



Monitoring Report:

The Principles of Public Administration

MONTENEGRO

May
2016

Authorised for publication by Karen Hill, Head of the SIGMA Programme.

SIGMA is a joint initiative of the OECD and the EU, principally financed by the EU.

This document has been produced with the financial assistance of the European Union. It should not be reported as representing the official views of the EU, the OECD or its member countries, or of beneficiaries participating in the SIGMA Programme. The opinions expressed and arguments employed are those of the authors.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS AND ACRONYMS	2
INTRODUCTION.....	3
ACCOUNTABILITY	4
1. State of play and main developments: May 2015-April 2016.....	5
2. Analysis.....	6
PUBLIC FINANCIAL MANAGEMENT - PUBLIC PROCUREMENT	19
1. State of play and main developments: May 2015-April 2016.....	19
2. Analysis.....	21

LIST OF ABBREVIATIONS AND ACRONYMS

AI	Administrative Inspection
DOOPA	Decree on Organisation and Operation of the Public Administration
EC	European Commission
EU	European Union
EUR	euro
HRM	human resource management
HRMA	Human Resource Management Authority
LFAI	Law on Free Access to Public Information
LGAP	Law on General Administrative Procedures
LSA	Law on State Administration
MoE	Ministry of Economy
MoF	Ministry of Finance
MoI	Ministry of Interior
MoJ	Ministry of Justice
PPA	Public Procurement Administration
PPL	Public Procurement Law
PPP	public-private partnership(s)
SAI	State Audit Institution
SC	State Commission
WTO	World Trade Organization

INTRODUCTION

Following the comprehensive *Baseline Measurement Reports*¹ prepared by SIGMA in May 2015 for all European Union Enlargement countries against *The Principles of Public Administration*², SIGMA has continued to monitor the progress of public administration reform in each country. The focus of the specific topics within the Principles for assessment by SIGMA in 2016 was selected in co-operation with the European Commission.

This report covers two Principles for the accountability area and three Principles for public procurement, under the public financial management area:

- The accountability chapter focuses on the rationality of the overall set-up of the state administration and on rights and practices to access public information.
- The public financial management chapter on public procurement provides a systematic analysis of the legislative framework, developments of the institutional set-up in relation to performance of procurement functions, and the functioning of the procurement review system.

Focused analysis of both of these areas is highly relevant: an in-depth review of how the public administration is organised is pertinent because, since the 2012 reform to merge a number of agencies into the relevant ministries and the 2013 plan for reorganisation of the public sector, there has been no thorough analysis. The practices regarding access to public information also merit further analysis due to an increasing number of public information requests and the administrative challenges in dealing with them. In public procurement there have been changes in legislation and a new public procurement strategy has been prepared and adopted for 2015–2016.

The report covers the period from May 2015 to April 2016, highlighting the main developments, providing updated values for the indicators relevant to the Principles analysed and providing both short- and medium-term recommendations for reforms.

¹ SIGMA (2015), [Baseline Measurement Reports](#), OECD Publishing, Paris.

² SIGMA (2014), [The Principles of Public Administration](#), OECD Publishing, Paris.



ACCOUNTABILITY

1. STATE OF PLAY AND MAIN DEVELOPMENTS: MAY 2015-APRIL 2016

1.1. State of play

The legal framework setting out the overall organisation of the state administration is in place, but distinctions among various types of administrative bodies are not clear. The structure of the state administration is not subject to regular analysis of rationality and effectiveness, and control over the creation of new institutions is not exercised rigorously. Many institutions are very small, often with a total staff of less than ten.

Numerous bodies within ministries are managed directly by ministers, meaning decisions in key areas (human resource management [HRM], financial issues, public procurement [PP]) are not taken autonomously by the heads of these bodies and require ministers' approval. This undermines the principles of managerial autonomy and delegation of a decision-making authority, and also hampers the ministers' capacity to focus on policy making and strategic issues. There are no standards in place for ensuring a coherent approach to supervision over bodies subordinated to the Government.

The Law on Free Access to Public Information (LFAI) provides procedural guarantees for the constitutional right of access to public information and establishes the requirement for proactive dissemination of information. However, there are many shortcomings in its implementation. Public information requests often remain unanswered. Centralised monitoring of the proactive provision of public information on public websites is not conducted. The level of compliance with statutory requirements on proactive dissemination of public information varies, and is especially low among non-ministerial bodies. The Agency for Personal Data Protection and Access to Public Information deals effectively with individual complaints against decisions refusing access to information but, until 2016, it lacked the resources to do more.

1.2. Main developments

There were no significant changes in the organisation and legislative framework of the state administration. Two executive bodies (the Assets Administration and the Administration for Food Security, Veterinary and Phytosanitary Affairs) went through a major re-organisation and the Agency for Prevention of Corruption was established, replacing the anti-corruption body under the Ministry of Justice (MoJ), as an autonomous agency accountable to the Parliament. The Government has abandoned implementation of the Public Sector Internal Reorganisation Plan and decided to merge the activities of this plan with the new Public Administration Reform (PAR) Strategy 2016-2020.

The budget of the Agency for Personal Data Protection and Access to Information for 2016 has been increased by 50% compared with 2015, which will enable it to perform the other functions assigned by the legislation, for example monitoring the efficient disclosure of public information. This corresponds with SIGMA's recommendation from the *2015 Baseline Measurement Report*³ to improve the capacity of the Agency. Supervision of LFAI implementation has been tightened: the Administrative Inspection (AI) reviewed the compliance of ministries and other administrative bodies with legal standards and imposed fines on responsible officials.

³ SIGMA (2015), [Baseline Measurement Report: The Principles of Public Administration, Montenegro](#), OECD Publishing, Paris.

2. ANALYSIS

This analysis covers two Principles for the accountability area under one key requirement. It includes a short analysis of the indicators of the Principles and a systematic analysis of two dimensions of public accountability: rationality of the overall set-up of the state administration and guarantees of transparency of public institutions stemming from legislation on access to public information.

Key requirement⁴: Proper mechanisms are in place to ensure accountability of state administration bodies, including liability and transparency.

Indicator values

The system of accountability for the state administration is examined through five quantitative and two qualitative indicators. The values given reflect that legislation is largely in place for both the overall organisation of the administration and free access to information, but that implementation remains a challenge and further changes in the legislation are needed. In the set-up of the public administration, the main issues are both a lack of capacity and clearly assigned responsibilities to govern the organisation of state administration according to a clear vision. Transparency of public institutions is hampered by the absence of effective monitoring of proactive disclosure of public information. Public information requests often remain unanswered, even though the Agency for Protection of Personal Data and Access to Information provides citizens with legal recourse in such cases.

	Principle No.	Indicator	Baseline year	Baseline value	Assessment year	Indicator value
Qualitative	1	Extent to which the overall structure of ministries and other bodies subordinated to central government is rational and coherent.	2014	2	2015	2
	2	Extent to which the right to access public information is enacted in legislation and applied in practice.	2014	3	2015	3

⁴ SIGMA (2014), [The Principles of Public Administration](#), OECD Publishing, Paris, p. 59.

Montenegro
Accountability

Quantitative	1	Number of bodies reporting to the Council of Ministers, to the Prime Minister or to the Parliament.	2014	5 ⁵	2015	23 ⁶
	2	Share of public information requests refused in a given year by the public authorities.	2014	24% ⁷	2015	18% ⁸
	2	Share of public information requests refused in a given year by the supervisory authority.	2013	9.6% ⁹	2015	10% ¹⁰
	2	Share of public authorities maintaining websites in line with regulatory requirements.	2014	Not available ¹¹	2015	Not available
	2	Share of public authorities maintaining a document registry and database.	2014	Not available ¹²	2015	Not available

Analysis of Principles

Principle 1: The overall organisation of central government is rational, follows adequate policies and regulations and provides for appropriate internal, political, judicial, social and independent accountability.

The Law on State Administration¹³ (LSA) and the Decree on Organisation and Operation of the Public Administration¹⁴ (DOOPA) establish the structure and governance scheme for the state administration.

⁵ Information provided by the administration in 2015.

⁶ There were no overall changes in the number of bodies reporting to the Council of Ministers or the Parliament since the last assessment. However, calculations provided in 2015 were revised in the course of the 2016 assessment according to detailed information on accountability structures within the state administration.

⁷ Data provided by the Agency for Personal Data Protection and Access to Information set the number at 1 007 out of 4 058.

⁸ Data provided by the Agency for Personal Data Protection and Access to Information set the number at 788 out of 4 434.

⁹ Calculations included in the SIGMA 2015 *Baseline Measurement Report* have been updated (revised downward from 9.6% to 8%) in light of information provided by the Agency for Personal Data Protection and Access to Information in the course of this assessment.

¹⁰ Data provided by the Agency for Personal Data Protection and Access to Information.

¹¹ No monitoring was conducted by the administration.

¹² Data was not provided by the administration.

¹³ Official Gazette, No. 38/03, of 27 June 2003.

The typology of administrative bodies set out in the LSA and the DOOPA defines the areas of responsibility for ministries, administrations, secretariats, bureaus, directorates and agencies. Distinction among secretariats, bureaus and directorates is not based on clear functional criteria. In addition, legislation does not specify any principles determining when the administrative authorities should be provided with the status of a legal person. It should also be noted that neither the LSA nor the DOOPA specify the internal organisation for the different types of administrative bodies, so this is determined through decisions establishing each institution, or in sectoral laws. As a result, the management schemes among public bodies vary significantly, even if they belong to the same category of institution.

