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CONSTITUTION, DEMOCRACY AND THE RULE OF LAW

The Constitution of Montenegro is in line with European standards of parliamentary democracy. According to the legal text the state is built on the principles of democracy, rule of law and the separation of powers between the executive, legislative and judiciary. The Constitution grants fundamental freedoms and human rights, freedom of expression and religion, and respect for minorities. It recognises the equality before the law and legality in the action of public powers.

However, democracy is threatened by a gap between the democratic values enshrined in the Constitution and political reality. This reality shows an unbalanced system with a clear supremacy of the executive branch directly/indirectly controlling the other two branches.

The role of Parliament in the system of checks and balances is marginal. There is no effective parliamentary control of the Government and Parliament's substantive involvement in the legislative process is trivial. Parliament functions mostly as a "law-passing factory" without debate on policy. The involvement of Parliament is seen as a formality rather than as the substantial participation of a respected, decisive power within a system of good governance.

The lack of substantial parliamentary participation in the legislative process not only raises the question of the democratic legitimacy of legislation, but it is also a reason for the poor quality of laws, which in turn negatively affects their implementation, and therefore the quality of administrative services delivered by the executive power.

The freedom of the press remains constrained by the small number of independent media, and cases of intimidation of journalists are a cause for concern.

The social and political role of the rule of law is either not understood or not accepted within the public governance system. Public sector institutions frequently disregard legal provisions or binding procedures as they see fit. Administrative authorities often ignore Administrative Court rulings and obligatory decisions of other administrative bodies.

Respect for and confidence in democracy requires that, among other things, the political establishment understands and accepts the importance of Parliament in a parliamentary system of state powers. Such a reform process can only be driven by the country's individuals and institutions, with very limited external influence affecting the outcome.

Government

Montenegro has established a basic policy management system, comprising a legal framework and the bodies necessary to perform the required planning and policy co-ordination tasks. With the new Rules of Procedure, the Decree on Public Consultation, the Decree on Impact Assessment, and the Decree on Relations with NGOs, the required regulatory framework is now in place. The extent to which these decrees are adequately implemented remains to be evaluated and it is too early to assess their effectiveness.

Public Administration

The small size of the country may explain some, but not all, of its administrative shortcomings. However, most problems stem from a bureaucracy based on patronage rather than merit, administrative practices disrespecting the rule of law, a political system dominated by a single political party since its inception, and a weak system of checks and balances.

An evaluation of the case law of the Administrative Court – a remarkably capable and well functioning institution, and therefore valued by citizens and international observers - highlights the major shortcomings of the public administration: civil servants are insufficiently familiar with the applicable legislation; administrative bodies often consciously ignore or disrespect the law; and senior and top-level staff do not consider themselves as accountable for the legality of their bodies' administrative practices. Furthermore, the Administrative Court's decisions tend to be ignored by administrative authorities, unfortunately without any legal consequences because the current legislation does not provide any controlling mechanism or sanctions. On the whole, it can be argued that the lack of respect of the law in administrative practice is notorious and strongly hampers the consolidation of a state ruled by law.

However, the Government's decision to prepare a new Law on General Administrative Procedures -- a first draft legal text is expected to be completed by the end of 2012 -- could open the door for real progress in the medium-term, since a good system of administrative procedures is the basis for good administrative behaviour in general. A Law in line with the principles of EU law and good administrative practice would provide the legislative conditions for administrative decisions of adequate quality and for their legal correctness. It would also further avoid unnecessarily complicated, formalistic and lengthy processes, and enhance transparency and accountability.

The reluctance of heads of administrative bodies to use hierarchical delegation as a managerial tool in administrative decision-making adds to the malfunctioning of the public administration. In practice almost all decisions are taken at the top -level of an administrative body (*e.g.* by the minister), so creating decisional bottlenecks and impeding the emergence of any managerial accountability within the professional civil service.

The existing system of general administrative inspections remains inadequate, even after the entry into force of new relevant legislation in 2011. This controlling mechanism is ineffective, weakens rather than supports the protection of citizens against illegal administrative actions, negatively affects accountability, and can be misused as an instrument of (political) arbitrariness against public officials.

The public administration reform process suffers from a lack of effective implementation mechanisms. The Strategy for Public Administration Reform 2011-2016 (AURUM Strategy) did not envisage any special structure for steering and monitoring its. Following the adoption of the AURUM Strategy, the Government left it to institutions to put the strategy into practice, or, in other words, to reform themselves. As a result, too many actors with unclear competences were involved, some of them without relevant expertise and operational capacity.

In the area of public expenditure management, political commitment for prudent budgetary policies is visible. However, a problem is the small number of staff working in line ministries formulating policies who are aware of the budgetary implications of these policies. Other weaknesses include the fact the Parliament does not play a significant role in budget formulation, that the budgeting procedure focuses primarily on the next calendar year and that there is virtually no multi-annual budget planning, and that sectoral policy plans do not give enough importance to medium-term costs.

The successful implementation of public internal financial control depends on reforms underway, such as the reorganisation of the administration and the revised budgetary arrangements. The relationship towards these reforms is important and can be used in the context of strengthening managerial accountability.

The Senate of the National Audit Institution (NAI) is fully aware of the need to further strengthen its institutional capacity. The Institution will need to continue ensuring that its own management and staff are dedicated to their tasks in accordance with their Strategic Development Plan.

The legal framework for public procurement in Montenegro has been further aligned with the *acquis*. The new Public Procurement Law removes a number of deficiencies but falls short of achieving full alignment. There are no provisions for competitive dialogue, electronic auctions and dynamic purchasing systems. Utilities do not benefit from the greater flexibility allowed by Directive 2004/17. The provisions for framework agreements differ from those of the Directives and are less flexible. Directive 2009/81 (defence) has not been transposed. Legislation on concessions and public-private partnerships will start becoming aligned only if and when the new, recently drafted Public-Private Partnership law becomes adopted. Applying it properly will require careful attention.

Prescriptive regulations and an increased reliance on inspections add cost and complexity to the public procurement system and make it difficult for contracting authorities to do their work effectively and efficiently. They also put greater strain on the two main bodies responsible for public procurement, which are already facing capacity problems. Further alignment is among the main objectives of the Government's "Strategy for Public Procurement System Development for the Period 2012-2015". Its implementation will require continued assistance to help ensure that the remaining regulatory issues are resolved and that practice follows policy.

Judiciary

Judges and prosecutors are not free of political influence, in particular because of the system of appointments and the composition of the Judicial Council, whose members are mostly appointed by Parliament and the Government. Similar concerns relate to the prosecution. All state prosecutors are elected by Parliament on the recommendation of the Prosecutorial Council, whose members are in turn also elected by Parliament. Presumably in response to the European Commission's 2010 Opinion and Analytical Report, the February 2011 Action Plan for Monitoring Implementation of the European Commission's Recommendations nevertheless sets very specific objectives concerning this issue. Section 3 of the Action Plan is dedicated to "strengthening of the rule of law – particularly through de-politicised and merit-based appointments of members of the judicial and prosecutorial councils and of public prosecutors, as well as through reinforcement of the independence, autonomy, efficiency and accountability of judges and prosecutors".

Nevertheless, during the period assessed, activities to improve the situation could not be observed. The fundamental obstacle relates to the Constitution: some of the issues that need to be addressed, such as the composition of the Judicial Council, would require constitutional changes. However, it seems that for the time being, a constitutional reform that would include the constitutional set-up of the judiciary, does not enjoy priority on the Government's political agenda.

Integrity

In spite of the adoption numerous strategies, legislation and action plans, corruption remains a critical problem. A major reason is that legislation is simply either ignored or not applied effectively. Anti-corruption controls in several important sectors, such as conflicts of interest of senior officials in the executive branch and politicians, the use of public funds in public procurement, privatisation and concessions, and the control of political party financing, remain largely insufficient.

Reform capacities are low. The Directorate for Anti-corruption Initiative, until recently under the Ministry of Finance, has been transferred to the Ministry of Justice. It is an advisory body that mainly proposes preventive policies and awareness raising campaigns. A thorough review of the Directorate's institutional localisation and of its mandate could bring better results. One option would be to transfer the current body to a new "directorate for corruption prevention" placed in the Prime Minister's Office, acting as a policy unit with the core mandate of analysing shortcomings and proposing policies, at its own initiative or at the request of the Prime Minister or any other minister.

