



UNRAVELLING MONTENEGRO'S FRONTRUNNER STATUS IN THE EU ACCESSION PROCESS

BENCHMARKING IN MONTENEGRO



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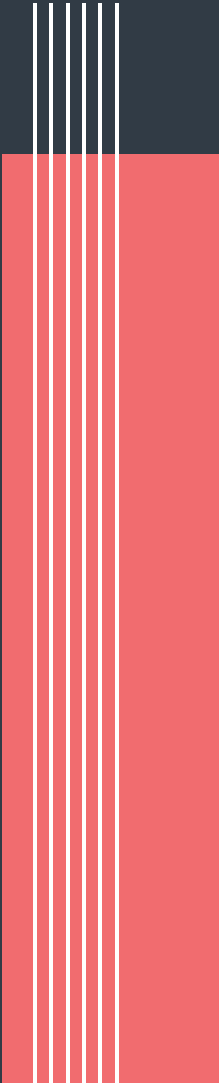
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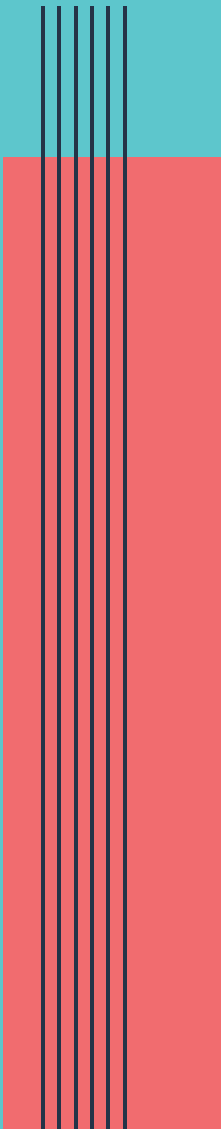
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INTRODUCTION



Montenegro opened accession negotiations with the EU in June 2012, being the first country to undergo the new approach, which frontloads rule of law criteria. The new approach places emphasis on Chapter 23 (Judiciary and Fundamental Rights) and Chapter 24 (Justice, Freedom and Security). The two chapters are opened early in the process, with the aim of allowing the country to adjust to complex reforms, which alongside technical aspects, capacity building and legislative alignment, require a track record of fighting organized crime and high level corruption.

Between June 2012 and January 2018, Montenegro opened 30 chapters and provisionally closed 3 chapters. In addition, following the “State of the Union” address by Commissioner Juncker, the newly announced Enlargement Strategy for the region outlined a clear perspective for the first time, with a potential date for Montenegro’s accession to the EU of 2025.¹

Government officials often use the opening of negotiation chapters as an indicator of success. Nonetheless, the closure of most chapters is still pending. This depends, at least officially, on meeting selected interim benchmarks, which should lead to the closing benchmarks. The aim of this analysis is precisely to assess the selected interim benchmarks within Chapters 23 and 24. By benchmarks we imply concrete requirements which key EU enlargement documents specifically formulate for the Montenegrin authorities, whose conditions for implementation signify further progress along the country’s path to EU accession.

Apart from assessing the content of benchmarks and their adequacy for the domestic context, as well as monitoring their implementation, we have tried to assess the monitoring tools used to judge the implementation of benchmarks and the achievement of the objectives which they define. In our view, this can serve as an indicator of the effectiveness of EU conditionality, and should provide guidance for enhancement of the current benchmarking system and EU conditionality in general.

The selected benchmarks encompass various aspects of Montenegro’s alignment with EU standards: legal and technical as well as the required track record of prosecuting organized crime and corruption, or the emphasis on establishing merit-based recruitment in public administration and the judiciary. The importance of analysing benchmarks is indicated by the lack of qualitative discussion about the content and consistency of EU conditionality. On the other hand, some countries are labelled frontrunners or stragglers in the process, despite a lack of in-depth analysis of the conditions imposed and their actual compliance with them.