Furthermore, some institutions performing significant tasks and managing large public funds do not fall under any category set out in the LSA, as they were created under special regulations. For instance, there are 14 agencies and 7 funds¹⁵ established and operating according to sectoral laws.

Table 1: Typology of administrative bodies in Montenegro

Type of administrative body	Number	Legal basis
Ministry	16	LSA, DOOPA
Administration	19	LSA, DOOPA
Secretariat	2	LSA, DOOPA
Bureau	13	LSA, DOOPA, sectoral legislation
Directorate	4	LSA, DOOPA
Agency	14	Sectoral legislation
Fund	7	Sectoral legislation

Source: Based on the dataset of public institutions prepared for SIGMA by the Montenegrin think tank Institut Alternativa.

There is no comprehensive and regularly updated inventory of administrative bodies, which undermines the Government's capacity to manage the structure of the state administration as a whole and review its rationality. The creation of new administrative bodies is not subject to *ex ante* analysis based on a well-defined concept of the institutional development of state administration. The DOOPA assigns responsibility for the organisation and operational methods of the state administration to the Ministry of Interior (Mol)¹⁶, which is also formally consulted whenever new public bodies are established at the central level. However, the powers of the Mol are limited to providing an opinion on the procedure of establishment or reorganisation of administrative bodies¹⁷. The Mol does not have any direct impact on the current structure or accountability schemes for administrative bodies subordinated to other ministries. Moreover, its analytical capacity does not meet the scope of tasks relating to organisation of the public administration.

As a result of the 2012 reform, 23 administrative bodies are incorporated into the organisational structures of relevant ministries as "administrative bodies within ministries"¹⁸. This was aimed

¹⁴ Official Gazette, No. 61/12, of 7 December 2012.

¹⁵ Pension and Disability Insurance Fund; Labour Fund; Compensation Fund; Protection of Deposit Fund; Health Insurance Fund; Investment and Development Fund; and Fund for Protection and Exercise of Minority Rights.

¹⁶ DOOPA, Article 5.

¹⁷ Rules of Procedure, Article 40, Official Gazette, No. 45/01, of 21 September 2001.

¹⁸ Mol, "Analysis of effects of implementing PAR Strategy for 2011-2014", May 2015.

primarily at cost reduction, but also at more effective steering of the state administration. The Government has not conducted a comprehensive review of the outcomes of this reform, although its implementation revealed serious challenges. First, the scope of managerial autonomy of the heads of bodies within ministries remains narrow, similar to that of heads of organisational units in the ministries. Heads of bodies within ministries in key areas of management (HRM, financial management, contractual relations, access to public information) cannot take autonomous decisions, or their decisions require approval from the relevant minister or ministers (Table 2). This arrangement deprives heads of bodies within ministries of autonomy in key aspects and, as a result, undermines attempts to introduce managerial accountability.

Second, this model of centralised management of bodies within ministries hampers ministers' capacity to focus on policy making and strategic issues. Since ministers are involved in numerous managerial issues regarding the bodies within ministries (such as recruiting all new staff and approving individual contracts), the balance between "steering and rowing" in their activities is disrupted. This is particularly problematic in those bodies within ministries having a large administrative apparatus, such as the tax or prison administrations.

Table 2 presents a sample of administrative bodies within ministries and specifies who takes decisions in matters of HRM, financial management and access to public information. It illustrates the scope of managerial autonomy granted to the heads of selected bodies within various ministries, in key spheres of the management of those bodies. It also confirms that the ministers' right to delegate certain powers to heads of administrative bodies within ministries is not used in most cases.

Table 2: Distribution of decision-making power in key functions of administrative bodies within ministries

Body within ministry [relevant ministry]	Issue			
	<i>Appointing new staff members</i>	<i>Announcing public tenders</i>	<i>Concluding contracts for provision of goods or services</i>	<i>Issuing decisions on access to public information</i>
Forest Administration [Ministry of Agriculture]				
Directorate for Development of SMEs¹⁹ [Ministry of Economy]				
Police Directorate [Ministry of Interior]				
Prison Administration [Ministry of Justice]				

	Relevant minister (or secretary), yet approval of the Ministry of Finance (MoF) is required
	Relevant minister (or secretary) autonomously or upon request of the head of relevant administrative body
	Head of relevant administrative body within a ministry (autonomously)

Source: Based on information provided by the relevant ministries.

Supervision of administrative bodies subordinated to ministries is based on an extensive catalogue of instruments specified by the DOOPA and includes: reviewing administrative acts of subordinated bodies, requesting information and reports, issuing guidelines and recommendations, and providing regular feedback on performance²⁰. However, supervision differs among ministries and there are no initiatives or standards in place for ensuring a consistent scheme of supervision across government.

All administrative bodies report to relevant ministers on an annual basis, but the scope and content of these reports reflect a bureaucratic, process-oriented approach. Annual reports encompass the list of activities undertaken, including detailed statistical data on the number of specific acts issued or cases handled²¹. Annual plans (and reports) do not contain a matrix of specific objectives, expected outputs and outcomes, targets or indicators. Thus, no progress towards a results-oriented managerial culture in the state administration has been made since the 2015 SIGMA Baseline Measurement Report.

¹⁹ Small and medium-sized enterprises.

²⁰ DOOPA, Article 50.

²¹ Based on a review of annual reports of the MoJ, Ministry of Economy, Ministry of Agriculture and MoF. These documents also include annual reports of the administrative bodies within these ministries.

There are 23 central government institutions, in addition to constitutional bodies that do not report to any ministry but directly to the Council of Ministers (CoM) or the Parliament. Thirteen bodies report to the CoM and ten bodies report to the Parliament. This creates problems with accountability, particularly with regard to the six regulatory agencies subordinated to the Parliament. The capacity of the legislature to perform effective and regular supervision over those bodies remains uneven. The Parliamentary Committee on Economy, Finance and Budget discusses the annual reports and financial plans of the agencies, holds a hearing of the managing body of each agency and submits recommendations to the plenary on their approval. The Committee is not provided with consistent analytical support, which would enable a professional review of the agencies' performance. The Government (i.e. the relevant ministry) is not involved in the annual review process of each agency, neither through submitting an opinion nor by participating in discussions.

A system of oversight is established and ensures multiple instruments for supervision over the legality of administrative actions. The AI, operating as an integral part of the MoI, performs control functions over the application of key laws, such as the Law on Civil Servants and State Employees and the Law on Administrative Procedures. However, due to limited staff capacity (seven inspectors²²), this body cannot provide regular or comprehensive supervision over all administrative bodies. In 2015, the AI conducted inspections in only 19 central administrative bodies (one quarter of the institutions listed in Table 1)²³. External scrutiny is provided by the Ombudsman Institution (Protector of Human Rights and Freedoms of Montenegro) and the Administrative Court.

Since the regulations do not define all types of state organisations, the status of autonomous bodies is not coherently regulated and there are no detailed and coherent rules for governing the relationships between ministries and reporting bodies, the value of the indicator on the organisation of state administration remains 2.

The legislative framework for organisation of the state administration is in place, although the large number of bodies created by special regulations undermines the consistency of the administrative apparatus. Managerial accountability and delegation of decision-making authority are not promoted, as the heads of bodies within ministries have a limited scope of autonomy. The ministries' supervision of subordinated bodies is based on a bureaucratic model and does not support results-oriented management. There are too many bodies directly subordinate to the CoM or to the Parliament. The rationality and cost effectiveness of the organisation of the state administration is not subject to regular review.

Principle 2: The right to access public information is enacted in legislation and consistently applied in practice.

The Constitution enshrines the right to access to information held by state authorities and other organisations exercising public functions. It also contains an exhaustive catalogue of grounds for refusal of access to information, based on protection of life, public health, morality and privacy, ongoing criminal proceedings, security and defence, and foreign, monetary and economic policies²⁴. The main law regulating the rules and procedures for access to public information is the LFAI²⁵, which largely meets the standards established by the SIGMA Principles. The definition of public information is broad. Private institutions exercising public authority or managing public funds are also included in the remit of the LFAI. Persons applying for information are not required to provide justification for their requests and information holders are obliged to enable access to information in the requested format. Fees for copying documents are regulated by a Government decree²⁶ and are moderate

²² Information provided by the MoI.

²³ Annual Report of the AI for 2015.

²⁴ Constitution, Article 51, Official Gazette No. 1/07, of 25 October 2007.

²⁵ Official Gazette No. 44/12, 9 August 2012.

²⁶ Regulation on the Compensation of the Costs of Access to Information, Official Gazette No. 2/07, 29 October 2007.

(EUR 0.10 per page). There is a list of information that should be disclosed proactively by public authorities on their websites.

However, some deficiencies of the LFAI affect practical implementation of the right to access public information. First, the scope of available restrictions in access to information envisaged by the LFAI is broader than the constitutional catalogue of limitations. For instance, there is an exception with regard to data relating to “deliberations within and between public authorities as concerns taking of positions, for the purpose of producing official documents and proposing resolution of a matter” or “work and decision-making of collegial bodies”²⁷. While some limitations in access to information on policy-making activities are justified, they should be formulated precisely and interpreted restrictively.

Second, the LFAI does not assign clear responsibility for promoting proactive disclosure of public information and providing public authorities with consistent support in performing this task. In practice, the Agency for Personal Data Protection and Access to Public Information undertakes some actions in this area (for example, publishing a manual on proactive dissemination of public information²⁸), although it has limited capacity and needs to prioritise the tasks explicitly imposed on it by the LFAI. In addition, responsibility for regular review of the LFAI and developing policy in the area of access to information is not assigned. The LFAI was drafted under the responsibility of the Ministry of Culture; however, the Ministry has not been assigned responsibility for this area by the legislation²⁹. As a result, the responsibility for regular review of the LFAI and its implementation is not properly addressed.