Recommendations

To Montenegro

- Strengthen the power of Parliament as both the legislator and the controlling institution over the executive. This requires first and foremost the political establishment's understanding and acceptance of the role given to the Parliament by the Constitution. The development of such an understanding could be supported by the Parliament (represented by committees, groups, individual members) -- and not only the executive power -- was involved as much as possible in the political dialogue taking place at all levels with the EU.
- The Government should address the existing shortcomings related to the implementation mechanisms of the AURUM Strategy. The establishment of a small but authoritative body for the co-ordination of reform activities is strongly recommended. This body, in which the Ministry of Finance, the Ministry of Interior and the Human Resources Management Authority need to be represented, requires operational capacity and clearly defined competences, backed up by full political support from the Government.
- The Ministry of Interior and Public Administration should take the lead in promoting the use of delegation of authority in all administrative bodies as a managerial tool for organising administrative decision-making processes. This needs to be done by regulatory means as well as through awareness-raising and training measures.
- The working group of the Ministry of Interior should complete the process of drafting a new Law on General Administrative Procedures by the end of 2012. A programme to prepare the implementation of the new Law should start immediately and be followed up after the adoption of the Law, at least in the first half of 2013, to ensure effective and sustainable implementation. At a political level, the EC should underline the importance of adopting a Law on General Administrative Procedures that is fully in line with EU legislation and standards of good practice in EU member states.

CIVIL SERVICE AND ADMINISTRATIVE LAW

Main Developments Since the Last Assessment (May 2011)

Several developments have taken place during the period assessed, some of them in the right direction. If implemented, they could lead to a state administration better aligned with European administrative principles.

A new Law on Civil Servants and State Employees (CSL) was passed by Parliament in July 2011 to supersede the 2008 Law. The preparation of the new CSL, which will enter into force in January 2013, underwent a long participatory process which represented a noticeable novelty in the Montenegrin customarily non-participatory law-making. The new law is not fully aligned with the strategic policy goals recurrently declared by the Montenegrin Government during the consultation process, namely to establish a unitary civil service and embrace more clearly a merit-based civil service and public employment. This is especially manifest in recruitment, where the legislator, by leaving the final administrative decisions to the political level, has left the door open for neglect or circumvention of the principle of a merit-based, professional and non-politicised civil service. The many exceptions in the scope of the law, along with the weakening of the capacity of the Human Resource Management Authority (HRMA) to impose homogenous managerial standards across the system, also depart from the declared Government objective of achieving a unitary and homogeneous civil service in the country. At the time of writing (March 2012), the drafting of secondary legislation is starting.

The legal framework for the organisational set-up of the state administration has slightly improved. The Ministry of Interior and the Ministry of Finance carried out a “Legal and Institutional Analysis of the Organisation of the State Administration System of Montenegro with Proposals for Future Measures” and presented it to the Government in December 2011, who, on 29 December 2011, adopted a “Decree on the State Administration Organisation and the Manner of Working”. The overall objective of this regulation is an *ad hoc* rationalisation of the central administration system by according a number of organisational mergers and restructurings. This has momentarily reduced the existing organisational fragmentation. The opportunity was missed, however, to establish a more general legislation determining the criteria to be followed to create institutions, agencies and other administrative structures. The *ad hoc* measures, however necessary, will probably be short lived, because the Decree does not provide against the ill-advised practice of “agencification” in the future.

A new Law on General Administrative Procedures (LGAP) is under preparation and is expected to be ready by the end of 2012.

The system of administrative inspections was modified by the November 2011 amendments to the Law on Inspection Control, with the goal of establishing some new organisational elements and a more precise definition of its jurisdiction and legal powers, as well as of strengthening its human resources and technical capacities. The whole process of changing the organisational set-up is expected to be completed by the end of 2013. However, the new law does not address the real problems: the controlling mechanism is ineffective, weakens rather than supports the protection of citizens against illegal administrative actions, negatively affects the accountability system of public administration, and can be misused as an instrument of (political) arbitrariness against public officials. Therefore, the November 2011 amendments to the Law on Inspection Control largely missed the point.

Main Characteristics

The country's small size may explain some, but not all, of its administrative shortcomings, and in particular those related to the poor quality of the institutional set-up. Most drawbacks stem from a bureaucracy based on patronage rather than merit, administrative practices disrespecting the rule of law, a political system dominated by a single political party since its inception, and a weak system of checks and balances.

The human resources management system is an area where the lack of respect for the law is particularly obvious. Frequently, ministries and administrative bodies simply disregard legally binding procedures or do not respect the competences of the Human Resources Management Agency. Patronage networks, clientelism and politicisation thus dominate recruitment and promotion practices. Furthermore, the lack of statutory co-operation on the part of other administrative bodies is the major reason why some other efforts of the HRMA to develop the civil service management system, e.g. the completion of a central civil service registry, have failed so far.

The Administrative Court has established itself quite remarkably since its creation and has gained a high level of respect from citizens and international observers for its timely and accurate resolution of litigation cases. The court publishes its rulings on its website, which serves as a precious source of information and learning on legal administrative practice. More than a half of the cases brought in front of the court in 2011 were decided against the administrative authorities. Administrative silence was reproached in 20% of the cases (in some ministries, this reached 50% to 60%, and in one, 80%). The court case law shows that major problems of the public administration are: 1) civil servants' insufficient familiarity with the applicable legislation; 2) administrative bodies' conscious ignorance or disrespect of the law; and 3) the fact that senior and top-level staff do not see themselves as accountable for the legality of their bodies' administrative practice. The Administrative Court's decisions tend to be ignored by administrative authorities, unfortunately without any legal consequences. On the whole, it can be strongly argued that the lack of respect of the law in administrative practice strongly hampers the consolidation of a state ruled by law.

The Ombudsman is generally well respected and trusted by citizens. It contributes to the better protection of the human rights of individuals and groups (Roma, women, disabled persons, homosexuals, etc.). However, the financial and human resources provided by the budget do not meet the requirements for a well-functioning institution. Furthermore, administrative restrictions of the Ministry of Finance in the field of financial and employment management obstruct the Ombudsman's legally guaranteed independence. In addition, administrative bodies tend to disregard the Ombudsman's recommendations. A specific problem raised by the Ombudsman is the administrative bodies' non-compliance with the citizen's right of access to information (the administrative practice of the General Secretariat of the Government is reported to be particularly problematic).

The existing system of inspections, rooted in the former Yugoslav tradition of (partly political) state control, is inappropriate to ensure the legality of administrative practice and public safety and order in the country. There are two kinds of inspections, the General Administrative Inspection (understaffed and under resourced) to control the administration; and a system of inspections that controls economic and social activities from the viewpoint of public safety and order. There is no room for a detailed analysis of the shortcomings of this arrangement in this report, but as a general assessment one could conclude that in general, the inspection mechanism, rather than contributing to more legality in public administration or improving the compliance of economic and social activities with the law, adds confusion and legal uncertainty, because of the way the inspection role was traditionally understood and the way its working procedures are designed. The 2011 reform did not address the deep problems posed by this inspection system.

The reluctance of heads of administrative bodies to use hierarchical delegation as a managerial tool in administrative decision-making adds to the malfunctioning of the public administration. The current legislation allows for more delegation in decision making, but in practice almost all decisions are taken at the top level of an administrative body (*e.g.* by the minister), so creating decisional bottlenecks and impeding the emergence of any managerial layer within the professional civil service.

Reform Capacity

Overall, domestic reform capacities are weak. The reforms undertaken so far have been driven mainly from abroad, especially under the auspices of the European Commission in the wake of the country's attainment of EU candidate status. This situation may lead to quick reforms, but the risk that they remain superficial raises questions concerning their sustainability in the medium term. The internal demand for reform is virtually non-existent and the civil society organisations, although very vocal, have little weight in the way in which state institutions really work and design policies.

The public administration reform process suffers from a lack of effective implementation mechanisms. The AURUM Strategy did not envisage any special structure for steering and monitoring the implementation process. Following the adoption of the AURUM, the Government left it to institutions to put the strategy into practice, *i.e.* to reform themselves. As a result, too many actors with unclear competences were involved, some of them without relevant expertise and operational capacity. These are not very promising preconditions for achieving results.

The Government Council, an advisory body to the Government, was designated as the central co-ordinating and steering mechanism for the implementation of the AURUM Strategy. However, the Government Council does not have the capacity to discharge any co-ordinating role. The function of the Government Council is confined to receiving and debating the biannual Government Report on the implementation of the AURUM Strategy. Reform initiatives do not originate in this body.

The Ministry of Finance plays the leading role in the reform, though the Ministry of the Interior has key competences for public administration in general, and for its sub-areas such as civil service or the general administrative law framework, including, for example, the LGAP. Clearly and transparently defined roles for the collaboration between the two ministries could not be identified. A steady weakening of the HRMA can be observed in recent times, and could further hold back the civil service professionalisation efforts.

Recommendations

To Montenegro

- The law is not fully respected. Frequently, public sector institutions do not hesitate to disregard legal provisions or binding procedures if the outcome of their observance would be unwelcome. Complaints are widespread that administrative authorities ignore Administrative Court rulings or obligatory decisions of other administrative bodies. The Government should consider providing the legal basis for tasking an appropriate institution (*e.g.* the Ministry of Interior and Public Administration) with systematically monitoring whether judgements of the Administrative Court are implemented by administrative authorities and publish the findings in an annual report.
- Both the Department of Public Administration within the Ministry of Interior and Public Administration and the Human Resources Management Authority reporting to that Ministry require a significant increase in qualified staff and budget in order to be capable of fulfilling their responsibility as the co-ordinating and driving force for the implementation of AURUM in

their respective areas. In particular, the creation of a small but efficient law-making unit is imperative in order to cope with the challenge of upcoming legislative projects.