The selected benchmarks are taken from official documents which outline the key conditions that Montenegro needs to meet for the two chapters, especially the EU’s common positions on the two chapters and their action plans. This analysis forms part of a wider regional project,² which permits comparison of the benchmarks set for the two countries that are currently undergoing accession negotiations – Montenegro and Serbia. Conditions set for other candidate countries, as outlined in other enlargement documents (country reports; roadmaps; Enlargement strategy), have also been taken into account.

METHODOLOGY

In order to assess the effectiveness of the benchmarking mechanism, this research process was based on sampling, comparison, monitoring of the implementation and assessment of the benchmarks. For the purpose of an in-depth analysis, the research is carried out on a sample of benchmarks from the Chapter 23 and 24.

The selection of the sample of benchmarks was done according to the following steps: interim and opening benchmarks that have been laid out for Serbia and Montenegro in Chapter 23 and 24 were taken as basis and were categorized in a table, depending on the type of action required:

1 European Commission President Jean-Claude Juncker, State of the Union Address, 13 September 2017, available at: https://ec.europa.eu/commission/sites/beta-political/files/roadmap-factsheet-tallinn_en.pdf (Accessed: 15.1.2018.)

2 The project Benchmarking EU Reform – How Effective (BENCHER), is a regional project implemented by the Think for Europe Network (TEN), comprised of Institute Alternative in Podgorica, the European Policy Institute in Skopje, the European Policy Centre in Belgrade, the Group for Legal and Political Studies in Prishtina, the Foreign Policy Initiative in Bosnia and Herzegovina and the Institute for Democracy and Mediation in Tirana. The project’s objectives are to explore the effectiveness of the EU’s benchmarking system for the Western Balkans and contribute to improving the system.

Adoption of a policy document (Pol); Adoption of legislation (Leg); Implementation: Setting up/strengthening a body (B); Training (T) Setting up ICT systems (ICT) Cooperation (Coop) Track-record (Track) Other (O).

Next, the research team selected a sample of 8 benchmarks which will be analysed in depth. In this process the following factors were considered: the relevance and importance of the issue both from a national and regional perspective; common critical junctures and equal distribution of categories and actions as set by the benchmarks; availability of information pertinent to assess the effectiveness of the benchmarks. While Montenegro and Serbia have traced the benchmarks in their Screening reports and Common position papers as countries that have opened negotiations, the other countries have adequately traced the benchmarks in the enlargement documents (EC country reports; roadmaps; Enlargement strategy). Thus, the following benchmarks were selected:

Chapter 23	
•Merit-based career system for the judges	Track record
•Judicial academy reforms	Setting up / strengthening a body
•Merit-based career system for civil servants	Other / track record
•Track record for addressing media intimidation; attacks on journalists; media independence	Track record / strengthening a body
•Implementation of Law on prohibition of discrimination	Leg/Pol
Chapter 24	
•Law on Asylum aligned with EU acquis	Leg
•Specific anticorruption plans; providing adequate follow up of detected cases	Track record/Cooperation
•The role of intelligence services and the oversight mechanisms that are introduced; established initial track record of investigations in organised crime	Other/track record

The **data collection** for all countries was consisted of **desk analysis of and interviews with stakeholders**. First, the **key documents**³ related to the EU accession process were analysed for the identification, sampling and analysis of the evolution benchmarks. In addition, for the assessment of the effectiveness of the benchmarking the study utilises the assessments of own reports of the research team engaged, but also reports of other international bodies that have monitored developments in the policy areas studied. These included Progress/Country Reports and strategic documents on enlargement by the European Commission SIGMA reports, OSCE reports, US Department State Reports, Reports of UN bodies, as well as Council of Europe Monitoring Mechanisms. Where available, the analysis of the state of play also includes a review of available quantitative indicators such as: the Freedom House Nations in Transit scores, Bertelsmann Transformation Index in combination with perception indicators through regional surveys. Second, in all countries **semi-structured interviews** were conducted with representatives of the EU delegation and/or EU Members States as well as representatives of national institutions in charge of EU accession and in the implementation of the selected benchmarks. The focus on the EU staff and the national civil servants is a result of the important role these individuals play in both crafting the benchmarks at the EU level as well as the respective national response(s). In the case of Montenegro, interviews were conducted with representatives of Government and Delegation of European Union in the period between November 2017 and February 2018. In addition, one focus group with civil society representatives was organized. The key interlocutors were four representatives of the Ministry of Interior, one representative of Ministry of Public Administration (Administrative Inspectorate), two representatives of the Delegation of the European Union to Montenegro, one representative of the Training Centre for Judges and Prosecutors and a representative of the Commission for monitoring of the state authorities in investigations of the old and recent cases of intimidation and violence against journalists, murders of journalists and attacks on the media property.