The implementation of the LFAI in practice remains a challenge. The problems include non-compliance with statutory requirements for the proactive disclosure of public information and obstruction of access to information requested.

SIGMA’s review of randomly selected ministries’ and other public institutions’ websites shows that information available on the websites of state administration bodies is incomplete and some institutions ignore their obligations as specified in the LFAI (Table 3). This concerns particularly administrative bodies within ministries and institutions subordinated to ministries or the Parliament.

²⁷ LFAI, Article 14.

²⁸ Agency for Personal Data Protection and Access to Public Information, *Manual on Processing Personal Data and Proactive Disclosure of Public Information*, Podgorica, 2015.

²⁹ DOOPA, Article 13.

Table 3: Review of websites of state administration bodies for compliance with requirements on proactive disclosure of selected information

Institution	Type of information required by Article 12 of LFAI		
	<i>Guide on access to information</i>	<i>List of employees</i>	<i>List of public officials and calculation of their salaries</i>
Ministry of Finance	✓	✓	✓
Ministry of Interior	✓	✓	✓
Ministry of Culture	✓	✓	✗
Ministry of Justice	✓	✓	✓
Tax Administration	✓	✗	✓
Public Works Directorate	✓	✗	✗
Agency for Prevention of Corruption	✗	✗	✗
Human Resource Management Administration	✓	✓	✓
Pension and Disability Insurance Fund	✗	✗	✗
Insurance Supervision Authority	✗	✗	✗

Note: ✗ = absent ✓ = present

Source: Prepared by SIGMA with the support of the Montenegrin think tank, Institut Alternativa, March 2016.

The proactive dissemination of public information is not managed in state administration bodies in a consistent manner. Public information officers primarily handle public information requests, and responsibility for uploading and updating information on the websites is dispersed among organisational units of relevant institutions. The practices regarding publication of information required by the LFAI differ among public institutions. Among the reviewed websites, only the MoJ³⁰ and HRMA³¹ provide easy access to all the required information from the main page of the website.

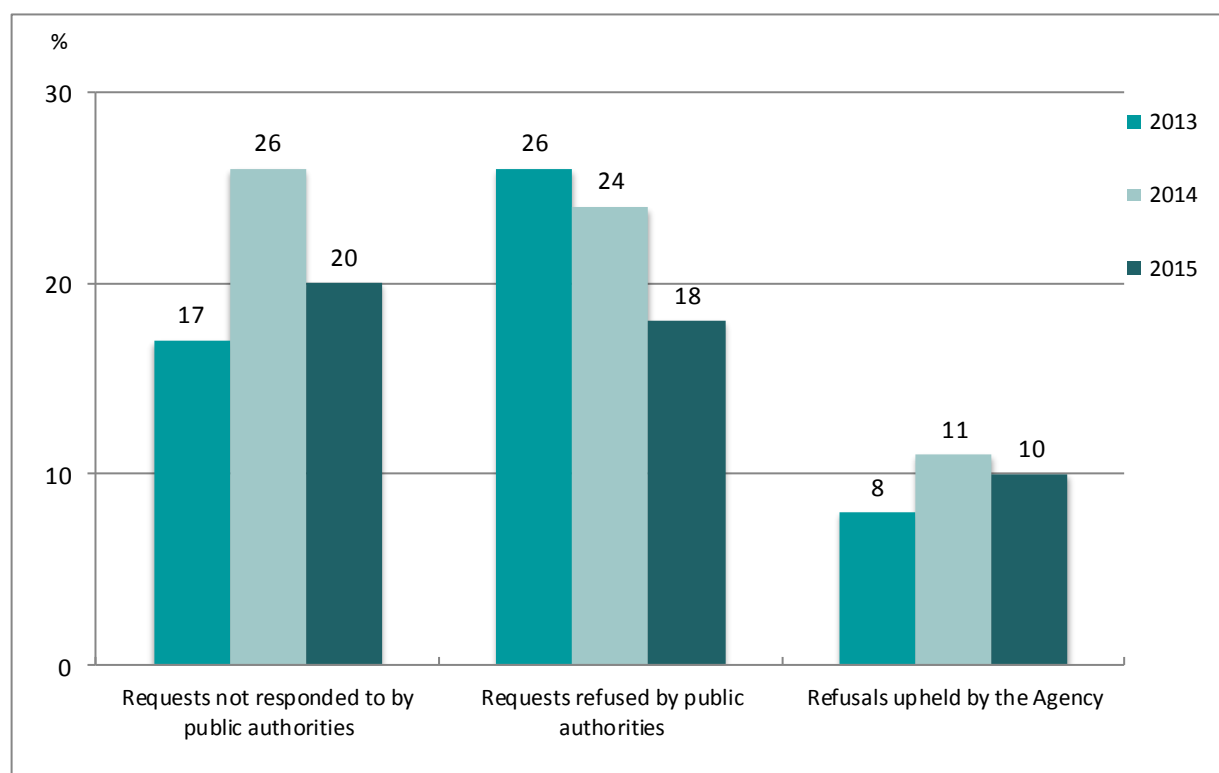
³⁰ http://www.pravda.gov.me/rubrike/slobodan_pristup_informacijama (accessed 10 March 2016).

³¹ http://uzk.co.me/index.php?option=com_content&view=category&layout=blog&id=75&Itemid=234&lang=sr (accessed 10 March 2016).

There is no mechanism for regular review of the quality and accuracy of information provided on the websites or within the internal databases and registries of public institutions. The Agency for Personal Data Protection and Access to Public Information broadly holds the mandate³², but has no capacity to monitor the websites of public institutions.

Access to information upon request has improved slightly since the last assessment. The number of requests doubled between 2013 and 2015³³. The share of public information requests not responded to by state administration bodies was 20% in 2015; this has been a concern since the adoption of the LFAI. The share of requests refused by the administration decreased from 24% in 2014 to 18% in 2015, yet it is still high. The percentage of refusals upheld by the Agency for Personal Data Protection and Access to Public Information – acting as an appeal body – remains stable (Figure 1).

Figure 1. Statistical data on requests for access to public information



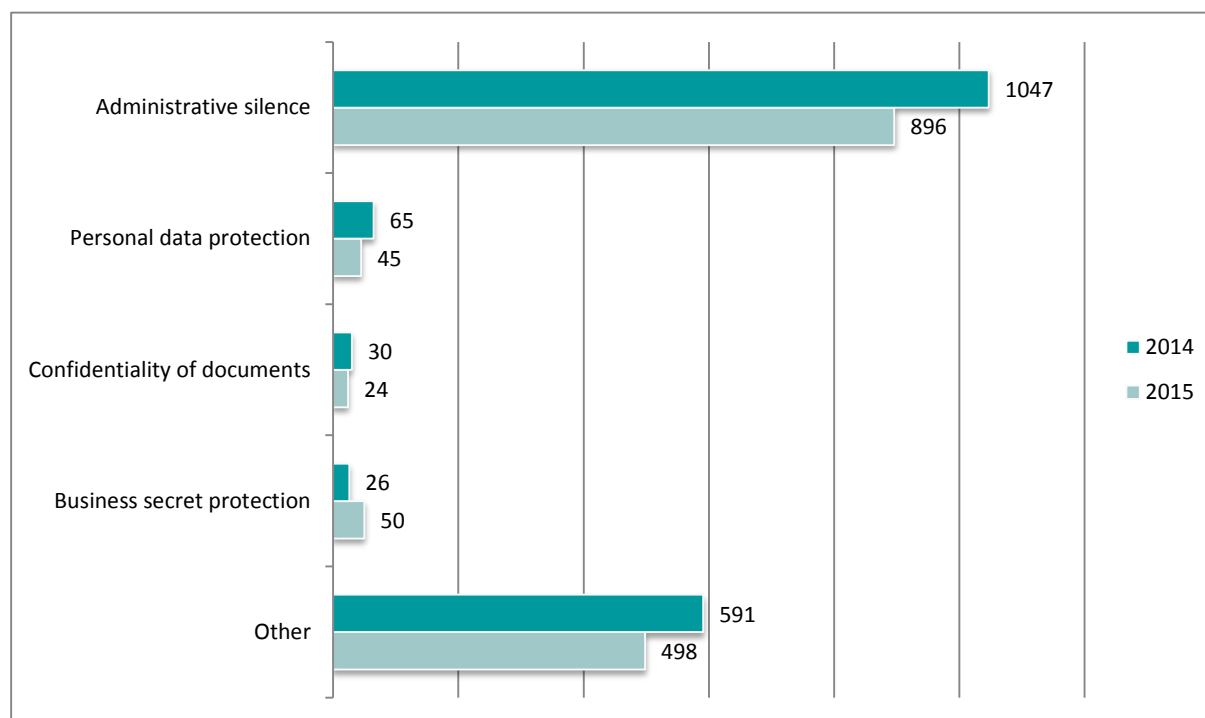
Source: Data provided by the Agency for Personal Data Protection and Access to Public Information.

The vast majority of complaints submitted to the Agency for Personal Data Protection and Access to Public Information concern administrative silence, i.e. not responding to public information requests (Figure 2). Citizens' requests for public information that are not responded to reflect low awareness among public institutions of their obligations, and also that scrutiny of compliance in this matter is not efficient. The AI conducted its first comprehensive examination of application of the LFAI among state administration bodies only recently (2015), and imposed fines for non-compliance on the responsible public officials.