- The working group of the Ministry of Interior should complete the process of drafting a new Law on General Administrative Procedures by the end of 2012. A programme to prepare the implementation of the new Law should start immediately and be followed up after the adoption of the Law, at least in the first half of 2013, to ensure effective and sustainable implementation. At a political level, the EC should underline the importance of adopting a Law on General Administrative Procedures that is fully in line with EU legislation and standards of good practice in EU member states.

INTEGRITY

Main Developments Since the Last Assessment (May 2011)

The developments that have occurred during the period assessed mainly concern the execution of the February 2011 Action Plan for Monitoring the Implementation of the European Commission Recommendations given by the EC in its Opinion on Montenegro's EU membership application. In general, they will have little to no impact on strengthening the protection of public integrity in the country.

The Law on Conflicts of Interest was amended in August and again in September 2011. Amendments are mostly details and do not address the real problems, since the Law deliberately avoids tackling the conflict of interest of politicians and high-level officials. The Parliament has again failed to establish clear incompatibilities and situations of conflict of interest with parliamentarians, Government members, local mayors and local council members, as well as other high-ranking public officials who are not civil servants. The conflict of interest of the latter group is already regulated in the Civil Service Law. In addition, the Law on Conflict of Interest does not provide an operational definition of conflict of interests. This vagueness was outstanding in the previous law and remains so after the amendments.

The Law on Political Party Finances was amended in August 2011 and January 2012. Although the amended law covers almost all areas defined by GRECO, it still suffers from the same shortcomings as the previous law. The amendments introduced are few and unfortunately most of the deficiencies have not been properly addressed:

- The law does not prohibit cash donations. Cash payments are by definition "anonymous" since their origin is not easily traceable.
- The law does not address all types of elections. The revision of laws on political financing must be made in parallel with the review of existing laws on political parties and elections. A single and comprehensive political financing regime is preferable to multiple political financing provisions, which are often inconsistent if dispersed in various laws.
- The allocation formula for public funds and the ceilings for private fundraising favour the major parties to the detriment of the smaller ones, thus hindering pluralism.
- The law is very lenient with regard to the commercial transactions that parties can operate, while completely ignoring the regulation of their fundraising activities.
- The monitoring/enforcement system is vague and confusing, with multiple institutional actors involved and different levels of control. This is an unnecessary overlapping of responsibilities that affects negatively the independence of the supervision without bringing any added value to its effectiveness.
- No specialised body is proposed to monitor and control the origin of private donations and the informality surrounding the financing of political parties and electoral activities.

- The current sanctioning framework is inadequate because it relies exclusively on fines of vague and uncertain imposition. It also does not extend liability to other natural persons such as party leaders, financial officers and private donors, while legal persons (parties and companies) are completely excluded. In addition, it does not offer a clear, independent and reliable enforcement mechanism to apply such sanctions.

The Penal Code was amended in June 2011 in response to the GRECO recommendations. The amendments represent a real effort to meet international commitments, in particular the Council of Europe's Criminal Law Convention on Corruption and its Additional Protocol. Dual criminality is abolished with respect to offenses on bribery and trading in influence committed abroad, and descriptions of corrupt behaviour have been extended to the private sector. However, many articles in the Penal Code remain confusing and show inconsistency. A thorough legal harmonisation exercise needs to be carried out, as these inconsistencies are likely to thwart law enforcement, especially the prosecution, and therefore threaten the legal certainty. If legal certainty is not guaranteed in criminal matters, the possibility of convicting corrupt behaviour becomes rather difficult, if not impossible.

A Law on Lobbying was adopted in November 2011 and an amendment introducing the protection of whistleblowers in the Labour Code was passed in December 2011. Principally, the law defines lobbying and specifies the activities that fall under the definition of lobbying, the rights and duties of the lobbyist, the registration of lobbyists, and sanctions for illegal lobbying. Lobbying may be exercised by natural or legal persons, business associations, and non-governmental associations that are registered as lobbyists. Former public officials may register as lobbyists two years after the expiration of their mandate. The Law on Lobbying is comprehensive, but many doubts arise about the capacity of the country's institutions to enforce it. A Registry of Lobbyists is to be kept by the Directorate for the Anti-corruption Initiative (DACI).

In December 2011 the Government adopted a new Decree on the State Administration Organisation and the Manner of Working. The overall objective of this regulation is to rationalise the central administration system. The Decree addresses, among others, the previous problem of establishing new administrative institutions ("agencies") for new tasks. This "agencification" has led to a fragmented administrative system with a number of inefficient sub-elements and overlapping competences. The disadvantages of this development on the public integrity system include less transparency, higher susceptibility for corruption, and more difficulties for the state in its supervision and controlling role. Compared to the previous situation, the regulatory content of the Decree is an improvement, but its positive impact in reality will, however, depend on proper and timely implementation.

Main Characteristics

The lack of integrity in the public sector is still one of the most pressing problems. In recent years, many anti-corruption activities have been carried out, anti-corruption strategies and action plans developed and monitored, and numerous laws reviewed and adopted. Law enforcement capacities have also been strengthened.

In spite of the adoption of numerous strategies, legislation and action plans, corruption remains a critical problem. A major reason is that legislation is simply either ignored or not applied effectively. Anti-corruption controls in several important sectors, such as those concerning conflicts of interest of senior officials in the executive branch and politicians, the use of public funds in public procurement, privatisation and concessions, and the control of political party financing, remain largely insufficient.

The public administration's insufficient transparency remains a concern. The continuing resistance of the executive level (such as ministers/presidents, directors of department, heads of units) in many sectors to provide access to information has not been effectively addressed over the past year. Public

consultations on key reforms or development projects are not systematic. The establishment of a commissioner for personal data protection and access to information is necessary.

Transparency, integrity and anti-corruption controls in sectors where significant public funds are used - such as privatisation, public procurement and concessions, and urban planning - are neither well defined nor effective. Control and oversight processes in all stages, from planning to the selection of contractors to the execution of the contract, are fragmented and unsystematic. There is no clear strategy, institutional capacity or practical procedures to ensure integrity and prevent corruption in this area.

The problems highlighted by GRECO and previous SIGMA Assessments Reports remain and will negatively affect the implementation of any new legislation. Public institutions frequently disregard legal provisions or binding procedures as they see fit. This cultural phenomenon, combined with a low institutional capacity and a highly politicised civil service, provides fertile soil for corruption.

Reform Capacity

Reform capacities are low. The DACI, until recently under the Ministry of Finance, has been transferred to the Ministry of Justice. It is an advisory body that mainly proposes preventive policies and awareness raising campaigns. In terms of institutional location, the DACI would be better placed in the Prime Minister's Office.

The DACI has modest technical and expertise capacity. It is not recognised as a source of expertise by other state agencies implementing anti-corruption activities. This situation is not only the result of its lack of independence or limited powers (the DACI has no role in binding interpretation or in enforcing legislation), but rather of its inability to strengthen its knowledge and capacities, despite considerable financial and technical assistance over the years.

The country's small size is a factor limiting reform, but not the only one. There is an insufficient resolve to tackle the roots of corruption-related problems such as the incompatibilities and conflict of interest of politicians, a better and more precise penal description of corruption misdeeds, and the embedment of integrity goals within the managerial responsibilities of each institution. The spreading politicisation and a formalistic legal culture in the public administration may represent hindrances for developing a stronger culture of integrity in public office.

The main drivers for reform are to be found outside the country. In particular, the European Commission plays a significant role in triggering reforms, which raises concerns about their durability and their sustainability in the medium-term.

Recommendations

To Montenegro

- Undertake activities (e.g. awareness raising campaigns) targeted at the senior and top level management of ministries and other administrative bodies to develop a culture of managerial accountability in public administration, so that ministers and other senior staff see themselves in the first place as responsible for the integrity and legality of administrative actions in their area of authority.
- Establish a commissioner for personal data protection and access to information, which would increase transparency and legal protection in the administrative system.

- Transform the current DACI into a new “directorate for corruption prevention” into which the current staff of the DACI should be incorporated.
- Make this directorate a policy unit with the core mandate for, at its own initiative or at the request of Minister or any other minister:
 - analysing legislation and its practical implementation, including institutional capacity of public agencies to implement legislation;
 - analysing ex ante the impact of legislation on the anti-corruption policy;
 - identifying drawbacks in current legislation or institutional arrangements that impede the prosecution and persecution of corruption activities particularly of politicians and businessmen;
 - identifying and promoting measures or activities helpful in preventing corruption.