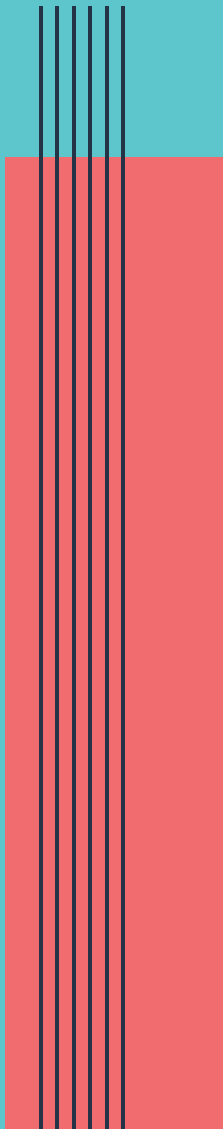
³ EU common positions on chapter 23 and 24 (for countries in accession negotiations); EC Country reports – staff working papers (analysing the areas in which the sample of EU benchmarks are mentioned); Enlargement Strategy – Communication of the Commission (analysing the areas in which the sample of EU benchmarks are mentioned); EU negotiating frameworks; EU screening reports; Roadmaps, conclusions of "high level dialogues" and other instruments setting conditions for further progress in the accession process; Documents through which the countries involved respond to the set benchmarks (National Plans); Action plans submitted by relevant authorities to the European Commission, Stabilisation and Association Council minutes, Subcommittees on Justice and Home affairs committees.

The analysis of the benchmarks was done through the insertion of the collected data and findings in a pre-determined template⁴ which consisted of several steps. First, it traced the introduction and evolution of the benchmark at least in the last five years, or since the last critical juncture in the EU documents. Second, the researchers assessed current state of play through document review, including through available quantitative indicators findings in the specific policy area. Last, conclusions were drawn on the effectiveness of the benchmarking in the specific policy area thus far. The information from the templates was further used to develop the country analyses by each of the partners.

⁴ Annex 2



BENCHMARKS WITHIN CHAPTER 23



Reform of Judicial Training Centre

Benchmark 1: “Montenegro establishes an initial track record of recruiting judges and prosecutors on the basis of a single, nationwide, transparent and merit-based system and ensures that candidate judges and prosecutors undergo obligatory initial training in the Judicial Training Centre prior to their nomination.” (Common Position of the EU on Chapter 23)

This benchmark is of utmost importance for the functioning of the judiciary and one of the most challenging benchmarks within Chapter 23. It affects a sensitive part of the political system that is still under political control, so its meaningful implementation is still awaited. Despite a completely new legal framework, prepared with extensive assistance from EU experts (and the Venice Commission⁵), and the capacity building of institutions like the Judicial Training Centre and the Judicial and Prosecutorial Council, merit-based recruitment and promotion is not yet guaranteed in practice.

However, a new nationwide system for the recruitment of judges and prosecutors formally applies as of 2016. Montenegro is now organizing single nationwide competitions for judges and prosecutors.

Unlike the previous law, which allowed any candidate from the list⁶ to be selected, the new law requires the Judicial Council to select according to a ranking based on the results of written tests and interviews. Although this is a very important improvement, discretion is still possible, as an interview provides 20 of a total of 100 points, allowing the Judicial/Prosecutorial Council a decisive role in the selection of candidates.

Although new legislation was adopted in 2015, its implementation was postponed until the end of 2016 (*vacatio legis*), meaning that the Judicial Council had an extra year to select judges without using a merit-based system. In fact they did so, with at least 68 judges being selected during this period.⁷ In the most striking example, not one of the 13 judges selected for the Basic Court in Podgorica received the highest score in the testing procedure.⁸

Bearing in mind that Montenegro currently has approximately twice as many judges per capita as other jurisdictions in Europe,⁹ it will take many years for new legislation to have an impact on the judiciary, as recruitment of a large number of new judges is not expected.