³² LFAI, Article 39.

³³ 2 120 requests were submitted in 2013, 4 058 in 2014 and 4 434 in 2015 (information provided by the Agency for Personal Data Protection and Access to Public Information).

Figure 2. Topics of complaints submitted to the Agency for Personal Data Protection and Access to Public Information, 2014-2015



Source: Data provided by the Agency for Personal Data Protection and Access to Public Information.

It should be noted that filing a complaint to the Agency for Personal Data Protection and Access to Public Information costs EUR 5³⁴. This is not justified particularly in cases of administrative silence.

The Agency for Personal Data Protection and Access to Public Information plays a central role in ensuring implementation of the LFAI. According to the LFAI³⁵, the Agency is responsible for:

- 1) supervising the legality of the administrative acts used to make decisions on requests for access to information (appeals against refusals or lack of response to public information requests);
- 2) managing the information system for access to statistical data on information holders, and public information requests and acts issued in response to them;
- 3) monitoring the situation in the area of access to information;
- 4) carrying out inspections of LFAI implementation;
- 5) filing requests for initiation of misdemeanour procedures in cases of LFAI violation.

However, the current staff capacity of the Agency (Box 1) enables it to effectively perform only its major function, i.e. handling complaints submitted in individual cases, resulting from refusal or lack of response to public information requests. All decisions of the Agency are available on its website. Performance of the Agency in this matter has received positive assessment by civil society organisations active in the area of free access to information³⁶. Nevertheless, execution of the Agency's decisions is not fully ensured as it has no capacity to impose sanctions on the institutions or civil servants failing to implement its decisions.

³⁴ Law on Administrative Fees, Appendix A, Official Gazette No. 55/03, of 1 October 2003.

³⁵ LFAI, Article 39.

³⁶ Information based on SIGMA interviews carried out with three leading NGOs in the area: Center for Democratic Transition, MANS and Institut Alternativa.

Box 1. Organisational capacity of the Agency for Personal Data Protection and Access to Public Information

Budget: The Agency's budget for 2016 increased by 50% from 2015 (to over EUR 630 000). There is no separate budget line for handling public information issues.

Staffing: In 2015, the Agency had a total of 22 staff members. However, only four staff members deal with access to public information and two of them were not on duty at the time of assessment (maternity leave). Staff capacity of the Agency to perform tasks relating to access to public information has not improved since 2013, and the Agency has therefore not fulfilled its mission, particularly in the area of monitoring and promoting access to public information. The budget increase in 2016 will enable the Agency to recruit the new staff needed to perform the Agency's tasks, but recruitment requires approval from the MoF and will be conducted by the Human Resources Management Administration. Filling all vacancies will therefore only be possible in the second half of 2016, at the earliest.

Although the legislative and institutional framework for dissemination of public information exists, full access and right to information requires more systematic efforts. Public information is not always disclosed proactively, and monitoring of LFAI implementation is not fully in place. For these reasons, the value of the indicator for access to public information is 3.

The LFAI provides a good legal framework for protecting the citizens' right to access public information. However, its implementation lacks effective monitoring and supervision, particularly with regard to proactive disclosure of public information. The share of public information requests not responded to by the administration also remains high. The recent increase to the budget of the Agency for Personal Data Protection and Access to Public Information provides an opportunity to improve the situation in this area.

Key recommendations

Short-term (1-2 years)

- 1) The MoI should develop a framework for assessing the rationality and effectiveness of the organisational set-up of the state administration, accompanied by a procedure and criteria for *ex ante* analysis of proposals to create new administrative bodies or reorganise existing institutions.
- 2) Ministers should enhance managerial accountability of the heads of administrative bodies within ministries by delegating competences to them in key areas of management (HRM, financial management, public procurement). This should be complemented by clear minimum requirements for regular performance reviews in each area, including supervision over subordinated bodies.
- 3) The Parliament should develop its analytical capacity for supervising regulatory agencies by assigning responsibility in this area to specialised organisational units of parliamentary administration and ensuring Members of Parliament regular access to experts. The Government should be formally involved in the parliamentary review process of the regulatory agencies.
- 4) The Government should clearly assign responsibility for managing the LFAI to a ministry and ensure resources for promoting openness and transparency within the Government and among institutions subordinated to the Government.
- 5) The Government should adopt rules of procedure establishing uniform standards for managing public information issues in administrative bodies. This document should specify the role and tasks of public information officers, rules for uploading and updating the required information to the related websites, and simplified standards for processing public information requests.
- 6) The Agency for Personal Data Protection and Access to Public Information should launch regular reviews of the websites of public institutions, based on detailed standards for the content and form of publication of the required information.

Medium-term (3-5 years)

- 7) The Government, with primary responsibility lying with the MoI, should conduct a comprehensive review of the whole structure of state administration. A new or modified typology of administrative bodies should be considered and a coherent governance scheme for each category of institution should be developed, including a results-based accountability model.
- 8) The Government, in co-operation with the Agency for Personal Data Protection and Access to Information, should develop a detailed plan for promoting proactive disclosure of public information.

A large, stylized teal folder icon with rounded corners and a light blue tab on the left side. The text "Public Financial Management" is centered on the folder.

Public Financial Management

PUBLIC FINANCIAL MANAGEMENT - PUBLIC PROCUREMENT

1. STATE OF PLAY AND MAIN DEVELOPMENTS: MAY 2015-APRIL 2016

1.1. State of play

The legal framework is largely aligned with the European Union (EU) *acquis* on public procurement³⁷. Some discrepancies remain, however, including the definition of the works and services contracts and a certain number of exemptions to the Public Procurement Law (PPL)³⁸. Further alignment is required to bring the PPL into line with the 2014 EU Procurement Directives³⁹. Concessions and public-private partnerships (PPPs) are still not in line with EU standards.

The institutional set-up for public procurement is complete, with the exception of concessions. In practice the Public Procurement Administration (PPA) is the main policy-making body, although the Minister of Finance (MoF) bears the overall policy responsibility. A separate, autonomous and independent administrative review body, the State Commission (SC) for the Review of Public Procurement, is in charge of reviewing complaints against decisions of contracting authorities, with the possibility to appeal its decisions to the Administrative Court.

The review and remedies system is broadly compliant with the EU Remedies Directives⁴⁰; however, the provisions on legal standing in review procedures are not fully harmonised, and some provisions of the 2007/66/EC Directive⁴¹ have not yet been implemented, such as mechanisms for ineffectiveness of the contract and imposition of alternative penalties. The Inspection Administration deals with the issue of monitoring compliance with public procurement procedures, although it lacks capacity, skills and knowledge to undertake these tasks. There is no centralised purchasing body, although some authorities carry out joint procurement on an *ad hoc* basis.

1.2. Main developments

In December 2015, the Government adopted the Strategy of Development of Public Procurement in Montenegro for 2016-2020, with an Action Plan for its implementation⁴².

On 15 July 2015, Montenegro became a party to the Agreement on Government Procurement of the World Trade Organization (WTO).

The MoF adopted new regulations for implementing the PPL, such as the standard forms to be used in public procurement procedures, the methodology of using sub-criteria for the selection of the best tender, correction of arithmetical errors in tenders and methodology of risk analysis in control of public

³⁷ Directive 2004/18/EC of 31 March 2004 on the Co-ordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts (Official Journal L134 of 30 April 2004, p. 114), and Directive 2004/17/EC of 31 March 2004 Co-ordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors (Official Journal L134, of 30 April 2004, p. 1).

³⁸ Published in Official Gazette No. 42/11, as amended (relevant amendments published in Official Gazette Nos. 57/14 and 28/15).

³⁹ Directive 2014/24/EU of 26 February 2014 on Public Procurement and Repealing Directive 2004/18/EC and Directive 2014/25/EU of 26 February 2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services and Repealing Directive 2004/17/EC.

⁴⁰ Council Directive 89/665/EEC of 21 December 1989 on the Co-ordination of the Laws, Regulations and Administrative Provisions Relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts; Council Directive 92/13/EEC of 25 February 1992 Co-ordinating the Laws, Regulations and Administrative Provisions Relating to the Application of Community Rules on the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors.

⁴¹ Directive 2007/66/EC of 11 December 2007 Amending Council Directives 89/665/EEC and 92/13/EEC with Regard to Improving the Effectiveness of Review Procedures Concerning the Award of Public Contracts.

⁴² <http://www.ujn.gov.me/en/strategija-razvoja-sistema-javnih-nabavki-u-crnoj-gori-za-period-2016-2020-godine/>

procurement procedures. The Ministry of the Economy (MoE) adopted a rulebook on the methodology for determining the degree of energy efficiency in the process of public procurement⁴³.

The SC is now operating at full capacity, as a new president was appointed by the Government after a period in which the Commission operated with four instead of five members. The database of the SC's decisions became available and operational on the SC website in March 2016.

⁴³ Official Gazette No. 9/16 based on the authorisation of the Law on Efficient Use of Energy (Official Gazette No. 57/14), Article 2 (2).

2. ANALYSIS

This analysis covers three Principles for public procurement, under the public financial management area. It includes a short analysis of the indicators of the Principles and a systematic analysis of the legislative framework, of developments in the institutional set-up related to performance of procurement functions, and of the functioning of the procurement review system following changes introduced in 2015.

Key requirement⁴⁴: Public procurement is regulated by duly enforced policies and procedures that reflect the principles of the Treaty on the functioning of the European Union and the European Union *acquis*, and are supported by suitably competent and adequately resourced institutions.