PUBLIC EXPENDITURE MANAGEMENT AND CONTROL

Main Developments Since the Last Assessment (May 2011)

After the emergency **Public Expenditure Management (PEM)** adjustments in 2010, the stabilisation of public finances continued in 2011 and became more systematic. It is estimated that public deficit in 2011 will be around 4% of GDP, which is a slight improvement from the deficit level of 5% of GDP in 2010. The level of public debt is currently (end of 2011) 44% of GDP. In 2011, the Ministry of Finance (MoF) prepared first drafts to amend the Organic Budget Law (OBL). The planned amendments include: *i)* creating a more formal framework for medium-term budget planning, including budget ceilings; *ii)* formalising a few fiscal rules; *iii)* changing the budget calendar; *iv)* revising the budget classification to further specify the budget items related to outsourcing. The amendments to the OBL are included in the 2012 Government Work Programme with an internal deadline in the first quarter of 2012.

The MoF was reorganised in 2011 to separate the macroeconomic forecasting work from the Budget Department. Following the reorganisation, the Economic Policy and Development Department was created; it includes a Division for Macroeconomic Analyses and Projections, a Fiscal Policy Division and a Division for Improving the Business Environment. The responsibilities of the new Department also include the preparation and co-ordination of the Pre-Accession Economic Programme (PEP), which was prepared by Montenegro for the first time at the end of 2011.

Finally, in order to improve the expert support to members of Parliament, the practice of providing briefing notes was introduced in 2011. A briefing note is prepared for every piece of legislation to be discussed at a Committee meeting and would, theoretically, be a valuable support for the Economy, Finance and Budget Committee of the Parliament.

The most significant change for the arrangements in public finance management comes from the new Decree on the State Administration Organisation and the Manner of Working (December 2011) in force since 1 January 2012. The decree changes the Government organisation by reducing the number of separate agencies and article 49 of the decree foresees that financial services, such as budget preparation and accounting, are consolidated mostly into a limited number of organisations (primarily the ministries). As any of these changes may create organisational problems in the short-term and should require an amendment of the 2012 budget, but in the medium-term, they are likely to have a positive effect on public finance management.

There were four main developments in the area of **Public Internal Financial Control (PIFC)** in 2011. First, the *Financial Management and Control (FMC) Manual* was issued in July 2011 and distributed to ministries, agencies and other relevant bodies, as well as municipalities. Second, guidelines for internal rules and procedures on implementing FMC have been developed (August 2011). Third, there is a new rulebook on the curriculum and manner of conducting the examination of authorised internal auditors in the public sector. Finally, a third version of the *Internal Audit Manual* was issued (October 2011). The key improvement in the manual is that the internal audit methodology is more clearly explained and more user friendly.

With regard to **External Audit (EA)**, in November 2011, the Parliamentary Committee for Constitutional Issues and Legislation of Montenegro considered proposed amendments and supplements to the Law on the National Audit Institution (NAI). The aim was to clarify some articles and harmonise them with the Constitution of 2007. However, the proposal did not reach a majority in the Committee. The law, therefore, remains unchanged.

The NAI wishes to enhance the Institution's professional capacity-building elements. To this end it is working on developing a Strategic Development Plan. The mission and vision statement, together with the Institution's values and strategic goals, have been drafted.

The Institution has independently contracted a private sector audit firm to audit its own financial statements.

In February 2012, the Parliament enacted a law regarding the status of the **Audit Authority** (Law on Audit of Funds from EU funds). The law regulates that the Audit Authority for IPA funds should be a body outside of the organisational structure of the National Audit Institution, thereby resolving the problem of the Audit Authority being a part of the supreme audit institution.

Main Characteristics

The Organic Budget Law (OBL), which is the public finance framework law, generally represents a sound fiscal framework for **public expenditure management**, together with the Law on Local Self-Government Financing.

Structure of public finances

The structure of public finances consists of the State Budget, including the Pension and Disability Insurance Fund, the Health Insurance Fund, the Employment Agency and Labour Fund, and local government budgets (historical capital Cetinje, administrative capital Podgorica and 19 municipalities). The State Budget accounts for around 92 % of public finances, while the remaining 8% is related to local government. There are two main documents produced for budget planning at the central level: the Fiscal Policy Statement (*i.e.* medium-term fiscal policy outlook) in the Spring, and the annual budget bill in the autumn. The annual budget is split into programmes but these generally don't reflect management structures in terms of responsibilities. The programmes therefore do not support initiatives to strengthen the accountability arrangements.

The Government is committed to rebalancing public finances by 2013, despite some further pressure from increasing pension liabilities. Motivated by the need to find savings in public expenditure, the MoF and the Ministry of Interior are leading further work to rationalise the public sector and a Public Sector Restructuring Plan is expected to be ready during the first half of 2012. Although wages in the public sector are, in general, considered low, the overall wage bill in the State Budget is relatively high. General public services account for more than 30% of general government expenditure, which is considerably higher than in many other countries (the OECD average is below 15%).

Budgeting procedure and structure

A significant weakness of the Montenegrin budgeting procedure is that it focuses primarily on the next calendar year and there is virtually no multi-annual budget planning. Also, sectoral policy plans do not give enough attention to medium-term costs. There is, nevertheless, a practice of producing fiscal impact estimations together with new policy or legislative proposals by the line ministries and according to the MoF, the general level of financial estimations has improved during the last years.

The budget is split between 127 spending units of which 16 are ministries. Baseline estimates are prepared foremost by spending units; the MoF does not produce independent forecasts in the level

of detail that would be necessary to establish proper top-down elements (e.g. sectoral ceilings) to budget planning.

The reforms in the area of programme budgeting have been at a standstill, which is understandable. Focus has been on more basic elements of public expenditure management such as multi-annual budget planning and consolidation of budget planning into a lesser number of spending units. No significant changes were seen in Treasury structures either in 2011.

Macroeconomic analysis

Macroeconomic analysis is carried out in a sufficiently robust and transparent way. There are regular publications on economic projections and the budget cycle includes two main releases of macroeconomic projections – one in April for the Fiscal Policy Plan and one in September for the budget bill. However, these main economic projections are not made public independently of the budget documents.

Relationship with the Parliament

The Parliament does not play a significant role in budget formulation. According to the OBL, the Government needs to send the budget bill to Parliament by the end of November, although recent practice has been to send it earlier. In 2011 it was sent in the middle of November, which is still less than the OECD recommended three-month period for parliamentary budget discussions.

The Economy, Finance and Budget Committee currently has five staff supporting it. It had three in 2010 and two in 2009. They are mostly occupied by procedural matters. However, within the context of a programme organised by the Westminster Foundation for Democracy, several activities are organised to support the capacity of the Economy, Finance and Budget Committee and its expert staff, focusing on improved budgetary oversight for members of Parliament.

Budget execution and accounting

Budget execution is under fairly tight control by the MoF. The Treasury Single Account (TSA) is almost complete but some public spending is still handled via separate bank accounts (municipalities). Instrument for Pre-Accession funds are planned to be part of the TSA once the programmes are implemented according to decentralised arrangements. All payment orders are entered into the Treasury SAP IT system by spending units but the signed orders, needed for legal authorisation, still arrive at the Treasury on paper.

Although according to the OBL all commitments should be recorded in the Treasury General Ledger, arrears still occur during the year. The MoF has made some progress and has been able to reduce the total amount of overdue invoices from EUR 22 million at the end of 2010 to EUR 14 million at the end of 2011. Funds not used by the end of the year cannot be carried over to the next budget year (except the funds for co-financing donor-funded projects) leading to significant last minute spending every December. This also creates pressure to cover the invoices received at the end of the year from the budget of the following year.

Accounting is on a cash basis with some elements of accruals. Discussions are underway to plan a strategy to move towards accrual accounting. The Treasury publishes monthly and quarterly reports on budget execution. Quarterly reports are also issued on public debt. The annual financial statement is presented to the Parliament only in September, with the previous year's data, and it is discussed by the Parliament in November, leaving practically no time to feed into the budget preparations of the following year.

Public internal financial control is regulated by the Law on Public Internal Financial Control, the Rulebook on the Manner and Procedure for Establishing and Implementing Financial Management and Control, the Guidelines for Internal Rules and Procedures of Establishing and Implementing Financial Management and Control, and the Treasury Directions.

According to the PIFC Law, the internal audit system has been changed from the previously centralised internal audit system within the Ministry of Finance to a semi-decentralised system. The arrangements, which have been carefully chosen to reflect the small size of the administration, are set out in the Decree on the Establishment of Internal Audit, issued in March 2009.

Financial management and control

One of the key characteristics in the PIFC approach is to strengthen the spending units' internal financial control arrangements, with the aim of making lower level managers manage their internal controls. According to the PIFC Law (article 14), a person (FMC manager) is to be appointed as responsible for the establishment, implementation and development of financial management and control. The overall characteristic of the current system is the significant number of institutions that have launched activities to improve internal rules and procedures, and, in general, FMC managers are becoming more interested and involved in the implementation process. The development of internal rules and procedures is an important achievement since such documents did not previously exist.

The weakness of the system lies in the fact that the minister is still the person responsible for approving and authorising any changes and there is no real scheme for delegation or delegated powers. The development of managerial accountability is therefore hampered.

