CHU contribute to the Ministry of Finance's work on internal audit so as to ensure that internal audit is carried out throughout the transitional period.

The annual audit plan covers all auditable areas in the Ministry of Finance, other ministries, spending units, extra-budgetary units and municipalities. During 2008, 17 audits were performed. The plan is based on areas of material risk, with three main criteria: staff, budget and nature of activity. This framework is the same as for the previous year. The number of audits carried out is a little less than last year's 21 audits but corresponds to the annual audit plan. The reason is that internal audit staff have contributed to the drafting of the new legislation.

Internal audit mainly reports to the institution under review. However, an annual report is also produced and submitted to the government. It is a kind of synthesis report of the major findings. The findings seem to be based on transaction- oriented audits, and less consideration seems to be paid to audit of internal control systems that would identify systemic matters.

In general, it seems that monitoring and analytical procedures are less developed and that much of the control is concentrated on individual transactions. There is a need to change the culture from exercising controls for external use to spreading the spirit of management throughout the administration and to using controls for a management that is directed towards achieving the objectives developed for each institution, in accordance with the standards set to achieve those objectives. There is also a need for a stronger co-ordination role by the Ministry of Finance whereby the various departments within the ministry improve their internal communication and professional dialogue. In that way, they may ensure that they are striving towards the same objective, that the different systems support each other, and that the small administration in Montenegro continues to take a more pragmatic approach to the implementation of budget and financial control reform.

Internal audit is emerging, and the establishment of internal audit units in line ministries is underway through the adoption of the PIFC Law and the related decree.

Reform Agenda and Capacities

Recently, at least in the area of PIFC, the reform agenda seems to be comprehensive and the agenda is prioritised through the action plan attached to the PIFC Policy Paper adopted on 20 December 2007. Progress is being made with the topics included in the action plan. The basic legal framework is almost in place. Attention should be given to taking the next steps, such as

- Relevant training of managers and employees;
- Review of the Directions on State Treasury Operations to align them with the PIFC Law;
- Development of the manual for financial management and control;
- Revision of the current internal audit manual;
- Creation of internal audit posts as a priority in the central government and later in the local administration;
- Development of a training programme for internal auditors.

The above elements cover the period up to 2012.

It will be challenging to implement the reform as expressed in the PIFC Policy Paper as well as in the PIFC Law, as there are new features that will require extensive awareness-raising activities for the top management. It seems that the Ministry of Finance has not yet completely understood the full implications of the reform objectives, although the pace of development of the regulatory framework follows the timing shown in the PIFC Policy Paper.

There is also an increased risk that the areas of budget preparation and execution will be developed without sufficient phasing of activities or without the necessary co-ordination between these activities and the related issues of financial management and control as well as internal audit.

External Assistance

No specific assistance has been provided to Montenegro on PIFC. However, an important USAID project ended in June 2008. This project covered a very broad range of tasks, and aimed to implement institutional reform and strengthen macroeconomic, fiscal and financial management. Under this project some assistance has been provided to the Ministry of Finance for the development of financial management and control systems and for the establishment of internal audit. Sigma is providing some technical assistance. However, much more intensive assistance would be needed to carry out the bulk

of the work to produce various sorts of training materials aimed at various levels of the administration, focusing on both financial management and control and internal audit. It is also important to find a solution with regard to the training of internal auditors and to establish training curricula.





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Support for Improvement in Governance and Management

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MONTENEGRO
PUBLIC PROCUREMENT SYSTEM
ASSESSMENT MAY 2009

1. Summary

1.1 Main Developments since last year

There have been no changes in the Republic of Montenegro's 2006 Public Procurement Law (PPL) since the last Sigma assessment in May 2008. Hence the basic legislative framework remains unchanged, although a number of pieces of secondary legislation were adopted and came into force during 2008.

The 2006 legislative reform was a step in the right direction in improving the public procurement system. Nevertheless, a review of the PPL reveals several areas of non-compliance with the relevant EC Directives and/or international good practice, which will need to be addressed in future work.

However, there is now considerable practice and experience with the 2006 PPL, and stakeholders in the public and private sectors of the country generally consider it to be a major improvement.

A new Law on Concessions was adopted in January 2009. However, Sigma concludes that the law is not compliant with either the EC Directives or good practice. Furthermore, this law requires for its correct implementation the formation of a concessions committee and a full set of supporting secondary legislation.