Reforms in the field also include performance evaluation of judges and prosecutors, although Supreme Court judges and Supreme State prosecutors are exempt from the new system. Bearing in mind the functions they perform and the very important powers they have, the prominent NGO Human Rights Action recommended that these judges and prosecutors should also be subject to regular control, and that evaluation of their performance should not end on the day of their election.¹⁰

Initial training for three judges and four prosecutors recruited under the new system has been ongoing since March 2017. In spring last year, the Prosecutorial Council published eight vacancies for state prosecutors at the Basic State Prosecutor's offices, the first time this was done at the national level without referring to specific prosecution offices.

The lack of publicly available data on all vacancies (public and internal) in courts and prosecution offices is especially worrying. As a result, the number of candidates who applied, the ranking lists, the decisions and the rationale remain unknown, especially in cases when all candidates had a similar number of points.

⁵ Venice Commission Reports (Opinion on Montenegrin judiciary legislation) available at: http://www.venice.coe.int/WebForms/documents/by_opinion.aspx

⁶ The list included all who applied for the position.

⁷ HRA Report on realization of the judicial reform strategy for 2014–2018 in 2014–2016, available at: <http://www.hracion.org/2017/04/15/izvjestaj-o-primjeni-strategije-reforme-pravosuda-2014-2018-u-periodu-2014-2016/>

⁸ Ibid.

⁹ World Bank 2017, Analysis of human resources management in the Montenegrin judiciary, available at: <http://documents.worldbank.org/curated/en/421381511259808906/Analysis-of-human-resources-management-in-the-Montenegrin-judiciary>

¹⁰ Human Rights Action, Proposals for Amendments to the Draft Law on the Judicial Council, 20 January 2015. Available at: <http://www.hracion.org/wp-content/uploads/Predlog-amandmana-na-Predlog-zakona-o-Sudskom-savjetu.pdf>.

As regards the evaluation of judges, following completion of the pilot phase of the implementation of the new system of regular professional assessment in the Nikšić Basic Court and the Cetinje Basic Prosecution Office in autumn 2016, both councils reviewed the assessment criteria. After conducting a pilot assessment, the Prosecutorial Council reviewed the results and proposed amendments to the rules for the evaluation of prosecutors, which were made in October 2016.

In July 2017, the Prosecutorial Council started to implement regular professional assessment of prosecutors appointed in 2015.

During 2017, the Judicial Council only assessed judges for the purpose of promotion. It also appointed a working group to review and prepare proposals for amendments to the Law on the Judicial Council. However, the Ministry of Justice's official position is that there is no need to change the laws, despite the disapproval of judges and prosecutors. Judges and prosecutors have a certain level of dissatisfaction about the way new laws are applied. First, they emphasize that the complexity of cases is not sufficiently taken into account, but only statistics, the quantity of work, academic titles, participation in working groups, teaching seminars or other optional training.

Some judges think that new system of recruitment is "too rigid and strict, which results in nerds being favoured over competent professionals".

Although the judiciary is evidently resistant to reduced discretion in recruitment and promotion, in December 2017 the Judicial Council decided to implement an evaluation procedure for 47 judges from the basic courts, starting in March 2018. The Prosecutorial Council evaluated 9 more prosecutors in December, which can be seen as a breakthrough against resistance to the implementation of new legislation.

Still, in the opinion of the stakeholders interviewed, cases of the appointment of judges show that the appointment of judges will remain primarily discretionary with regards to references and achieved results, which leaves room for the continuous politicization of the judiciary.