Internal audit

The main characteristic of internal audit is that the organisational structures are in place for a majority of the state-level spending units. Twenty-four internal audit units have been established at the central level (19 of which have auditors) and three units have been established and manned in the municipalities. Internal audit is now developing system audits. The consequence of this is a move from a reactive audit method to a methodology designed to check the adequacy and effectiveness of internal controls in both financial and non-financial systems.

Central Harmonisation Unit

The Central Harmonisation Unit (CHU) has to cover both the state and local level. For the moment the state level has been given priority. The Head of the CHU is supported by six staff: four work in the IA division and two in the FMC division. Institutions seem to recognise the staff's competence and requests for support from the CHU are frequent (both from state level institutions and municipalities). All employees in the CHU have been recruited from the Department for Internal Audit of the Public Sector and have been involved in internal audits of institutions in the public sector. Thus their knowledge of the manner in which public sector institutions work, as well as of the weaknesses of some financial processes, has been an indispensable value added for their current scope of work.

The CHU, in co-operation with the IPA project "Strengthening the Management and Control Systems for EU Financial Assistance in Montenegro", significantly increased its training activities in 2011. This should be recognised as a major improvement.

Eleven seminars were provided for the key target group of FMC managers (general secretaries). No such training existed in 2010. By 2012, a total of 63 FMC managers had been appointed, compared with 30 in December 2010. These appointments represent a step forward in developing awareness

that financial management should be considered as a tool for improving the use of public resources. Forty-five FMC action plans have been (or soon will be) finalised, compared to zero in December 2010. In the autumn of 2011, five FMC and IA pilot studies commenced in five ministries (Finance, Transport, Tourism, Internal Affairs, and Justice). These studies will last until November 2012. The training plan also foresees FMC training for between 75 and 100 staff in 2012.

Internal audit statistics follow the same pattern. There were eight trained internal auditors in December 2010. By November 2011, 24 had undertaken the training, and were among the 32 who had been appointed to internal audits positions. Twenty-four agreements between internal audit units and entities have been (or soon will be) signed. Such agreements did not exist at all in December 2010. Twenty-five internal auditors were engaged in pilot audits in 2011. In the second half of 2012 the Central Harmonisation Unit (CHU), in co-operation with the Human Resources Management Authority, will organise the first formal certification training programme for public internal auditors.

IPA funds

The funds channelled through the IPA programmes are not part of the budget (only the national co-financing is), but they will be once these programmes are implemented under the decentralised arrangements. However, the plans for decentralised management include centralising IPA funds into the budget of the MoF and not into the sectoral budgets of line ministries. This may be reasonable for simplifying the monitoring of IPA funds but can be counter-productive for programme budgeting or public internal financial control.

Adjustments in Government organisation

Regarding the Decree on the State Administration Organisation and the Manner of Working (December 2011) and its impact on IA and FMC managers, 2012 appears to be a year of consolidation and integration, when the related internal changes will be defined. The implications of the decree have not yet been analysed by the CHU from an FMC or IA perspective. It is likely, however, that the reform will lead to larger internal audit units at the ministerial level by merging the units that constitute new bodies. Regarding FMC managers, they will probably remain in their current positions while the reporting structure might change in some cases. In such a small country, the synergy makes sense to reduce overheads, but it will only prove efficient if management and support services really are streamlined. This will call for co-ordination activities that will take time.

Concerning **external audit**, the National Audit Institution (NAI) is a young institution (established in 2004) and has a sound legal basis, which provides for independent external audit of the budget execution and it has a sufficiently broad mandate, financial autonomy and full discretion, in the discharge of its functions.

Financial autonomy

The independence of the NAI is ensured by provisions in the Constitution. Financial autonomy is regulated under Article 51 of the NAI Law. It foresees the submission of a draft budget by the National Audit Institution directly to the parliamentary working body responsible for financial affairs, i.e. the Committee on Economy, Finance and Budget. This also happens in practice. The parliamentary Committee requests from the Ministry of Finance that it includes the NAI budget into the draft State Budget. This is within the normal remits of the Ministry and it presents the final draft State Budget to Parliament for its final adoption. The draft State Budget includes the budget of the NAI as well as all other constitutionally independent bodies. However, the MoF should not adjust the NAI budget, but should propose adjustments if necessary for ensuring a balanced national budget for parliamentary discussion and final adoption. It should be the Parliament who negotiates and approves any adjustments to the NAI budget.

Strategic development of the National Audit Institution

The NAI is governed by a Senate of five members; one post has been vacant for almost two years. The Institution has opted for a sound step-by step approach whereby it gradually improves its institutional capacity by increasing the number and professional capacity of its staff. Currently, the NAI employs 54 staff, 35 of whom are auditors (senate members, state auditors and junior auditors). In 2011, the Commission for Passing the Examinations for State Auditors organised three examinations (February, June and December 2011). Twelve auditors passed the test.

The Strategic Development Plan will constitute an important document for the President of the Institution and the Senate in setting priorities on how to lead the institution forward so that it can be in a position to undertake the full range of audits envisaged in the legislation and to contribute to an even more enhanced discussion of the execution of the State Budget. The process should constitute an important contribution to strengthening public accountability in Montenegro.

A key issue is the need to strengthen internal co-ordination and harmonisation of the audit approach and audit procedures. The audit standards and methodology will be compiled into one comprehensive document, which will serve as a manual to all audit staff. The Senate will adopt a final version in April 2012, present it to the staff and provide adequate training activities. The manual provides adequate and practical guidelines and templates for the auditors.

Reform Capacity

In the area of **public expenditure management** there has been visible political commitment in Montenegro for prudent budgetary policies and for the modernisation of public finance management. Vertical communication between sectors is visible and, at least in the Ministry of Finance, there seems to be sufficient informal communication. A clear problem is the small number of staff working in line ministries formulating policies who are aware of the budgetary implications of these policies.

The Ministry of Finance is benefitting from technical assistance for setting up decentralised IPA structures and for developing public internal financial control in the public sector. There is a limited support by Slovakia's Ministry of Finance to increase capacities for macroeconomic forecasting and to further align the national reporting to the European System of Accounts (ESA 95). There is also an informal plan to carry out a new Public Expenditure and Financial Accountability (PEFA) assessment in co-operation with the World Bank during 2012. There is some concern, however, that the IPA funds foreseen for public administration reform are too small, thus leaving almost no funds to support the reforms in the area of public expenditure management.

The successful implementation of **public internal financial control** depends on other reforms underway, including the reorganisation of the administration and the budgetary arrangements. It is well understood that the relationship between these reforms is important for the successful implementation of PIFC. In that sense, reform capacity is based on a solid foundation.

The CHU appears to have strengthened its position in the Ministry of Finance, which indicates a stronger political commitment. However, the fact that this is not balanced with equal experiences regarding FMC may hamper the reform capacity in general.

Reform capacity in preventing fraud and corruption should theoretically have increased due to strengthened control measures in the spending units but there are still concerns regarding capacity in the executive level of administrative authorities (such as ministers, directors of agencies, heads of departments and units) on detecting and addressing indications of fraud and corruption.

In the area **external audit**, the Senate of the National Audit Institution (NAI) is fully aware of the need to strengthen its institutional capacity. What hampers this process is the Senate members' lack of commitment to working together. This in turn leads to an unclear separation of duties between various sectors and the lack of standardised procedures for carrying out the work.

The activities related to the development of strategic documents are carried out with the support of the EU project "Strengthening of External Audit in Montenegro" IPA 2009, which is provided by the German Technical Co-operation Organisation (GIZ). The GIZ co-operation will terminate in June 2012 after having supported the Institution since it was established. The National Audit Institution has demonstrated its willingness to continue to develop the institution but this has been possible with ongoing support by donor funded projects. There are reasons to believe that the Senate, at least temporarily, does not have the necessary capacity to fulfil the triggering role of bringing the Institution together towards the needed reform.

There are also reasons to believe that this, at least temporarily, will hamper reform capacity. The Institution will need to continue ensuring that its own management and staff are dedicated to their tasks according to the Strategic Development Plan to ensure the formal adoption of the audit methodology and manuals in order to provide a sound foundation for its co-ordinated programme of institution-building and capacity strengthening.

However, the NAI's development will not be effective if it is implemented in isolation. Further development in the areas of internal control and internal audit in the Ministry of Finance and in budget beneficiaries will also be needed so as to ensure a continuous process of evolution of the Montenegrin public administration.

Recommendations

To Montenegro

- The Parliament should provide clear direction to the Ministry of Finance how to deal with constitutionally independent institutions such as the National Audit Institution regarding the budget preparation process. The Parliament should be the one who negotiates and approves any adjustments to the NAI budget. The MoF should not adjust the NAI budget, but should propose amendments if necessary for ensuring a balanced national budget for parliamentary discussion and final adoption.
- The Government should put forward the planned changes to the Organic Budget Law in order to set a more formal framework for medium-term budget planning that would promote a firm and determined use of budget ceilings, focusing on the following budget year. It is also important to create a few simple fiscal rules and to change the budget calendar to allow the Parliament more time to discuss the budget bill.
- The Ministry of Finance should strengthen its capacity to prepare sectoral expenditure estimates in order to propose and negotiate budget ceilings to be strengthened in the planned medium-term budgeting framework.
- The Ministry of Finance should use the opportunity created by the revised Government organisation (following the Decree on Government Administration and Operations) to consolidate the medium-term and annual budget planning into a lesser number of spending units while ensuring that the accountability structures and the managerial responsibilities that flow from these structures are strengthened and based on appropriate principles of segregation of duties.