There have been changes in Montenegro's central procurement organisation and capacity. Most importantly, several competences of the State Commission for the Control of Procurement Procedures (hereafter referred to as the "State Commission") have been transferred to the newly established Public Procurement Directorate (PPD), in operation since 2007.

1.2 Main Characteristics (strengths and weaknesses)

The economy of Montenegro is comparatively small, which affects the market functionality of public procurement in terms of the availability of domestic economic operators and the extent of contracting authorities as well as the way in which the regulatory, controlling and advisory functions within the government administration are, and should be, organised and managed. Sigma concludes that the public procurement system largely includes the key components of a sound procurement system in terms of an EC-compatible legal framework for public procurement and a fairly solid institutional structure for regulation and support, complaints review and control. The ambition to develop the system is also highly noticeable and a number of improvements have been registered in recent years.

However, Sigma has also identified a number of significant shortcomings and deficiencies in the legal framework that need to be addressed. Some of these problems relate to non-compliance with the EC Directives, but there are also many rules that simply do not follow good procurement practice. The PPL is still considered to be too complex, inflexible and bureaucratic, which in turn affects the operational efficiency within contracting authorities. There is also a strong need to strengthen the institutional capacity generally, but in particular of the PPD, to enable it to carry out its important regulatory and advisory functions efficiently.

1.3 Recommendations for Reform

As mentioned above, Montenegro's public procurement system has moved in the right direction with the adoption of new legislation based on the EC Directives and a comprehensive set of secondary legislation. However, a number of significant shortcomings have been identified in the legal system for both public procurement and concessions, which should be addressed by the government in the near future in order to meet EU requirements in terms of harmonisation and good practice. Considerable weaknesses remain in the implementation of the legal framework and the operational capacity to manage procurement work efficiently. The Montenegrin authorities are looking to the technical assistance project, due to start in summer 2009, to help them tackle these problems.

Priority should be given to the following actions:

A. *To be applied (or started) in the short term:*

- Initiate a comprehensive and simultaneous revision of both the Public Procurement Law and the Concessions Law. The revisions should ensure that these two acts comply with EU requirements and should remedy a number of deficiencies in areas that are not covered by the detailed provisions of the EC Directives. The aim should be to promote sound procurement practices and reduce the current overly bureaucratic, legalistic approach;
- Strengthen the capacity of both central public procurement institutions (the PPD and the State Commission);
- Further strengthen and professionalise procurement practice by institutionalising training and education in public procurement.

B. *To be applied (or started) in the medium term:*

- Provide more assistance to procurement officers through the publication of guidelines and manuals and the interpretation of public procurement legislation;
- Introduce new ways of organising and managing procurement processes within contracting entities;
- Provide support for the practical implementation of the new instruments in the EC Directives (*e.g.* framework agreements and e-procurement).

2. Legislative Framework

2.1 Public Procurement

Since no major changes have been observed in the regulatory framework for public procurement, the main findings in last year's Sigma assessment report remain relevant. In the present report, the Sigma assessment team identifies some further debatable features, and expands the discussion on various aspects of the regulatory framework.

The Public Procurement Law (PPL) was adopted and published in the *Official Gazette of Montenegro* in July 2006 and came into force three months later. The 2006 PPL aims to implement the provisions of the following EC Directives: Directive 2004/18/EC (public sector), Directive 2004/17/EC (utilities), Directive 89/665/EEC and Directive 92/13/EEC (remedies).

The PPL applies to any contract awarded on behalf of state or local authorities. Companies that are covered in the EU by Directive 2004/17/EC when they operate networks in the areas of drinking water, energy, transport and postal services are not expressly covered by the PPL. However, they are likely to be included in the wider definition of contracting entities (in the case of public undertakings). Unlike Directive 2004/17/EC, the PPL does not include private companies operating in the utilities sector on the basis of special or exclusive rights.

Six different procedures can be used under the PPL: open procedure, restricted procedure, negotiated procedure (with or without prior publication of a contract notice), framework agreement, direct solicitation of tenders (shopping method, only for supplies or services contracts below 10,000 EUR and works contracts below 30,000 EUR); and direct agreement (only for contracts below 2,000 EUR). The contract award criteria are "lowest price" and "economically most advantageous tender". There are rules about qualification and compliance, as well as a review system. For more detailed comments see below.