On the other hand, justifications for the grades of state prosecutors in the pilot prosecutor's office (Basic State Prosecution (BSP) Cetinje¹¹) are not publicly available, meaning that external assessment of the quality of performance appraisal is not possible. Even though Institute Alternative (IA) asked for anonymized scores in order to better understand the quality of the professional appraisal process, the opinion of the Prosecutorial Council is that the president and the prosecutors would not have been protected by anonymization.¹² According to the council, the "state prosecutors' interest of privacy" dominates, and their scores constitute personal data, so access to the information was denied. Justifications for the grades of employees in other state bodies in Montenegro are accessible via freedom of information. IA filed a complaint with the Agency for Data Protection and Freedom of Information on September 2nd 2016. However, a year and a half later, the agency has still not made a decision.

It was announced that frameworks for measuring performance would be strengthened after the pilot projects. Evaluations should be linked to promotion and career progression, with incentives built in to encourage judges and prosecutors to develop their skills through continuous training. Specific criteria needed to evaluate president judges and public prosecutors that recognize their significant case flow and management responsibilities for both judicial and non-judicial activities. However, it is not clear whether the Ministry of Justice will support further reforms in this regard, given that their understanding is that "although they might have some flaws, the laws are good enough for the European Commission".

¹¹ In accordance with a 26th February 2016 decision of the Judiciary Council, pilot scoring is conducted at the Basic Court in Nikšić.

¹² Response of the Prosecutorial Council to IA's Fol request: https://dl.dropboxusercontent.com/u/49359529/SPI_Tužilački_savjet_odgovor.pdf

Merit-based Judiciary

Benchmark 2: Montenegro establishes an initial track record of recruiting judges and prosecutors on the basis of a single, nationwide, transparent and merit-based system and **ensures that candidate judges and prosecutors undergo obligatory initial training in the Judicial Training Centre prior to their nomination.** (Common Position of the EU on Chapter 23)

Montenegro has gone a good way towards meeting this benchmark. However, what is lacking is proper quality control of the training provided by the centre and assessment of the impact of their programmes on the functioning of the judiciary. The centre provides training but lacks any substantial role in the testing process for prospective judges and prosecutors.

In Montenegro, training of judicial authorities is carried out within the Centre for Training in the Judiciary and State Prosecution, which has been active as an independent organization with the status of a legal entity since the adoption of the new Law on the Centre for Training in the Judiciary and State Prosecution Service in October 2015.

Institutional changes were made based on a 2013 needs assessment, but analysis and expert opinions are not publicly available. The government report on Chapter 23 from July 2015 states that an expert appointed by the European Commission prepared an opinion on the draft law, but it provides no more detail. Reform of the centre was not an issue of broader policy debates, and decision-makers generally accepted the EU's recommendations readily.

The centre was originally established in June 2000 as the Centre for the Training of Judges of the Republic of Montenegro. It was an organizational unit within the Supreme Court, in compliance with the Government of the Republic of Montenegro's 1998 Plan for the Judiciary Reform Project.

There are four particularly important aspects of this benchmark: a) the introduction of obligatory initial training for candidates for judges and prosecutors; b) organizational independence for the Centre; c) the allocation to the Centre of 2% of the budget allocated to the Judiciary and Prosecution; and d) the recruitment of staff.

Initial training of candidates for judges and prosecutors is prescribed by the 2015 law and has been regularly implemented since then. **The centre does not have any role in selecting candidates nor does it evaluate them after the 18-month programme.** A candidate for judge/prosecutor who is rated as satisfactory in initial training by the Judicial Council/Prosecutorial Council is selected as a judge/prosecutor for the basic court/prosecution office.

The budget allocated to the centre was 225,601 in 2016, 447,594 in 2017 and 624,204 in 2018. However, this is less than 2% of the total budget allocated to the Courts and Prosecution, which is the legal obligation. For 2018 this would have been 754,546. Representatives of the centre claim that the centre is overfunded due to the great support provided by international donors.

Of 19 planned positions, 11 have been filled, while procedures for filling 4 more positions are under way.

In addition to "initial" training, the law also stipulates that every judge and prosecutor has the right and obligation to participate in a programme of "continuous" training at least two working days a year. Thus, the Centre also provides continuous training in accordance with annual programmes prepared in cooperation with judges and prosecutors.