- The Ministry of Finance should review and analyse the current programme budgeting approach. Given the present management structures, proceeding with the current programme formation is not a sustainable solution. The formation has to reflect the management structures more consistently and, over the longer term, the future accountability arrangements. Different options are at hand e.g. sub programmes could be developed or the previous sectorial structure could be restored.
- The Ministry of Finance should, in parallel with the above-mentioned recommendation regarding the programme budget structure, review the managerial needs of financial information provided by the Treasury SAP system.

PUBLIC PROCUREMENT

Main Developments Since the Last Assessment (May 2011)

The most significant development in 2011 was the introduction of a Law on Public Procurement. It was adopted by Parliament (*Official Gazette of Montenegro*, 42/11, of 15 August 2011), and is being applied since 1 January 2012. The intention of this new Public Procurement Law (PPL) was to improve the alignment of the Montenegrin system with the EU *acquis*. Closer alignment has been achieved and the new law addresses a number of issues raised in previous Progress Reports, *e.g.* through the introduction of provisions enabling environmental and social protection and increased anti-corruption provisions. However, the PPL is not yet entirely in line with the *acquis*. As further developed below, although it reflects Directives 2004/18 (“classic” procurement) and 2007/66 (remedies) quite well, it does not make use of the flexibility allowed by Directive 2004/17 (utilities). Directive 2009/81 (defence) has not been transposed for the time being.

A new Decree on organisation and manner of work of state administration (*Official Gazette of Montenegro*, 5/12, of 23 January 2012) regulates, among other things, the tasks and competences of the Public Procurement Administration (PPA, formerly the Public Procurement Directorate).

Another important change is the formal introduction of a new Inspection Control service to be provided by the PPA. It will monitor – at different stages in the process – the regularity and timeliness of procedures for contracts below EUR 500,000. Two additional staff members will be engaged by the PPA for this purpose. This complements a similar function of the State Commission for the Control of Public Procurement Procedures (the “State Commission”) for contracts with a value above EUR 500,000. These controls are in addition to the complaints review mechanism which is also ensured by the State Commission. Although the intention may be laudable, there is a risk that the new service may fail to improve integrity, while creating additional costs and delays.

The State Commission has now also been restructured, the complaints mechanism has been somewhat revised, and a complaint fee has been introduced with the intention of speeding up the process and discouraging unscrupulous complainants while improving the quality of the decisions taken. While experience from neighbouring countries shows that this is likely to be the case, it merits monitoring.

Other positive developments include clearer definitions of methods for implementing the public procurement procedures; publication of contract award notices; possibility for setting up centralised purchasing which may be made mandatory; introduction of the Common Procurement Vocabulary (CPV); increased minimum time periods for tender submission (which are now criticised by several contracting authorities as being unworkably long); inclusion of utilities within the scope of the law; and improved record keeping. The law also foresees the development of a curriculum for professional capacity building and training.

Concessions remain regulated by the 2009 Law on Concessions, although its scope is largely limited to the exploitation of natural resources and other common goods. However, in 2011, a task force from the Deputy Prime Minister’s Office and the Ministry of Finance prepared a draft of a new PPP Law which also covers public works and public service concessions and is expected to be in line with

the Directives and international standards. Adoption of this law is expected in the first half of 2012. Its implementation will be supervised by the Ministry of Economy.

As another positive step, a clear and comprehensive “Strategy for Public Procurement System Development for the Period 2011-2015” was prepared by the Ministry of Finance late in 2011 and formally adopted by the Government on 22 December 2011. Reflecting the work behind the new PPL, and recognising the need for further, continuous development of the public procurement system, it sets out a number of measures to be taken for improving the efficiency and effectiveness of public procurement and successively aligning regulations and institutions with the *acquis* as required for EU membership. A corresponding Action Plan sets out the steps to be taken to this effect by the PPA during 2012. Considerably front-loaded, its time schedules appear to be unrealistically ambitious, given the limited resources of the PPA. A “Co-ordinating Body for the Strategy Implementation and Monitoring”, with wide participation, including by civil society, will be set up to guide work on implementing and updating the strategy. The effects of its work remain to be seen.

Main Characteristics

Public procurement in Montenegro is governed by the new Public Procurement Law (PPL), intended to reflect the commitments envisaged by the National Programme of Integration of Montenegro into the EU. Among the objectives of the changes made were the removal of deficiencies observed in practice up to now; a clearer definition of the responsibilities of the persons conducting public procurement procedures; more efficient mechanisms for the prevention of abuse in public procurement by strengthening the system of managing contracting authorities, bidders, categories and contracts; enhancing the control mechanisms; better co-operation between the institutions involved; and strengthened capacity building. The new law also includes some changes intended to improve the implementation of basic public procurement principles: transparency, competition, equal treatment of tenderers, efficiency and cost-effectiveness. It is complemented by a fairly complete set of secondary legislation, including *e.g.* rules for evaluation and record keeping as well as a large number of standard forms and practical guidance notes.

The law thus now more closely reflects the Community *acquis* but falls short of complete alignment, as may be expected at this stage in the accession process. There are some differences which may have to be addressed in the medium term. For example, there are no provisions for competitive dialogue, electronic auctions or dynamic purchasing systems. Utilities are subject to the same rules as the public sector; *i.e.* the provisions of Directive 2004/17 allowing greater flexibility and excluding purchases of *e.g.* energy for distribution are not used. The provisions on frameworks are different to those of the Directives and resemble a long-term, fixed contract with a single provider, since quantities, prices and other terms are fixed at the outset, thereby removing the flexibility envisaged by the Directives. The law contains a specific procedure for consultancy services which is not foreseen in the Directives and which resembles the procedures of the international financial institutions and those contained in the UNCITRAL Model Law. The methods of determining whether bids are abnormally low (based on a mathematical average), although in apparent conformity with Article 55 of Directive 2004/18, may be inconsistent with the case law of the European Court of Justice. Several contracting authorities consider that the measures implementing the law are too detailed and formalistic, for example with a requirement to collect original certified copies of numerous documents, including tax and health insurance payments.

Other novelties of the law are concerned with transparency and the intention of achieving budgetary discipline. The introduction of anti-corruption and conflict of interest provisions allows exclusion on the basis of suspicion, which is an evident source of concern. The law requires the publication of a full budgetary plan at the beginning of the year, including quantities and estimated prices (which are, in fact, ceiling prices, since tenders must be cancelled if all of them exceed the estimated prices – a

very uncomfortable situation for a contracting authority). These are difficult to amend during the year and it can only be done with the agreement of the Ministry of Finance. The “shopping” procedure (in effect a “request for quotations”) which is used for relatively low-value contracts (up to EUR 25 000 for goods and services and up to EUR 50 000 for works) must now also be advertised and is subject to a public tender opening. While intended to improve transparency and predictability, these measures have direct and indirect costs which are likely to be high and have probably been underestimated.

Contracting authorities still need to seek approval for using the negotiated procedure, frameworks and consultancy services contracts. Within many contracting authorities, internal approval requirements often appear to be excessive, reflecting a general lack of delegation of authority: there are ministries where a few hundred euros’ worth of office supplies requires the approval of the minister in person.

For public contracts exceeding EUR 500 000, the contracting authority is obliged, within five days of the award decision, to provide the State Commission with complete documentation of the contracting procedure for control by the Commission. Such control must be completed within 30 days of the receipt of the documentation. If an appeal has been received against the award decision, the control and the appeal must be resolved by way of the same decision. If during the control the State Commission finds that the contracting procedure was carried out contrary to the legal provisions, it may cancel the procedure and the award decision wholly or partially, informing the contracting authority of the irregularities.

Tenders below EUR 500 000 are subject to control and inspection by the State Commission or the PPA since 1 January 2012. However, the modalities for this are not yet complete.

Procurement officers must hold a university degree and pass a professional exam. Nevertheless, the use of tender committees remains the rule. These have wide-ranging responsibilities and procurement officers are prohibited from being a member of them.

The efforts towards closer alignment with the *acquis* are welcomed and the evident concern to ensure transparency and probity is positive. Care must be taken, however, to ensure that the benefits of the well-regulated procurement system which Montenegro promises to offer are not undermined by over-reliance on a command and control philosophy. What appears to be an over-emphasis on the formal aspects of public procurement and the related compliance control is a clear cause for concern.