The PPL stipulates that a list must be published of parties subject to the PPL. This list has now been published on the PPD's website.

Generally, the PPL maintains a good standard and is basically in line with the main principles of the EU public procurement system. However, a detailed review of the PPL reveals several areas that do not comply with EU public procurement legislation and good practice, as indicated below.

Need for a separate procurement regime for utilities

The EU public procurement system, in Directive 2004/17/EC, provides for a separate and more flexible regime for publicly and privately owned utilities. The 2006 PPL does not provide for such a separate regime — either as a separate law or as a section of the PPL. While this situation is not prohibited by EU legislation, the lack of a more flexible utilities regime is in contrast to common practice in the EU and is symptomatic of the PPL's generally more inflexible and formal approach. The need for a utilities procurement regime also has to be seen against the backdrop of Montenegro's current restructuring of the utilities sectors, particularly the move towards privatisation. It appears that utilities in Montenegro do not consider the current PPL to be a fully adequate instrument for procurement in this context.

Purchase of electricity

The inclusion of the purchase of electricity in the PPL places a particular burden on the national electricity utility. It should be noted that the EC Directives have exemptions concerning supplies quoted and purchased on a commodity market and the purchase by utilities of energy to produce energy. This inclusion should be amended in future revisions of the PPL, and the utility should instead have the right to use sound commercial practices. The specific guideline for purchasing electricity could be defined in more detail, in co-operation with the PPD.

Prior approval for using some procedures

Under the PPL, contracting entities must request prior approval from the PPD when they intend to use the negotiated procedure (with or without prior publication of a contract notice) or to award a framework agreement. This requirement should be reconsidered in future — it creates a conflict of interest and goes against the principle of a decentralised procurement system in which contracting entities are delegated the authority to make decisions for which they are accountable.

Restricted procedure

The use of the restricted procedure requires justification by the contracting authority and may be used only in specific circumstances. Furthermore, the only award criterion allowed in this procedure is the lowest price. This variant of the restricted procedure has nothing in common with the restricted procedure provided for by the EC Directives. Instead, it is based on UNCITRAL's model law²² and consequently does not comply with Directive 2004/18/EC. In addition, the restricted procedure is rarely practised by contracting authorities.

Qualification documents

In order to prove their professional, economical and technical standing, tenderers have to submit 10 or more individual documents with each bid (article 51, PPL). These documents relate to, inter alia, licences, liquidity, bankruptcy, commercial court proceedings, petty crime and taxes. The 2006 PPL requires even more documents than the previous legislation. These documents have to be either originals or photocopies that have been certified as genuine copies by a municipality or court (the cost of certification usually amounts to 100 EUR). Tenders that are submitted with an incomplete set of these documents are rejected. Preparing this formal part of the tender can be very costly and time-consuming, especially for tenderers participating in dozens or even hundreds of tenders. More time can be spent collecting and processing the required documents than on the substance of the tender. The law is not clear as to whether these documents are also needed for the simplified shopping method, but they are required in practice.

A related problem is the fact that the 2006 PPL does not include an equivalent of Article 51 of Directive 2004/18/EC, which allows contracting authorities to invite tenderers to supplement or clarify the documents that have been provided.

Cost of tender documents

In Montenegro's economic context, tender costs of up to 100 EUR are relatively high, especially when the contract value is small.

Opportunities for using electronic means are only rarely provided in practice and never for the tender documentation. Article 42 (2) of the PPL is rather precise: "costs of copying and distribution only". However, it appears that in practice contracting authorities often ignore this limitation and overcharge for tender documents. The discretion over these costs enjoyed by contracting entities has been criticised.

Time limits

The PPL's minimum time limits for submission of tenders (applications for participation) for the open, restricted and negotiated procedures (articles 62-64) are significantly shorter than those prescribed by the EC Directives.

Formal procedures for low-value contracts

Contracting entities have to apply the normal procedures laid down by the law (open, restricted and negotiated procedures, framework agreements) for contracts exceeding 10,000 EUR (supplies or services) or 30,000 EUR (works). However, the EC Directives intend these procedures to apply to

²² UNCITRAL is the United Nations Commission on International Trade Law.

much larger contracts (130,000 EUR for supplies or services contracts, 5 million EUR for works). The use of procedures that are disproportionate to the size and nature of a contract unnecessarily complicates the procurement process, which may discourage potential candidates from taking part in the procedure and thereby limit competition.