Indicator values

Harmonisation of public procurement regulations with the EU *acquis*, as well as the establishment of corresponding institutional structures and arrangements, is examined through six qualitative indicators. The first two describe the extent to which the legislation is complete and enforced, covering the eight main goals defined in Principle 10, and the openness of policy making and monitoring. The next two indicators concern the development and implementation of the policy framework and the existence and performance of a dedicated institution for central procurement functions. The last two indicators cover the effective monitoring of the public procurement system and the extent to which information about its workings is readily available to all interested parties.

A legal and institutional framework for public procurement is in place, despite certain gaps in conformity with the *acquis*, especially concerning concessions. The strategic framework for the development of the public procurement system during the period 2016-2020 has been adopted. The Strategy for Development of the Public Procurement System in Montenegro for the period 2016-2020⁴⁵ is itself comprehensive and can therefore serve as a basis for the development of the procurement system in the coming years, although the accompanying multi-annual Action Plan does not contain any resource planning or allocation. Regular reports on public procurement are prepared and published by the PPA and SC.

⁴⁴ SIGMA (2014), *The Principles of Public Administration*, OECD Publishing, Paris, p. 96.

⁴⁵ <http://www.ujn.gov.me/en/strategija-razvoja-sistema-javnih-nabavki-u-crnoj-gori-za-period-2016-2020-godine/>

Montenegro
Public Financial Management

	Principle no.	Indicator	Baseline year	Baseline value	Assessment year	Indicator Value
Qualitative	10	Extent to which public procurement legislation is complete and enforced.	2014	4	2015	4
	10	Nature and extent of public consultations during the process of developing regulations for public procurement and monitoring their use and appropriateness.	2014	4	2015	3
	11	Extent to which policy framework for public procurement is developed and implemented.	2014	4	2015	4
	11	Extent of coverage by dedicated institutions of the central procurement functions mentioned and of regulations defining their roles, responsibilities, working practices, staffing and resources.	2014	3	2015	3
	11	Comprehensiveness of systems for monitoring and reporting on public procurement proceedings and practices.	2014	2	2015	3
	11	Clarity, timeliness, comprehensiveness and accessibility of information available to contracting authorities and entities, economic operators and other stakeholders.	2014	4	2015	4

Analysis of Principles

Principle 10: Public procurement regulations (including public-private partnerships and concessions) are aligned with the *acquis*, include additional areas not covered by the *acquis*, are harmonised with corresponding regulations in other fields and are duly enforced.

Under the public procurement legislative framework, the PPL covers procurements in the public sector and the utilities sector, as well as defence procurements and the implementing regulations adopted by the MoF or the PPA. The implementing regulations consist of the Rulebooks on:

- Procurement Procedures Records
- Methodology and Contents of Records on Anti-corruption Rules Violations
- Forms used in Public Procurement Procedures
- More Detailed Contents and Methodology of Electronic Procurement Procedures
- More Detailed Criteria for Setting Up Tender Opening and Evaluation Commissions
- Methodology of Determining Calculation Errors in Tenders in Procurement Procedures
- Methodology of Expressing Sub-criteria for Selection of the Most Advantageous Tender in Procurement Procedures
- Procurement Risk Assessment Methodology
- Contents and Methods of Taking the Professional Exam for Procurement Officers
- Risk Assessment in Conducting Control of Public Procurement
- Methodology for Assessing the Degree of Energy Efficiency in Procurement Procedures

The current PPL was adopted in 2011 and is applicable as of 2012. Recent changes to the PPL, applicable from 4 May 2015, have increased the level of compliance with the *acquis* (especially in the utilities sector⁴⁶ and defence procurement⁴⁷), and have facilitated the application of framework agreements and joint procurement. Nonetheless, a number of procedures from the 2004 EU Directives have not yet been implemented (such as the competitive dialogue, electronic auctions and dynamic purchasing systems)⁴⁸. The application of the modified provisions was not comprehensively supported by the PPA through awareness-raising or capacity-building activities⁴⁹.

The scope and coverage of the PPL is not yet fully aligned with the *acquis*. There are some exceptions from the application of the PPL, which are not allowed in the EU Procurement Directives⁵⁰. The definitions of public works contracts⁵¹ and public service contracts⁵² do not reflect the terms of the relevant Directives. On the other hand, the scope of the PPL (definition of the contracting authorities and entities) is wider than required by the EU Directives⁵³. For example, public procurement rules have to be applied by public undertakings, which conduct purely commercial activities and are not subject to

⁴⁶ Directive 2004/17/EC.

⁴⁷ Directive 2009/81/EC; PPL, Chapter IVa, Articles 116a-116i.

⁴⁸ These provisions were optional for EU Member States but became mandatory with the adoption of 2014 Directives.

⁴⁹ Information gathered in a roundtable discussion with the representatives of different contracting authorities as well as in a roundtable discussion with representatives of the business sector (facilitated by the Chamber of Commerce).

⁵⁰ PPL, Article 3: exemption of procurement aimed at protection and recovery from catastrophes and major disasters, procurement of services related to employment and services of advertising on public procurement procedures in the media.

⁵¹ PPL, Article 35. The definition is narrower than it should be according to the *acquis* – it does not make reference to activities defined in Annex I to the 2004/18/EC Directive, does not cover “execution of a work by any means”, and the design and execution of work(s) is not mentioned in the definition either.

⁵² PPL, Article 36. The scope of the PPL related to services is defined by the list of specific services, while it should be defined in a more general way – public contracts other than public works or supply contract works; Article 1 (2d) of Directive 2004/18.

⁵³ PPL, Article 2 (1) item 2, defines the category of “body governed by law” more broadly than the relevant EU Directives, as it does not require covered parties to be established for “the specific purpose of meeting needs in the general interest, not having commercial or industrial character”.

EU procurement rules⁵⁴, resulting in a disadvantageous situation for them in the market in comparison with their competitors. Utilities procurement is subject to a set of rules provided in Chapter III of the PPL, which makes use of almost all available, flexible instruments envisaged under Directive 2004/17/EC, apart from the possibility of making a call for competition in the form of a periodic indicative notice, the more flexible rules on framework agreements and setting time periods for receipt of tenders.

The PPL applies to the award of contracts both above and below the relevant EU thresholds. However, there is no threshold below which a contract would be free from the provisions of the PPL. On the other hand, the PPL provides for mandatory, transparent and competitive procedures for procurement over the relatively modest threshold of EUR 5 000. The direct agreement method⁵⁵ – purchase of goods or services from specific economic operators chosen at the discretion of the contracting authority – is allowed only up to EUR 5 000. This procedure may be used by contracting authorities, for the same category of goods or services, only once per year. Additionally, the total value of all contracts awarded by means of direct agreement may not exceed a certain proportion of the public procurement budget spent by a given contracting authority in the preceding year. In the case of large contracting authorities⁵⁶, the total maximum value of all contracts which may be awarded in this way may not exceed 7% of procurement expenses incurred in the previous year. Contracting authorities, however, interpret this requirement differently (i.e. the year for which direct agreements are calculated), and the PPA does not ensure consistent interpretation⁵⁷.

While a cap on the value of a contract which may be awarded without competition, and the discretion of a contracting authority to use it or not, is not against the *acquis* requirements, the methodology of its application (i.e. distinction based on the size of the budget of the contracting authority) is not well grounded. Exceeding this limit is also one of the most often identified violations of the PPL⁵⁸. Between the thresholds of EUR 5 000 and EUR 25 000, contracting authorities may apply the shopping method⁵⁹. This procedure does not differ in practical terms from the open procedure, as it is launched by the publication of a call for tenders on the public procurement portal to which any interested economic operators may reply. However, the only criterion used to evaluate tenders is price. Over the EUR 25 000 threshold, procedures based on EU Directive 2004/18/EC⁶⁰ are applied.

Application of the negotiated procedure, with or without publication of a call for tenders, requires a request for prior approval from the PPA. While limitation of non-competitive procedures to explicitly mentioned, exceptional cases is required by the *acquis*, issuing approvals for application of these procedures by a control institution is beyond the *acquis* requirements. This approval mechanism means that it is difficult to distinguish responsibility for inconsistencies in the application of the law. Furthermore, in those cases in which factual circumstances (such as the objective lack of competition) preclude the application of open procedures, the *ex-ante* approval process is an unnecessary burden on both the contracting authorities and the PPA. Approvals by the PPA are issued without “conducting

⁵⁴ Undertakings which are not covered either by the term “body governed by public law” under Directive 2004/18/EC or the term “public undertakings” under Directive 2004/17/EC. It is notably the case of such companies as the wine and brandy manufacturer “13. jul – Plantaže” or the commercial airline “Montenegro Airlines”. See the list of contracting authorities kept by the PPA (<http://www.ujn.gov.me/wp-content/uploads/obveznici/Lista2016.pdf>).

⁵⁵ PPL, Article 30.

⁵⁶ With annual budget exceeding EUR 800 000.

⁵⁷ Information collected at SIGMA roundtable discussions with representatives of different contracting authorities and representatives of the business sector (facilitated by the Chamber of Commerce). *Public Procurement in Montenegro: Corruption within the Law*, pp. 12-13, Institut Alternativa, September 2015.

⁵⁸ Annual reports of the State Audit Institution (SAI), such as the report covering the period October 2014-October 2015.

⁵⁹ PPL, Article 29. The contracting authority may use it for the same object of public procurement only once per year.