In fact, the strong emphasis on transparency and control may lead to a system which is too rigid and does not favour effective and efficient public procurement, which would require procurement officers to exercise their best professional judgment. However, even though they are the best placed to take decisions on what should be procured, their situation is ambiguous: the use of tender committees takes away most of their authority while leaving them with the responsibility for good procurement; despite needing a university degree and a professional exam to become a procurement officer, they receive no additional benefits, lay themselves open to financial penalties for administrative mistakes and yet still need to seek approval and remain subject to strict control.

Also, other enforcement measures may overlap or fail to achieve the desired result. The complaint fee, while generally accepted as an effective means for discouraging frivolous complaints, is relatively high and may therefore act as a disincentive to make legitimate complaints. This possible effect may be counteracted by the new inspection mechanism to be run by the PPA, but its effectiveness may be limited, since only two inspectors are intended to be appointed for several thousand procurements. The net effect of these two novelties on probity in public procurement thus remains to be seen.

Since the beginning of 2012, the organisational set-up for central public procurement functions in Montenegro consists of the Ministry of Finance, in charge of supervising the legality and purposefulness of the PPA (thus influencing policy); the PPA, which has the status of an “autonomous administration body”, mainly responsible for policy preparation and implementation; and the State Commission, which provides enforcement through a well-established complaints review mechanism. In addition, as mentioned above, both the State Commission and the PPA now have a wider control function in addition to their principal functions.

To help improve its performance, in November 2011 the PPA was reorganised into four departments, with a total of 18 staff positions (15 of which were filled by 28 February 2012), for monitoring the implementation of regulations and inspection control; monitoring public procurement procedures and managing electronic public procurement; professional training and education and international co-operation; and general affairs and finances.

In the capacity building field, the PPA will have to organise and conduct professional training and hold the exams required for public procurement officers. However, plans for this are only in the early stages of preparation. The PPA co-operates with other state bodies, NGOs and international organisations and agencies for building its own capacity and helping improve that of others, especially contracting authorities and economic operators. It is the “central institution” in Montenegro for the IPA 2009 project “Training in Public Procurement for Western Balkans and Turkey”.

E-procurement is being introduced successively. Notices are already published by electronic means and a new e-platform for public procurement (the “PPA Portal”) is being introduced with support from the EU. The PPA Portal will initially make available public procurement plans, contract notices, award decisions, and contracts concluded and their annexes. It may later be developed to support electronic auctions. The CPV will also be published on the PPA Portal and regularly updated. All of the State Commission’s decisions on complaints are published in full on its website on the day they are made. The intention is to make it possible to also file complaints by e-mail.

In the remedies system, the State Commission now has a President and four members (instead of two), nominated by the Government but reporting to the Parliament, and appointed for a five-year term. The complaints mechanism no longer requires the initial complaint to be made with the contracting authority. There is now only one, direct step to the State Commission, although a copy of the complaint must be sent to the contracting authority in question. Decisions taken by the State Commission are final and the contracting authority is obliged to act upon it and notify the State Commission on actions taken within the time allowed. If the contracting authority fails to follow the decisions within the specified time, the State Commission will inform the Government or relevant local authority thereon and propose that appropriate action be taken.

In addition, a complaint fee has been introduced, amounting to 1% of the contract value, with a maximum of EUR 8 000. Complaints also now have to be made within a certain period of time, whereas earlier they could be made at any time. These measures should be seen against the fact that the number of complaints brought forward to the State Commission (after having been initially made to the respective contracting authority up until the end of 2011; for this reason, the ones dealt with by the State Commission were referred to as “appeals”) rose by 5%, from 330 in 2010 to 516 in 2011, and that many of them were considered by the State Commission to be frivolous (and were therefore dismissed), taxing the resources of the commission for no good reason. Of the total number of such appeals in 2011, 165 were upheld, 299 were dismissed, 47 were rejected, and in 5 cases the proceedings were terminated because the complaint was withdrawn.

Reform Capacity

There is no doubt of the commitment to reform and improve. Apart from regulatory development, the Strategy for Public Procurement System Development together with the Action Plan for 2012 foresee further development of monitoring and the strengthening of electronic communications tools and the development and introduction of electronic procurement, which will be carried out with World Bank assistance. They identify many other public procurement initiatives, including awareness raising; closer co-operation with NGOs; improved reporting; greater use of “green procurement”; more professional training and the introduction of public procurement as a subject in the curricula of universities in Montenegro; strengthening the fight against corruption and conflicts of interest; and strengthening judicial protection of rights.

While these proposed measures may be quite reasonable as such, their implementation will require putting to good use the external support available, and their ultimate success will much depend on the future availability of experienced public procurement professionals, both in the central institutions and in the contracting authorities. Unfortunately, the current set-up and staffing of the PPA seems to leave only a few resources for regulatory development. Notwithstanding all of its efforts, the PPA should therefore be strengthened in terms of budget and administrative capacities for this purpose. Also, if the PPA proceeds with the development of the Inspection Control beyond the currently envisaged recruitment of two inspectors, there is no doubt that this will again require significant additional resources both from the Government (in terms of increased staff budgets) and from other sources in order to have available the technical expertise needed to carry out a larger number of meaningful inspections.

Recommendations

The recommendations below reflect the fact that the current PPL is not yet fully aligned with the *acquis* and requires further fine-tuning. The differences are not great, other than in respect of utilities and concessions, although a number of regulatory provisions (such as those relating to frameworks) could be revisited in order to better reflect the intentions of the European regulator.

Fully aligning with the *acquis*, including the provisions and intents of Directive 2004/17/EC, and attaining a mature public procurement culture are thus medium-term objectives at this stage of the accession process, receiving constant attention in the Government’s strategy. For the time being, the following specific recommendations are made:

To Montenegro

- To increase the emphasis on professionalisation of the procurement function, including measures for raising the status of procurement officers and improving their skills. This may require harmonising their roles and responsibilities with those of other civil servants and revisiting and possibly abolishing the tender committee institution.
- To monitor the development of PPA’s Inspection Control and the use of the new remedies system, possibly including a cost-benefit analysis of the new measures. Such an analysis might point to the desirability of an alternative monitoring system or other measures for ensuring value for money and probity in public procurement while simplifying the system as much as possible.
- To monitor the costs and benefits of the provisions regarding estimated (*i.e.* apparently, ceiling) prices (advance publication, possibilities to change, cancellation if exceeded, etc.).

PROCUREMENT/CONCESSIONS STATISTICS for 2011¹

Number of contracting entities²		
Central Government		185
Regional and local authorities		93
Other (bodies governed by public law)		497
Utilities		199
Total number of contracting entities		974
Awarded³ public contracts/Contracting entities		
	Total (estimated) value (Mio EURO)	Total number⁴
Central Government	90.1	1287
Regional and local authorities	84.4	600
Other (bodies governed by public law)	31.8	1458
Utilities	155.4	676
Total public contracts awarded	361.6	4021
Awarded concessions⁵/Contracting entities		
Central Government		
Regional and local authorities		
Other (bodies governed by public law)		
Utilities		
Total concessions awarded		
Awarded public contracts above the EU thresholds⁶		
Works ⁷	/	/
Services ⁸	6.2	13
Goods ⁹	19.0	27
Mixed contracts	/	/
Total public contracts above the EU thresholds	25.2	40
Awarded concessions above the EU thresholds		
Works ¹⁰		
Services ¹¹		
Other		
Total concessions above the EU thresholds		
Procurement methods used¹² (above the national thresholds¹³)		
Open procedure	314.9	3498
Restricted procedure	2.5	9
Negotiated procedure with prior publication of a notice	0.4	6
Negotiated procedure without prior publication of a notice ¹⁴	35.8	121
Other procedures (competitive dialogue, etc.)	8.1	387
Low-value¹⁵ procurement (estimated)	24.8	2157
Participation rate (average number of submitted tenders)	5.24	
Works	3.97	
Services	5.06	
Goods	6.7	
Review procedures¹⁶		
Number of complaints received ¹⁷		516
Number of complaints treated ¹⁸		464
Number appealed to the Court ¹⁹		N/a
Number of decisions with interim measures ²⁰		..

Note: Data delivered by the PPA

A list of 10 biggest procuring entities (name, main activity, (estimated) annual procurement budget):

1. Public Property Administration, governance over public property, EUR 3,298,000,00
2. Montenegrin Electric Enterprise, production, distribution and supply of energy, EUR 424,752,528,00
3. Directorate for Transport, governance, construction and maintenance of public roads, EUR 58,345,000,00
4. Directorate for Public Works, preparation works, investment works, studies, EUR 28.685.250,00
5. Agency for Construction and Development of Podgorica, construction and development of the Capital City, EUR 24,607,462,58
6. Health Insurance Fund, EUR 15,887,739,58
7. National Police, EUR 9,365,445,54
8. Ministry of Defence, EUR 4,491,000,00
9. Clinical Centre of Montenegro, EUR 4,671,200,00
10. Railway Infrastructure of Montenegro, EUR 14,874,864,31

A list of 10 biggest public contracts/concessions awarded and/or advertised in 2011 (subject of the contract, name of the contracting authority and contractor (if selected), (estimated) value, time of execution):

1. Directorate for Transport, road construction, EUR 4,442,147,17, Bemax D.O.O. Podgorica
2. Municipality of Budva, construction works, EUR 1,436,729,34, Flamer Stone Nikšić
3. Directorate for Transport, road construction, EUR 3,347,368,33, Tehnoput Podgorica
4. Directorate for Transport, road construction, EUR 2,932,222,12, Bemax D.O.O. Podgorica
5. Directorate for Transport, road construction, EUR 2,066,666,61, Tehnoput Podgorica
6. Municipality of Bar, construction works, EUR 2,100,000,00, Put A.D.
7. Directorate for Transport, road construction, EUR 3,420,046,00, Mehanizacija i programat
8. Montenegrin Fund for Joint and Dwelling Construction, construction works, EUR 1,975,563,11, Bast D.O.O
9. Directorate for Transport, road construction, EUR 3,173,052,46, Bemax D.O.O. Podgorica
10. Directorate for Public Works, construction works, EUR 1,116,450,61, ArtIng D.O.O.