Low-value public procurement contracts (between 2,000 EUR and 10,000 EUR, 30,000 EUR for works) are governed by article 77 of the PPL (shopping method): "Procedure related to public contracts awarded under the shopping method may be carried out twice a year at the most, individually for each subject matter of the public supply, service or works contracts." This limitation has frequently been criticised by stakeholders, especially municipalities, and there is still uncertainty about its application, which means that it is not used as widely as it could be. It is difficult to understand the rationale behind limiting the use of the shopping method to six times a year, since the threshold of 10,000 EUR (or 30,000 EUR for works) during a year is what matters.

Another issue that causes great irritation among contracting authorities is that the procurement procedure must be cancelled and relaunched if fewer than three responsive tenders are received following an invitation for tenders. This specific provision, in connection with the shopping method, is not applicable in the context of the open procedure, where a contracting authority is allowed to conclude a contract with only one responsive tenderer.

However, there are also other matters of principle related to this procedure. The shopping method is normally designed for the purchase of supplies and for simple works contracts of a recurrent nature, where the lowest price is the only criterion, but not for services contracts, where factors other than price need to be considered in the evaluation. Sigma recommends the introduction of a new simplified competitive procedure for low-value contracts of all types. The introduction of a more suitable and transparent procedure would also facilitate a raise in the thresholds for low-value contracts.

Other questionable rules and practices

In addition to the observations and comments made above, the following provisions of the PPL are questionable from a good practice standpoint:

- The minimum tender validity period of 60 days (article 56) is questionable, since it may prevent contracting authorities from receiving the most accurate and competitive market prices for products, especially those that are subject to strong price fluctuations in the market. It would be better to let the contracting authorities decide the duration of the tender validity period. The tender validity period must be indicated in the tender invitation and documentation.
- The definition of abnormally low price as 30% lower than the second lowest price (article 59) should be reconsidered, since any determination of whether a price is abnormally low may vary from one situation to another. As an example, in the case of procurement of fuel, a 10% difference may raise concerns with respect to this issue. Therefore, it is better to give to contracting authorities the right to take this decision of defining the abnormally low price.
- The mandatory point system in the tender evaluation process (as laid down in article 66 of the PPL as well as in secondary legislation) appears to be difficult to apply correctly, especially for quality versus price factors. We strongly encourage further discussion on the appropriateness of this method.
- Some of the reasons for invalidation of tenders are questionable (article 68) and should be reconsidered. Examples include situations where the total price is not stated as an absolute amount and where arithmetical errors are greater than 3%.
- If no contract can be concluded with the winning tenderer, the contracting authority may instead conclude a contract with the next most favourable tenderer, provided that the price difference is not larger than 10%. This rule is questionable and seems to be based on incorrect assumptions about how the market operates. It should be at the discretion of the contracting authority to determine whether it is reasonable to continue the award process with the second-ranked tenderer.

Other relevant legislation

The 2006 PPL is accompanied by a wide range of secondary legislation, which covers, inter alia:

- conditions and methods for estimating the value of public contracts;
- a public procurement plan;
- methodological regulations for expressing criteria as an appropriate number of points and regulations for tender evaluation, comparison method and procedure;
- tender documents for goods, works and services;
- tender public opening report;
- tender notices;
- evaluation and comparison of tenders;
- recording of public procurement data.

Summary

The legal situation under the new 2006 Public Procurement Law (PPL) is generally considered to be a major improvement on the old law. However, there is an almost unanimous view on both sides of the procurement relationship that there is still room for improvement. The PPL is still considered to be too complex, inflexible and bureaucratic. Some provisions are still not fully harmonised with EU legislation (acquis communautaire). Several areas of possible improvement are outlined above. Sigma understands that the Public Procurement Directorate (PPD) plans to revise the PPL in the near future. The revision will aim to harmonise the PPL more closely with EU law as well as remedy a number of other deficiencies in the PPL that are outside the scope of the EC Directives. This revision will be a very positive step in the right direction.

The qualification process and documentation requirements should be simplified for suppliers. One solution would be to establish an optional qualifications list, where tenderers could have all of their required documents checked every six months or every year. They could receive a certificate to include in the tender in place of the copies of all of the documents. This option would be particularly attractive for tenderers preparing many tenders. The list would also be available for utilities. This idea, which has the unanimous support of both contracting officers and tenderers, has been discussed for some time now. The major obstacle is deciding who would administer the system. Giving this responsibility to the PPD would put an additional strain on its already overstretched capacity.