⁶⁰ The restricted procedure is hardly ever used. In 2014, there was only one such procedure and the value of the contract awarded amounted to EUR 7 000.

an examination procedure”⁶¹, which suggests that the analysis of requests by contracting authorities is superficial and brings into question the soundness and reliability of this solution⁶².

The legislative framework also covers some areas which are not part of the *acquis*, such as: securing funds for public procurement (including multi-annual projects); adoption of annual public procurement plans and their publication on the public procurement portal; adoption of decisions to launch procurement procedures; the training and education of procurement officials; the role and tasks of evaluation committees; the validity period of tenders; tender security; and performance guarantees. While regulating matters such as planning, preparation and contract management is important, including issues of general management practice in public institutions adds an unnecessary layer of obligations and an additional burden for contracting authorities. On the other hand, the PPL does not provide rules for the management of concluded contracts.

In the field of concessions (PPPs), the relevant legislation is laid out in approximately 30 sector laws⁶³ regulating co-operation between the public and private sectors in the provision of public services. The Law on Concessions⁶⁴ deals with the preconditions, methods and procedures of awarding concessions. A concession is defined as the right to exploit mineral resources, goods of public interest and provision of services of general interest in consideration for a payment by the concessionaire. A draft PPP Law has already been developed but not yet adopted.

The PPA duly publishes on its website the list of contracting authorities covered by the PPL. In 2016, there were 612 contracting authorities listed⁶⁵. This is a relatively high number of entities which are obliged to follow the provisions of the PPL (roughly one contracting authority per every 1 000 inhabitants). As a result, procurement officials in small contracting authorities often carry out procurement in addition to their normal duties⁶⁶. The procurement-specific training they receive is usually limited to the provisions of the PPL. Although the number of contracting authorities has been reduced in recent years⁶⁷ due to partial consolidation of the public administration, internal re-organisation and privatisation⁶⁸, there is still room for further consolidation. For example, every primary school is a separate contracting authority but it may not necessarily be prepared to deal with public procurement procedures.

The PPL is harmonised with laws in other areas such as public finance and the budget; no major obstacle has been identified in this regard. Public contracts may not be signed if the necessary funds have not been approved. A contracting authority is also allowed to sign the contract when the procedure was commenced (but not concluded) in the previous financial year. The changes to the PPL applicable from May 2015 also resolved the problems related to the conflict between the PPL and the Law on General Administrative Procedures (LGAP)⁶⁹, which resulted in decisions (rulings) of the SC being quashed by the Administrative Court⁷⁰ for purely procedural reasons. In accordance with the

⁶¹ PPL, Article 31, paragraph 4.

⁶² Report from the MANS project “Ka efikasnim mehanizmima javnih nabavki u državama (potencijalnim) kandidatima u članstvo u EU”, November 2015, p. 17.

⁶³ Such as the Law on the Participation of the Private Sector in Provision of Public Services, Official Gazette No. 30/02; the Law on Private Sector Participation in Providing Public Services, Official Gazette No. 30/02; and the Law on Foreign Investment, Official Gazette No. 18/11.

⁶⁴ Official Gazette No. 08/09.

⁶⁵ <http://www.ujn.gov.me/wp-content/uploads/obveznici/Lista2016.pdf> (accessed 28 March 2016).

⁶⁶ Information gathered in a panel discussion with the representatives of different contracting authorities.

⁶⁷ 698 contracting authorities in 2013; 621 in 2014.

⁶⁸ 2014 report by the PPA on public procurement.

⁶⁹ Official Gazette No. 60/03.

⁷⁰ The PPL in Montenegro is part of administrative law; the procurement review body, the SC, is an administrative body and operates in accordance with administrative law procedures.

principle of subsidiary application⁷¹, the LGAP's rules are applicable to provisions clearly defined in the PPL. The new LGAP was adopted in December 2015 and entered into force in January 2016. It will be applied as of 1 July 2016, by which date the PPL will need to be harmonised with it, providing rules once more explaining the relation between the two Laws.

The PPL⁷² defines the main principles of public procurement: cost-effectiveness and efficiency, competition, transparency and equality of bidders. The non-discrimination principle is also fully respected in the legislation, as Montenegro does not apply domestic preferences. Special provisions⁷³ for the prevention of corruption and conflict of interests provide additional duties for contracting authorities. In December 2015, the MoF issued a new Rulebook⁷⁴ on the Methodology of Risk Analysis in Performing Control over Public Procurement Procedures, with the aim of providing a proactive approach to the prevention and early detection of corruptive actions.

Regarding modern procurement techniques and tools, the PPL does not provide for the application of the competitive dialogue procedure. Tools such as electronic auctions and dynamic purchasing systems have not been implemented. The PPL provides rules on the awarding of framework agreements, although they are stricter than required by the *acquis*⁷⁵.

The most often-used procedure by far is the open procedure. In 2015, 91.03% of all contracts covered by the PPL were awarded in open procedure; other competitive procedures launched with publication of contract notices were far less used⁷⁶. In 2015, the share of the value of contracts awarded through the least competitive procedures – the negotiated procedure without prior publication of a notice – amounted to 2.05%.

⁷¹ PPL, Article 121.

⁷² PPL, Articles 5-8.

⁷³ PPL, Articles 15-18.

⁷⁴ Official Gazette No. 07-12142/2015.

⁷⁵ For example, a framework agreement with only one supplier may not be signed for a period longer than two years, while Directive 2004/18/EC provides for a maximum period of four years.

⁷⁶ According to the PPA report, in 2014 the restricted procedure was used once, while there was no single case of the negotiated procedure with previous publication.

Table 4: Breakdown by type of procedure (as a share of total value of public procurement contracts)

Procedure	2013	2014	2015
Open procedure	81.23%	81.61%	91.03%
Restricted procedure	0.02%	0.002%	0.16%
Negotiated procedure with prior publication of a contract notice	0.05%	0%	0%
Negotiated procedure without prior publication of a contract notice	3.26%	2.66%	2.05%
Framework agreement	1.99%	4.15%	0.06%
Consultancy services	0.07%	0.07%	0.5%
Contest	0%	0.01%	-
Shopping method	5.99%	5.16%	6.55%
Direct agreement	7.38%	6.34%	-

Source: Data provided by the Public Procurement Administration. The 2015 data is based on 70% of the reporting entities which had provided the data to the PPA by April.

As the legislation is largely compliant with the *acquis*, the implementing regulations were adopted on time and the regulations cover the whole procurement cycle; however, due to the lack of legislation on concessions (within the meaning of the *acquis* on public procurement⁷⁷) and the transposition of certain elements of the 2007/66/EC Directive, the indicator for the extent to which legislation is complete and enforced receives a value of 4.

The indicator for public consultations receives a value of 3, as public consultations are not held systematically in early stages of regulatory development and all interested stakeholders are not given enough time to review the relevant documentation. Since the secondary legislation prepared and adopted in 2015 was not publicly consulted in all cases, the indicator value has decreased from 4 to 3.

A well-established legislative framework for awarding public contracts is in place in Montenegro. Contracts are awarded, even for relatively modest values, in predominantly competitive and transparent procedures. However, further alignment of the PPL and its implementation with the EU *acquis* is required. Concessions are not yet regulated in line with the EU Directives.

⁷⁷ Directive 2004/18/EC and Directive 2014/23/EU.

Principle 11: There is a central institutional and administrative capacity to develop, implement and monitor procurement policy effectively and efficiently.

The MoF has the formal responsibility for general public procurement policy making and co-ordination. It is responsible for submitting draft legislation to the Government and overseeing its implementation.

The PPA, which is an autonomous body, has a total of 18 positions, of which 16 were filled in April 2016. The new Rulebook on Internal Organisation and Job Classification⁷⁸ increased the number of staff from 16 to 18. The PPA is divided into four subdivisions: 1) monitoring of the application of regulations and of public procurement; 2) monitoring of procurement procedures and management of electronic procurement; 3) professional training and development; and 4) general issues and finances. The competences of the PPA include monitoring of the public procurement system and its compliance with EU rules, drafting procurement regulations, issuing prior approvals for application of negotiated procedures with or without the publication of calls for competition, keeping the lists of contracting authorities, conducting activities related to professionalisation of procurement, electronic procurement, co-operating with international organisations and others⁷⁹. The PPA supports the activities of contracting authorities by publishing opinions concerning the application of public procurement rules⁸⁰, instructions⁸¹ and procurement manuals⁸² on its website and offering on-line courses on public procurement⁸³.

The PPA also administers the public procurement portal, where contract notices and procurement documents are published⁸⁴. The PPA launched a new portal in May 2015, on which contracting authorities publish annual procurement plans, tender documents, announcements concerning negotiated procedures without publication, and contracts under framework agreements which were concluded before the amendment of the PPL. The PPA provided instructions on how to submit information to the portal on its website. Searches on the portal no longer require registration; registration is needed only for publishing notices. Data can be searched for by subject of the procurement, the contracting authority, and the type of procurement procedure, but not by bidder or contract registration number. However, the information is not sorted by category but by publication date. The lack of a unified naming policy for documents results in an unreliable advanced search, and the portal only publishes data from May 2015 onwards.