¹ Statistics should cover contracts awarded in the period 1 January 2011 – 31 December 2011

² As for 31 December 2011

³ Statistics should refer to contracts awarded (based on contract award notices), if not available, please give the data on contracts advertised (based on contract notices)

⁴ Low value contracts included (shopping as per PPL Art. 19)

⁵ No data available for 2011; definition of 'concessions' differs considerably from that of the EU Directives

⁶ Please indicate whether the data include contracts awarded by the utilities sector

⁷ Above €4,845,000

8	Above €125,000 for public institutions, €387,000 for utilities
9	Above €125,000 for public institutions, €387,000 for utilities
10	Above €4,845,000
11	Above €125.000
12	Both for public contracts and concessions
13	Including contracts above EU thresholds
14	Including single-source procurement
15	Direct agreement, up to EUR 2,000
16	Table covers appeals to the State Commission for the Control of Public Procurement Procedures against decisions by contracting authorities on complaints submitted to them in the first instance
17	Actually, number of appeals processed (cf. above)
18	Out of the 516 appeals processed, 47 were dismissed up front for being frivolous or otherwise without merit and 5 were withdrawn by the complainant.
19	Not applicable; the State Commission's decision is final
20	All appeals had suspensive effect

POLICY MAKING AND CO-ORDINATION

Main Developments Since the Last Assessment (May 2011)

In December 2011, the Government adopted new Rules of Procedure. The rules are well designed and easy to follow and strengthen the current system in a number of important ways. The main innovations include:

- a requirement that the Government Commissions (Committees) establish expert working groups to review and advise on important legislation;
- The delivery to Parliament of the Government Annual Work Programme to allow the Parliament to plan its legislation activities, and the posting of the Programme on the government web-portal;
- a stronger monitoring and reporting role for the General Secretariat of the Government with respect to the Work Programme;
- a requirement that drafters produce a regulatory impact assessment for laws and regulations in line with instructions prepared by the Ministry of Finance; and
- stronger requirements for public consultation and debate.

The Government adopted a new decree on public consultation detailing the obligations of ministries to consult both before and during drafting, as well as on the final text itself. The new decree should, if implemented, increase transparency, improve the quality of information available to ministries during the preparation of laws, and promote more effective implementation of legislation. It is too early to assess the extent to which these innovations or the adoption of the new decree will have any impact.

The Government adopted a new decree on relations with NGOs, which, if fully implemented, will provide civil society with a stronger role in the preparation of policies and legislation and entitling them to participate in working groups established to prepare draft laws and regulations.

For the first time, the Prime Minister presented a report to Parliament on the implementation of the Government Work Programme in late 2011.

The staff of the Unit for Regulatory Impact Assessment (RIA) in the Ministry of Finance was increased to five and is also supported by USAID consultants. A detailed methodology for RIA was prepared and published in November 2011, and training has so far been provided to about 100 staff in ministries, while training for 120 more is in progress. The Unit has started reviewing RIA from ministries and providing feedback on quality and completeness.

On 2 February 2012, the Government adopted a decision to upgrade the European Integration (EI) structure to respond to the needs of negotiations as part of the EI process. The negotiation structure will be composed of six new bodies: Ministerial Collegium for Negotiations on Accession of Montenegro to the European Union (chaired by the Prime Minister); State Delegation; Negotiating

Team; working groups for preparation of negotiations on individual negotiating chapters; Office of the Chief Negotiator; and Secretariat of the Negotiating Team.

Main Characteristics

Montenegro has established a basic policy management system, comprising a legal framework and the bodies necessary to perform the required planning and policy co-ordination tasks. With the new Rules of Procedure, the decree on public consultation, the decree on impact assessment, and the decree on relations with NGOs, there is now a fully adequate legal framework in place.

The extent to which these decrees are adequately implemented remains to be evaluated and it is too early to assess their effectiveness.

The structure for policy management includes the Office of the Prime Minister, the General Secretariat of the Government, the Secretariat for Legislation, the Government Office for Co-operation with NGOs, and the Unit for Regulatory Impact Assessment in the Ministry of Finance. Communication with the public and the media is handled jointly by the Office of the Prime Minister and the General Secretariat of the Government. Taken together, these bodies form the basis for supporting the performance of the entire core Centre of Government (CoG) functions.

The main body responsible for supporting and managing the decision-making system is the General Secretariat of the Government (GSG). Since independence in 2006, the GSG has taken a conscious step-by-step approach to reforming itself and the policy management system, and to bringing them into closer conformity with European practices and SIGMA recommendations.

There is a good system for preparing the Annual Work Programme of the Government. There is a link between the annual work-planning process and strategic priorities. The Annual Work Programme is compiled with both bottom-up and top-down inputs. The Strategic Planning Unit of the GSG takes a proactive role in drafting the Annual Work Programme by guiding ministries as they prepare their input to the Programme, ensuring that they take into consideration the strategic priorities of the Government, and that they do not include items that should be handled by the minister. In 2011, 93% of the items listed in the Annual Programme were achieved. At the same time, about 60% of the items considered by the Government came from the programme, and most of the remaining items were either urgent matters or items of minor significance.

The Office of the Prime Minister consists of nine advisers. Five of these are assigned to cover various areas of policy, while four others manage communications and public relations activities.

The Secretariat for Legislation also plays a co-ordinating role in the policy system. It is the main public administration institution that performs a legal oversight role, which includes ensuring conformity with the Constitution and with other legal acts, as well as legal linguistic coherence. Its effectiveness depends, however, on the capacities for policy drafting in ministries and progress will need to be made to develop these capacities if the country is to meet in full the challenges of European Integration.

The quality of policy development and legal drafting by ministries is variable and in many cases not sufficient. There is a reasonable system for inter-ministerial consultations, and continuing steps to improve policy analysis (impact assessment) and consultations with civil society. The GSG has the authority to return items to ministries that have not been sufficiently well-prepared, and it has assumed a proactive role in briefing the chairs of commissions and the Prime Minister before sessions of the commissions and the Government, respectively. The GSG holds regular weekly meetings to ensure items are distributed to the right commissions and to prepare advice to commission chairs, including advice on the creation of expert groups as required by the new Rules of

Procedure. The requirement to establish expert groups in support of the commissions is a potentially useful innovation that could improve policy co-ordination prior to decision by the commissions and the Government.

Montenegro's efforts for European integration appear to be well co-ordinated. The European Integration Sector in the Ministry of Foreign Affairs and European Integration, along with the new structure put in place to manage and co-ordinate negotiations provide a comprehensive structure that should be adequate to manage the negotiations process.

Reform Capacity

The step-by-step approach to reforming the policy system is suitable to Montenegro as a small country with limited personnel and resources. Over recent years, the GSG has shown a good capacity for undertaking reforms on its own, without external assistance. The leadership of the GSG continues to show commitment to building a full-service Centre of Government, and is supported by the Prime Minister in its ongoing efforts to gradually improve the policy and decision-making system. The GSG leadership is receptive to outside advice and to learning from regional models.

The European Integration Sector in the Ministry of Foreign Affairs and European Integration is a dynamic body that has capacity and interest to respond to the demands of the European integration process as it evolves.

Improving the policy making system is also one of the stated priorities of the Strategy for Public Administration Reform 2016 ("AURUM"). One of the elements of the Strategy is the implementation of measures to improve the quality of regulations and strategic documents, which includes regulatory impact assessment, the design of laws and strategic documents, and co-ordination of public policies.

Recommendations

To Montenegro

- The Government should continue to implement its current reform initiatives, and should seek full implementation by the GSG and the ministries of the revised legal framework which was put in place in 2011-2012.
- A major initiative should be undertaken to improve the capacities of line ministries for legal drafting, policy planning and implementing their respective policies. Ongoing effort for full implementation of the new Impact Assessment regulation and methodology would go a long way toward accomplishing this objective.
- Having significantly revised and upgraded the legal framework for policy making and co-ordination, Montenegro should now review the structure and personnel capacity of the Centre of Government and the ministries to perform fully all of the requirements of the revised legal framework.