Other options would be to reduce the number of documents required, to make the number required proportional to the size and complexity of the contract, or to permit photocopies rather than originals or officially certified copies, except in cases where there are serious doubts about the authenticity of the documents.

2.2 Concessions Legislation

A new Law on Concessions was adopted by parliament on 26 January 2009 and became effective on 12 February 2009. This law replaces the Law on the Participation of the Private Sector in Delivery of Public Services (*Official Gazette*, no. 30/02). It is an attempt to establish a coherent concessions law covering all aspects of concession activities and to some extent it is modelled on EU procedures and practice. However, the Concessions Law fails to satisfy some fundamental EU requirements, especially in terms of definitions and procedures. It can also be strongly questioned whether the law will further satisfy the requirements normally set up by the private sector community for participation in tenders for concession contracts. The law requires secondary legislation to be adopted within 90 days of the entry into force of the law. This secondary legislation should regulate the maintenance of a concessions register, the opening and evaluation of tenders, minimum values of concession contracts, and concessions on the use of mineral resources. However, no secondary legislation has yet been

adopted. The length of a concession contract can be up to 30 years (duration to be decided by the government) or up to 60 years (duration to be decided by parliament). Parliament's decision is also needed for all contracts with a value exceeding 150 million EUR.

Sigma's assessment of the Concessions Law is as follows:

- It does not distinguish clearly between a concessions contract and a public contract that falls under the PPL. It also does not include a correct definition of the term "works concession".
- The concept of works concessions versus service concessions is not addressed in either the Concessions Law or the PPL.
- It allows for the open procedure, the restricted procedure, and competitive dialogue (the last procedure does not exist under the PPL). There is also an accelerated procedure and the option of direct initiative by an economic operator. However, neither the restricted nor the competitive dialogue is correctly transposed from the EC Directives. In normal circumstances, open and restricted procedures are not appropriate for awarding concessions, since such contracts frequently require a dialogue between the parties during the award process.
- Some of the award criteria listed in the law include criteria that refer to the qualification phase and should therefore be classified as selection criteria (tenderers' references). Others are extremely difficult to relate to the subject matter of the concessions contract and should not be used to determine the most economically advantageous tender, i.e. such criteria as public interest and the effects on employment, infrastructure and economic development.
- Institutionally, the law provides for the establishment of a concessions committee to handle complaints about the award of concessions, keep a concessions register, and approve the use of certain procedures. However, the committee has not yet been formed, despite the fact that it was to have been established no later than 60 days after the Concessions Law came into effect.

No concessions contract has yet been awarded under the new law. There is a major highway concessions contract in the award process, but this project is governed by a special government regulation.

Summary

Sigma concludes from the number of critical procedural problems listed above that the new Concessions Law does not comply with EU requirements or European good practice. Subsequently, there is a clear need to revise the law extensively in order to bring it in line with European standards. This process should preferably be co-ordinated with the planned revision of the Public Procurement Law.

2.3 Central Public Procurement Organisation

The 2006 PPL provided for the establishment of a new central institution: the Public Procurement Directorate (PPD). The PPD's tasks include:

- participating in the preparation of laws, subsidiary legislation and other regulations;
- designing appropriate standard forms for applying this law;
- monitoring and reviewing the implementation of the public procurement system in terms of compliance with EU legislation, and proposing measures to ensure compliance;
- giving prior approval to contracting authorities for the choice of procedure in cases envisaged by the PPL;
- offering advisory and consulting services on public procurement to contracting authorities on request;
- organising staff training in public procurement activities;

- preparing, publishing and updating a list of parties covered by the PPL on the website;
- monitoring public procurement procedures and ensuring that they meet the needs of the general public;
- publishing procurement notices; and
- collecting statistical data.

Under the previous legislation the State Commission for the Control of Procurement Procedures (State Commission) carried out most of the above functions. Under the 2006 PPL, the State Commission is now tasked with reviewing appeals submitted by aggrieved tenderers.