The PPA has developed a system of collecting and processing data on public procurement. Annual reports on the functioning of the public procurement system are prepared and published on the PPA website in June of every year. The reports are comprehensive, but they are available only in PDF format. The PPA does not prepare and publish quarterly or semi-annual reports; publishing the annual reports only in June prevents the public from being informed of the trends and developments in the public procurement market in a timely manner. Furthermore, the PPA does not make full use of the opportunity to collect, process and present data that is relevant for the procurement market (such as details about the award criteria used in procurement procedures). Despite the launch of the new public procurement portal in May 2015, limitations of the monitoring system persist, which leads to a value of 3 being assigned for the indicator on the comprehensiveness of systems for monitoring and reporting on public procurement proceedings and practices. However, during the last year the situation has improved with searches on the portal no longer requiring registration.

⁷⁸ *Pravilnik o unutrašnjoj organizaciji i sistematizaciji uprave za javne nabavke*, adopted by the Government on 22 October 2015.

⁷⁹ PPL, Article 19.

⁸⁰ <http://www.ujn.gov.me/pregled-najvaznijih-misljenja-u-2015-godini>

⁸¹ <http://www.ujn.gov.me/wp-content/uploads/2016/01/Uputstvo.pdf>; <http://www.ujn.gov.me/category/uputstva>

⁸² <http://www.ujn.gov.me/wp-content/uploads/2014/04/Javne-nabavke.pdf>

⁸³ <http://www.ujn.gov.me/obuka/player.html>

⁸⁴ <http://portal.ujn.gov.me/delta2015/login.jsp>

Control of compliance of the public procurement procedures⁸⁵ is conducted by the public procurement section of the Inspection Administration, in accordance with annual and monthly plans of inspection and on the basis of the Law on Inspection Control⁸⁶. In 2016, the number of inspectors dealing with public procurement was increased from one to three, but this service remains understaffed compared with the number of contracting authorities (more than 600), and underequipped (no cars or laptops) to travel and conduct inspections across the country. As two of the three inspectors have only recently started, it will take some time for the institution as a whole to develop sufficient experience, knowledge and skills to cope with its new duties (such as the control of contract implementation). The Inspection Administration also lacks the necessary internal rules and procedures to conduct the inspections. Monthly reports cover, on average, 25 to 30 different contracting authorities. In addition, inspectors are obliged to react to *ad hoc* requests (which may be submitted by any interested person) to conduct inspections. In 2015, the Inspection Administration conducted 185 inspections in total, out of which 145 were planned, 36 were based on requests and 4 were control inspections. The Inspection Administration found 244 infringements, with a large proportion of these related to annual procurement plans, such as changes therein (62) and non-respecting of requirements concerning public procurement officers and members of tender committees (59). They imposed 15 financial penalties (EUR 19 500 in total)⁸⁷.

The PPL clearly divides the tasks and responsibilities related to monitoring of public procurement among the PPA, the Inspection Administration and the SC. However, there is still overlap in the PPL related to the monitoring function of the PPA and the Inspection Administration, as a result of errors committed in the legislative process (omission to delete some provisions following the reorganisation of the monitoring system)⁸⁸. There is a certain overlap between the Inspection Administration and the Agency for Prevention of Corruption⁸⁹ concerning the implementation of anti-corruption measures and measures for the prevention of conflict of interest in public procurement procedures. Regular auditing of procurement procedures is conducted by the State Audit Institution (SAI); the results of these audits are disclosed in the annual reports of the SAI⁹⁰. No single authority has assumed the tasks of monitoring and supervising the implementation of PPPs. A Concessions Commission exists, but it deals with concessions, which are defined as the right to exploit mineral resources or pursue other economic activities.

The current institutional set-up for the management of public procurement policy meets the needs of the *acquis* in the field of public contracts and performs the tasks required of it, except in the area of concessions/PPP. This and the above-mentioned overlap of tasks of the different institutions, as well as the lack of sufficient resources for the control institution, lead to a value of 3 for the relevant indicator.

On 28 December 2015, the Government adopted the new Strategy for the Development of the Public Procurement System in Montenegro for the period 2016-2020⁹¹ (prepared by the PPA). The accompanying Action Plan defines the relevant activities, the institutions responsible for their implementation⁹², time frames for their execution⁹³ and indicators intended to show whether the

⁸⁵ PPL, Article 148.

⁸⁶ Law on Inspection Control, Official Gazette No. 039/03 of 30 June 2003 as amended.

⁸⁷ Annual Report of the Administration for Inspection Affairs for 2015, www.uip.gov.me

⁸⁸ Article 19 (1) lists “inspection control” (item 15) as one of the tasks of the PPA, i.e. the task the Inspection Administration is entrusted with.

⁸⁹ PPL, Article 148 (1), item 7: “implementation of anticorruption measures and measures for the prevention of conflict of interest in public procurement” is one of the tasks of the Inspection Administration, while tasks related to the prevention of conflicts of interest in general belong to the Agency for Prevention of Corruption (see Article 4 of the Law on Prevention of Corruption adopted on 9 December 2014).

⁹⁰ Such as the annual report on the performance of audits and activities of the SAI for the period October 2014-October 2015.

⁹¹ <http://www.ujn.gov.me/en/strategija-razvoja-sistema-javnih-nabavki-u-crnoj-gori-za-period-2016-2020-godine/>

⁹² The PPA, the SC, the MoF, the MoE, Administration for Inspection and the Chamber of Commerce.

activity has been performed. A co-ordinating team with 19 members has been established to ensure smooth implementation and to monitor progress⁹⁴; its first meeting was held on 9 March 2016. Although the Strategy addresses the most important issues and challenges for the continued development of the public procurement system and can serve as a basis for development of the procurement system in the coming years, certain other important elements are missing, such as centralised and joint procurement, a further reduction of contracting authorities, and the increased and more efficient use of framework agreements. The Strategy lacks information about how Montenegro will evaluate the actual impact and does not envisage the adoption of more detailed, annual work plans for implementation. No budget is planned in the Strategy or in the Action Plan for the individual actions; the main risks for its implementation are the lack of financial support, resource planning and allocation. The above-mentioned shortcomings lead to a value of 4 for the indicator for the public procurement policy framework, despite the fact that the new Strategy has been adopted.

An institutional framework for public procurement is in place but with weaknesses in the performance of the tasks required of it. Resources remain limited in the SC, in comparison with the number of complaints they handle. There is a strategic document covering the development of the public procurement system, although the accompanying multi-annual Action Plan is too general. Annual reports on public procurement are published, but do not make full use of the opportunity to collect, process and present data that is relevant for the procurement market. The field of concessions and PPPs does not yet have the legal and institutional framework that is required to ensure conformity with the *acquis*.

Key requirement⁹⁵: In case of alleged breaches of procurement rules, aggrieved parties have access to justice through an independent, transparent, effective and efficient remedies system.

Indicator values

The key requirement for establishment of an independent, transparent, effective and efficient remedies system is examined through two qualitative and four quantitative indicators. They describe the efficiency of the review procedure, the accessibility of the review system for economic operators and the performance of the review body.

The remedies system is aligned with the *acquis* standards of independence, probity and transparency, and covers public contracts but not concessions. The values of the indicators measuring the performance of the SC have declined between 2014 and 2015.

⁹³ Either by reference to a specific quarter or, mostly, by giving a wide time span, for example, 2016-2018 or even 2016-2020.

⁹⁴ Decision of the MoF on Establishing the Coordinating Body for Continuous Monitoring of Implementation of the Strategy for Development of the Public Procurement System for the period 2016-2020, <http://www.uin.gov.me/en/strategija-razvoja-sistema-javnih-nabavki-u-crnoj-gori-za-period-2016-2020-godine/>

⁹⁵ SIGMA (2014), [*The Principles of Public Administration*](#), OECD Publishing, Paris, p. 101.

Montenegro
Public Financial Management

	Principle no.	Indicator	Baseline year	Baseline value	Assessment year	Indicator value
Qualitative	12	Presence of procurement review and appeal bodies covering the functions mentioned and of regulations defining their roles, responsibilities, working practices, staffing and resources, including the integrity of their work.	2014	3	2015	3
	12	Presence of user-friendly procurement review website including timely publication of decisions and statistics, with adequate research functions.	2014	3	2015	3
Quantitative	12	Actual processing time of complaints related to procurement compared with the maximum legal requirements.	2014	22 days vs.15 days	2015	42 days vs. 15/25 days ⁹⁶
	12	Number of cases in which the procurement review body exceeded the legal maximum processing time in relation to the total number of complaints.	2014	41%	2015	71.15%
	12	Number of complaints in relation to the number of tender notices published.	2014	Not available ⁹⁷	2015	Not available ⁹⁸
	12	Share of complaints in procurement that are challenged to the next judicial level.	2014	7.6%	2015	9.3%

⁹⁶ The deadline is 25 days in the case of complex cases in which expert opinions are needed.

⁹⁷ In 2014, 805 complaints were received; however, data on the total number of notices was not available.

⁹⁸ In 2015, the SC handled 976 appeals, 901 of which were filed in 2015 while the remaining 75 appeals were transferred from 2014; however, data on the total number of notices was not available.

Analysis of Principles

Principle 12: The remedies system is aligned with the *acquis* standards of independence, probity and transparency and provides for rapid and competent handling of complaints and sanctions.

The mechanisms and the institutional set-up for handling complaints in public procurement are in place. The roles of review bodies are defined by the PPL, and review procedures and remedies are based on the EU Remedies Directives⁹⁹. However, the *acquis* mechanisms for ineffectiveness of contracts¹⁰⁰ and imposition of alternative penalties¹⁰¹ are not transposed into the national legislation. Moreover, the provisions on remedies regarding concessions do not meet the requirements of the relevant EU Directive.