The setting up of the PPD was delayed, and the director was only appointed in June 2007. The PPD is now more settled in both organisational and staffing terms. Its website has been improved, giving better access to contract notices and to the procurement plans of contracting entities. This increased transparency will benefit the functioning of the procurement system generally. Contracting entities report that they have good co-operation with the PPD, partly as a result of the PPD's policy to open its doors two days a week.

The PPD checks notices, and finds and corrects errors in more than three out of every ten notices, which would seem to indicate that contracting entities need more training and guidance and that the PPD should work more with contracting entities on these problems.

The PPD is expecting to receive a budget increase in the coming financial year, although this is likely to be scaled back because of the general financial difficulties.

Summary

The establishment of the PPD was a step in the right direction. The separation of a review function (the State Commission) from other central public procurement functions is in line with EU standards. The PPD is still a young institution; to reach its full potential it needs to be strengthened in terms of staff, resources and technical assistance.

2.4. Procurement Operations and Practices

In 2008 (not including December), about 1,845 contract notices were published. Supplies made up 43% of all contracts, works 34% and services 23%. The total value of these public procurement contracts was about 481 million EUR.

Detailed statistics on participation rates in response to tender invitations are missing. Interviews with contracting authorities indicated that the competitive side of the public procurement market appeared to be satisfactory, while it was also noted that some areas were problematic.

The number of procurement operations differs depending on the size of the entity and its budget. The Public Works Authority has conducted about 270 public tenders since the introduction of the new law in 2006, Montenegrin Railways conducted 75 in 2007, the Public Supplies Agency conducted 38 in 2007, the (smallest) municipality of Danilovgrad 11 and the (largest) municipality, Podgorica, 20 (excluding works awarded by the administratively independent municipal works authority). In addition to these formal tenders, the shopping method is frequently used for smaller contracts. For example, in 2007 it was used 25 times by the Podgorica municipality (for an average value of about 6,000 EUR) and six times by the Danilovgrad municipality.

The number of procurement officers in Montenegrin contracting entities depends mainly on the size of the entity and its procurement budget. A small municipality like Danilovgrad has one contracting officer; a utility like the Montenegrin Electric Enterprise has five; and a larger utility, such as Montenegrin Railways, has 32 (public procurement and warehousing form one department). Larger contracting entities employ lawyers, economists, and engineers in these departments. Smaller municipalities and utilities usually have only one officer dealing partly or completely with public procurement. These officers often receive internal administrative training or management training. Procurement personnel do not receive specific independent or internal public procurement training;

they learn largely on the job. Public procurement is not a recognised profession and there is little procurement training in general.

There is room to improve the availability of training and professional support for contracting officers. The PPD has held workshops for contracting entities, with the help of the Human Resources Management Authority, but there is almost no sustainable and independent national training programme. Electronic procurement has been developed and is partly in use in some locations.

There are no rules that specifically favour national tenderers, although some stakeholders would appreciate some form of protection against such discrimination.

2.4.1 Observance of the PPL

It appears that contracting authorities do not always observe the requirements of the PPL; however, they are subject to no sanctions for this behaviour. There appear to be some cases where contracting officers favour certain bidders. For example, payment dates might be indicated as a decisive sub-criterion of the contract, but tenderers might offer different payment dates, e.g. 120 days or 240 days after delivery of the goods or services. Tenderers who offer 240 days might win the contract, but there is no way for the other tenderers to check whether this payment date was an important factor in the contracting authority's decision or whether the successful tenderer was in fact paid much later than the other tenderers would have been.

Incorrect application of selection criteria and award criteria

A frequently discussed issue was the correct application of selection/qualification criteria versus award criteria. It appears that many contracting authorities have difficulty distinguishing correctly between a selection criterion and an award criterion, which implies that typical selection criteria are often included on the list of award criteria.

Ad hoc tender committees

Ad hoc tender committees are established for each tender procedure. They are composed of members appointed for one year, plus experts for the opening and evaluation of tenders. At the same time, procurement officers are appointed and assigned a number of procurement responsibilities. With the future need for co-ordination, continuity and professionalisation, the current reliance on ad hoc committees may be insufficient. Instead, more permanent solutions should be sought, involving a stronger dependence on line organisation and on procurement departments.