The main body in charge of reviewing complaints concerning public procurement procedures, the SC, is composed of a President and four members appointed by the Government following a public selection process. Their term of office is five years, with the possibility of reappointment. The SC did not operate at full capacity between 19 February and 31 July 2015, as one of the members had left and, between 6 November 2015 and 5 May 2016, the SC was without an appointed president so one of the four Commission members performed as acting President. The SC has a legal department, consisting of eight experts, which provides professional and administrative (technical) support for the members of the SC. The recruitment of two additional staff members is under way¹⁰². The SC submits annual reports to the Parliament, in accordance with the PPL, no later than the end of June and publishes the reports on its website¹⁰³.

The right to appeal the decision of the contracting authorities is provided to bidders¹⁰⁴ (defined as persons or entities who submitted tenders in public procurement procedures) and interested persons. The latter term refers to persons who had requested clarification of tender documents and those who have proved that they suffered or could have suffered damage because of a decision by a contracting authority¹⁰⁵. The provision does not, however, cover “candidates” (i.e. economic operators who sought admission to participation in two-stage procedures, such as restricted or negotiated procedures) who were not invited to submit tenders or participate in negotiations. Consequently, the legal standing in the review procedures is narrower than required by the *acquis*¹⁰⁶. However, the practical consequences of this limitation are marginal considering the low number of this type of procedure in Montenegro and the entities which could be affected¹⁰⁷.

Since 4 May 2015, appeals have been submitted through the contracting authority concerned¹⁰⁸. The amended PPL clearly defines the decisions of contracting authorities which are open to appeal¹⁰⁹, and appeals shall be submitted when the challenged decisions are taken by contracting authorities. The

⁹⁹ 89/665/EEC Directive and 92/13/EEC Directive as modified by 2007/66/EC Directive.

¹⁰⁰ 2007/66/EC Directive, Article 2d.

¹⁰¹ 2007/66/EC Directive, Article 2e (2).

¹⁰² Information gathered during a SIGMA meeting with the Acting Head of the SC.

¹⁰³ http://www.kontrola-nabavki.me/1/index.php?option=com_k2&view=itemlist&layout=category&Itemid=142&lang=mne

¹⁰⁴ PPL, Article 4, Point 5.

¹⁰⁵ PPL, Article 4, Point 17.

¹⁰⁶ PPL, Article 1 (3) of 89/665 as amended. Article 122 of the PPL defines the stages of the procurement procedure (and decisions of contracting authorities) which are open to appeal.

¹⁰⁷ In 2014 the restricted procedure was used once, while the negotiated procedure with previous publication was not applied at all.

¹⁰⁸ Before the amendment, appeals were submitted to the State Commission – the complainant economic operators were required to deliver a copy of the appeal to the contracting authority responsible for the decision being appealed.

¹⁰⁹ For example, publication or submission of tender documents, selection of the best tender, cancellation of procurement procedure.

contracting authority is obliged to deliver the appeal and its response to it to the SC, together with all documents related to the procedure, within eight days of receipt of the appeal. If the contracting authority finds that the appeal is grounded, it may annul the challenged decision, correct the performed acts or terminate the whole procurement procedure. The contracting authority shall inform the SC accordingly of its decision, and decisions taken by the contracting authority then may be the subject of an appeal to the SC. Although this solution was introduced with the aim of decreasing the number of appeals, the number actually increased. In 2015, the SC received 901 appeals and also had to deal with 75 appeals which were not reviewed in 2014 (backlog cases)¹¹⁰.

Submission of an appeal results in suspension of the whole procurement procedure until the SC has made its decision about the appeal. This is more than is required by Directive 2007/66, which bars the contracting authority only from concluding the contract before the review body has made a decision. The PPL is not clear on whether the suspension should last until the decision is taken by the contracting authority or the SC. Only a suspension lasting until the decision of the SC would be consistent with the EU *acquis*, and the SC follows this interpretation.

The rulings of the SC shall be adopted within the statutory time limit of 15 days of receipt of the complete documentation. This time period may be extended for no more than ten days in the event that there is a need to engage experts or obtain opinions from the competent institutions, or if the procurement documentation is complex. In 2015, the SC exceeded the statutory time limit in 71.15% of cases¹¹¹. The average time for decision making by the SC was 42 days, counted from the moment a full set of documents from the contracting authority was received. Both demonstrate that compared to 2014 the SC has had more problems meeting their legal obligations. The main reason for these delays is that the SC was not operating with the required number of members for the major part of 2015.

Decisions of the SC are final and are published promptly. Until March 2016, decisions were published on the website of the PPA because of problems with the SC's software; in March 2016 this problem was resolved and all decisions are now published on the SC website¹¹², although only as non-searchable PDF files. There is, however, a basic search tool, which enables searches by subject matter of the public procurement, type of procedure, stage of the procedure when the appeal was submitted, and type of ruling (appeal admitted, rejected or dismissed). Decisions are available from August 2014. The respective decisions of the Administrative Court are not published in the same database; therefore, the contracting authorities and economic operators cannot easily follow the whole life cycle of the review process.

Decisions of the SC are clear and reasoned. There is no requirement in the PPL that the appeal be accepted as grounded only if the infringement of the law has any impact on the results of the procurement procedure. In fact, the PPL requires the SC to take into account "serious violations" of the PPL *ex officio*, regardless of whether they were indicated in the appeal or not. However, the amendment of the PPL applicable from May 2015 shortened the list of serious violations drastically and refers only to cases in which non-transparent or non-competitive procedure was applied, contrary to the PPL, or the tender documentation provided for discriminatory requirements or provisions otherwise restricting access to the public procurement¹¹³.

There has been a steady and marked increase in the number of complaints reviewed by the SC: 741 in 2013, 768 in 2014 and 803 in 2015. This is despite the fact that in 2011 the PPL introduced a complaint fee and strict time limits for making complaints. The fee, paid by the economic operator submitting the complaint, amounts to 1% of the estimated value of procurement (but no more than EUR 8 000).

¹¹⁰ Information provided by the SC.

¹¹¹ 518 decisions.

¹¹² http://www.kontrola-nabavki.me/1/index.php?option=com_content&view=article&id=84&Itemid=146&lang=mne

¹¹³ PPL, Article 134 – in the event that substantial violation of the PPL is identified, the State Commission annuls the relevant decision of the contracting authority or the whole procurement procedure.

Appeals of decisions of the SC can be made to the Administrative Court; in 2015, 75 appeals were submitted. Two-thirds of the appeals came from contracting authorities, the rest from economic operators. In those cases which were resolved in 2015, the Administrative Court cancelled the decisions of the SC in 12 cases, 14 appeals were rejected, 2 were dismissed and in 3 cases the proceedings were terminated due to withdrawal of the appeal by the complainant; the remaining 44 cases were rolled over to 2016. In 2016, there were no unresolved cases dating from 2014. The judicial procedure is relatively lengthy (although the law requires it to be an “urgent procedure”); it takes six to eight months to resolve disputes. Due to the relatively small size of the Administrative Court, there are no judges specialised in public procurement cases. The decisions of the SC are final and can be implemented immediately after their adoption; therefore, contracting authorities are allowed to sign contracts without waiting for the ruling of the Administrative Court.

Since the *acquis* mechanisms for ineffectiveness of contracts and the imposition of penalties are not transposed into the national legislation and the concessions are not covered by the system, the value of the indicator related to procurement review and appeal bodies is 3. The value of the indicator related to a user-friendly procurement review website is 3, due to only limited search functions and because in 2015 software problems delayed publishing of the SC’s decisions.

Review of complaints submitted by economic operators against decisions of contracting authorities is conducted by an independent and autonomous state administration body, with the possibility of appealing its rulings to the Administrative Court. The process of aligning the provisions of the PPL with the EU Remedies Directives has not been finalised, as some provisions of 2007/66/EC Directive are still missing. A growing number of appeals is being reviewed by the SC.

Key recommendations

Short-term (1-2 years)

- 1) The Government should implement the Strategy of Development of Public Procurement in Montenegro for 2016-2020 in a timely manner. The Government should supplement the existing multi-annual Action Plan with annual work programmes, indicating budget allocations for the actions.
- 2) The Government should strengthen the financial and administrative capacity of the PPA and the SC, especially by improving their information technology capacity and skills. This will allow them to take full advantage of the planned EU support for the development of e-procurement software.
- 3) The Government should finalise the preparatory work on the draft PPP Law and submit it to the Parliament, as well as establish a review system in the field of PPPs and concessions in accordance with the requirement of the EU acquis.
- 4) The Government should review the PPL and its implementing legislation to finish the transposition of the EU Remedies Directives and to implement the 2014 EU Directives on public procurement.
- 5) The Inspection Administration should develop internal rules and procedures for conducting the inspections of public procurement procedures.

Medium-term (3-5 years)

- 6) The Government should continue the consolidation of the contracting authorities and develop the system for centralised purchasing in certain areas, taking into account the size and other characteristics of the public procurement market.
- 7) The Government should improve the data collection and reporting system on public procurement to provide ready access to data on public procurement operations.
- 8) The Government should examine the potential for making the remedies system more effective and efficient, to facilitate access to justice while reducing costs and delays in the public procurement process.
- 9) The Administrative Court should ensure greater participation of its members in training activities specific to public procurement, or otherwise improve their skills in handling procurement-related cases.

For more information:

OECD/SIGMA

2 Rue André Pascal
75775 Paris Cedex 16
France

[mailto: sigmaweb@oecd.org](mailto:sigmaweb@oecd.org)

Tel: +33 (0) 1 45 24 82 00

Fax: +33 (0) 1 45 24 13 05

www.sigmaweb.org