Summary

Considerable efforts have been made to support contracting entities, as well as the private sector, with training, information and the publication of secondary legislation (including model tender and contract documentation). However, better support to purchasers will be required to strengthen the operational side of public procurement. It will be extremely important to increase professionalism in public procurement by reducing the reliance on tender committees. The line organisation should instead be strengthened by appointing more procurement officers or establishing procurement departments, where justifiable, within the contracting entities. The option of co-ordinated purchasing between small contracting entities should also be considered. This recommendation becomes particularly important in the light of the implementation of new procedures and instruments, such as e-procurement and framework agreements. The competitive side of the public procurement market appears satisfactory in certain areas (although detailed statistics are missing), while it was also noted that some areas were problematic. The absence of any preferential treatment rules is a positive factor. A crucial area in the procurement process is the evaluation of tenders, and further guidance and training in this respect are needed.

2.5 Review, Control and Integrity

2.5.1. Complaints review

The State Commission for the Control of Procurement Procedures is an autonomous body headed by a president appointed by the government on the proposal of the Ministry of Justice, and two members appointed on the proposal of the Ministry of Finance and the Community of Municipalities. The president must be a law school graduate who has passed the Bar examination and has at least 15 years of relevant work experience. The two other members must have tertiary education and no less than 10 years of relevant work experience. The president and the two members are appointed for four years. The State Commission has a secretary, appointed by the government on the proposal of the President of the State Commission. The secretary must be a law school graduate with no less than five years' experience in the public procurement area. The State Commission has three support staff and its annual budget amounts to 200,000 EUR.

Any person who considers that his/her rights may be harmed by a decision taken by a contracting entity may submit an objection to the contracting entity within eight days of the adoption of the decision. Objections can also be submitted to the State Commission by a competent state prosecutor, the SAI or other competent bodies. Such an objection prevents any further activities by the contracting entity, which must consider the objection within eight days of its receipt. A complaint may be lodged with the State Commission against the contracting entity's decision on this objection, or if the contracting entity fails to make a decision within the required eight days. In 2008, the State Commission decided on 223 complaints, of which 58 were approved, 138 refused and 27 rejected (for formal reasons).

The State Commission must decide on a complaint within 15 days of receiving the file and complete set of accompanying documentation. The State Commission can either reject a complaint as groundless or adopt it, and it can annul the public procurement procedure partly or fully by a reasoned decision: "The decision of the State Commission shall be final in an administrative procedure, but for the purpose of establishing its legality, an administrative dispute procedure may be undertaken, by means of an action, against it before the Administrative Court of the Republic of Montenegro" (article 102 of the PPL).

The decisions of the State Commission have been criticised by some stakeholders, who consider it to be overly bureaucratic, for example by ordering the annulment of a tender for small formal irregularities.

Recent developments

In 2008 the State Commission designed a new website, which provides more information and has an expanded search function. All of the State Commission's decisions and their justifications are published on the website.

The number of complaints lodged with the State Commission doubled in the first quarter of 2009 compared with the same period in 2008 (from 40 to 80 decisions). The State Commission views this situation as a reflection of increased awareness and knowledge by the private sector of how the public procurement system works, as well as increased confidence in the review system. However, it may also be an indication that contracting authorities are having difficulties applying the legal framework correctly, possibly due to insufficient knowledge on the part of procurement officers. Other explanations might be a lack of clarity in the law or in secondary legislation on the application of various provisions. Some of the debatable provisions were described above.

An electronic register for filing complaints was introduced in 2008. The register shows that the average complaint processing time for a decision by the State Commission was only 12 days, which is very impressive.

The PPD and the State Commission have set up a working group to co-ordinate and prepare joint interpretative statements. Some members of the procurement community mentioned that they had experienced inconsistencies in the interpretative statements made by the two bodies.

Summary

The transfer of all functions except review to the newly established PPD is a positive step; it will allow the State Commission to focus on its main review role without being distracted and without risking any conflict of interest. The new Remedies Directive (2007/66/EC) has not been transposed and assistance in this regard will be requested.

The State Commission appears to work satisfactorily, but its capacity should be strengthened (in terms of legal support staff).

2.5.2 External audit

External audit activities are carried out by the independent State Auditors Institution (SAI), which was set up in 2004. Approximately two-thirds of the SAI staff are auditors and one-third is comprised of support staff. The total number of staff currently employed is 39, including the five members of the SAI Senate. Of these, 23 are auditors and the plan is to employ eight new auditors in 2009. The SAI performs audits and produces audit reports on auditees as a continuous process throughout the year. It also reports to parliament in an annual report. In practice, the annual report is a compilation of its report on the annual budget execution statement together with other audit reports that it has issued since its last annual report.

The audit reports include recommendations in connection with the SAI's findings. The SAI also follows up on the implementation of its recommendations. To date the SAI has been interested mainly in the legality of public expenditure rather than its efficiency and effectiveness.

It should be pointed out that the SAI's resources — especially the number of auditors — are very limited. Training for SAI staff in auditing public procurement is carried out in-house.

Despite the fact that the new PPL is a clear improvement on the previous law, the SAI finds that contracting authorities need much more training and guidance on its application, especially in problem areas, such as the use of the shopping method. However, the PPL seems to be correctly applied for larger projects. The SAI makes use of framework agreements in its own procurement. A positive development is that the SAI is planning to undertake a cross-cutting audit of several contracting entities in 2009, focusing on the larger spending authorities.

Summary

The SAI considers the new PPL to be clearer than the previous one, but further efforts are needed to support its implementation. The SAI focuses its work on the legality of the procurement process in order to determine compliance with the legislation. Its intention to undertake a cross-cutting audit is a positive development. There is also a need, however, to further increase the SAI's understanding of public procurement through training.

2.5.3 Integrity of procurement operations

The PPL includes basic rules for avoiding corruption (article 13) and conflicts of interest in public procurement procedures (article 14). It also includes penal provisions for infringements of procurement rules (both for contracting authorities and tenderers, articles 103 and 104). So far the provisions have never been applied and no one has been fined.

According to the Law on Free Access to Information of Public Importance, all documents related to the public procurement process are public (including all tenders submitted after the contract award decision). This access is important for many companies and NGOs, which frequently check the integrity of the process.

In August 2006 the government adopted an action plan for fighting corruption and organised crime, which contains a section on public procurement. In March 2007 a national commission for monitoring this action plan was established.

The Administration for the Anti-Corruption Initiative has worked with the PPD on joint training in anti-corruption issues, using the facilities of the Human Resources Management Authority. The

Administration recognises that public procurement is an area that is vulnerable to corruption. It received no complaints about corruption in public procurement in 2007 or 2008; since the beginning of 2009 a helpline has been operated by the PPD. The Administration reported Transparency International's perception that in 2008 corruption in public procurement had been less of a problem than in 2007, and that this trend was expected to continue. They were conducting in-depth research in specific sectors, such as in local authorities, but disappointingly had no plans to specifically address public procurement.

Summary

The view of public authorities, supported by economic operators, is that corruption in public procurement is not a widespread problem. This situation is helped by a high degree of transparency in the public procurement system. There has not been any specific research in the area of public procurement to verify this view, however.

3. Reform Dynamics

Montenegro's public procurement system has noticeably undergone a number of positive changes in recent years, in particular the adoption of legislation based on the EC Directives and a comprehensive set of secondary legislation, the elaboration of a programme for training and provision of information for contracting entities and the private sector, and the creation of a review mechanism.

However, any capacity development will depend on the availability of central institutional resources for supporting and monitoring public procurement efficiently.

The establishment of the new PPD is another positive step, but this young organisation will need considerable capacity-strengthening support in the coming years. Currently the PPD is planning to prepare a development strategy for the public procurement system in Montenegro.

A new Law on Concessions came into force in early 2009. However, Sigma concludes that the new law does not comply with EU requirements or European good practice. There is consequently a clear need to revise the law extensively in order to bring it in line with European standards.

4. External Assistance

In October 2006 a technical assistance project began, managed by the EAR in Podgorica and amounting to 300,000 EUR, funded by CARDS 2005. The project, Capacity Building of the Public Procurement Commission (PPC), was initially envisaged to be completed in November 2007. It was extended for another seven months until early June 2008, and an additional amount of 150,000 EUR was allocated.

A technical assistance project under IPA 2007 will start in 2009. The beneficiaries will be the PPD, the State Commission and other stakeholders in the public procurement system. Its objectives include:

- further alignment of the PPL (including operational tools) with EU law and practice;
- establishment of a sustainable, independent national system of training in public procurement to develop the professional skills of procurement officers and other officials involved in implementing the PPL (e.g. judges, auditors);
- strengthening of the capacity of the PPD to implement its functions; and
- upgrading of the system for the publication of public procurement notices.