Merit-based career system for civil servants

Benchmark 3: Within the public administration, Montenegro recruits, promotes and nominates public officials on the basis of clear and transparent criteria, focusing on merit and proven skills. Montenegro reinforces the capacity of the Administrative Inspectorate, implements a risks analysis methodology, adopts integrity plans and appoints trained integrity managers in the public administration. Montenegro provides an initial track record of effective sanctions in cases of breach of ethical values. (Common Position of the EU on Chapter 23)

There has been a positive development in the evolution of benchmarks, particularly with the introduction of the European principles of public administration and the accompanying indicators and monitoring methodology (the principles were introduced in 2014 and amended in 2017).¹³ A shift has been also made to an emphasis on consistent implementation of legislation rather than the mere adoption of laws.

However, it is observed that **the progress that has been achieved is solely technical. Merit-based recruitment, a cornerstone of public administration reform, is still not guaranteed**, as reflected in the monitoring reports prepared by SIGMA – a joint initiative of the European Commission and the OECD – on implementation of European principles of public administration in Montenegro.¹⁴ What is more, the 2017 monitoring report stressed that although the 2016-2020 Public Administration Reform Strategy sets new objectives in the area of human resource management, “none of these changes address the issues highlighted in the SIGMA 2015 Baseline Measurement report for Montenegro”.¹⁵

The Administrative Inspectorate still lacks sufficient capacities. As of December 2017, there were 9 inspectors out of the 15 envisaged. The position of chief administrative inspector has been vacant for almost a year as of January 2018, while in early 2017 there were only four administrative inspectors employed. Also, although the Action Plan for Chapter 23 envisages reporting on irregularities detected during inspection oversight, the reports were overly quantitative. On the other hand, qualitative insight into the inspection oversight performed in the course of 2016 reveals the uneven coverage of state and local administration bodies and the potential politicization of the work of the inspectorate.¹⁶

Although a milestone in the field was reached with the adoption of a new Law on Civil Servants and State Employees in 2011, its implementation fell short of expectations. In a 2015 statement on implementation of the Law, the government stated that there were problems in the implementation of certain legal solutions, which were negatively affecting the achievement of key objectives in the field.¹⁷

Reports from Institute Alternative demonstrate that the discretionary right of ministers and heads of other administration authorities to choose to recruit any of the top five ranked candidates is not conducive to the establishment of a system of merit-based recruitment.¹⁸ On the other hand, the government’s 2015 report also highlighted as particularly worrying the large proportion of decisions to terminate employment annulled by the Appeals Commission and Administrative Court.

The European Commission’s 2016 country report explicitly states that “even though the law establishes merit-based recruitment and promotion as a principle, loopholes in the organization of the selection process allow for arbitrary selection at all levels”. The senior civil service is particularly exposed to political influence, since the entry criteria are neither strict nor stringent, requiring only higher education (a level VIII qualification in the

¹³ See more at: <http://www.sigmaxweb.org/publications/public-governance-monitoring-reports.htm>

¹⁴ The 2015 and 2017 monitoring reports assign the same values to crucial indicators of the establishment of a merit-based state administration. Both the 2015 and 2017 baseline reports rated the extent to which the recruitment of public servants is based on the merit principle in all its phases at 4 on a scale 0-5; the extent to which the termination of employment of public servants is based on merit was rated at 3 throughout the reporting period; while the extent to which political influence on the recruitment and dismissal of senior managers in public service is prevented slightly improved from 2 in 2015 to 3 in 2017.

¹⁵ Monitoring report: The Principles of Public Administration in Montenegro, November 2017, available at: <http://www.sigmaxweb.org/publications/public-governance-monitoring-reports.htm>

¹⁶ For example, the opposition-led municipality of Kolašin was the most frequent subject of inspection oversight in 2015. See more in: Milena Milošević, Public Administration Reform: How far is 2020?, Institute Alternative, June 2015, available at: http://media.institut-alternativa.org/2017/10/Reforma-javne-uprave_engl_web.pdf

¹⁷ Informacija o primjeni Zakona o državnim službenicima i namještenicima, Ministarstvo unutrašnjih poslova, Vlada Crne Gore, Podgorica, jun 2015. godine (Statement on the Implementation of the Law on Civil Servants and State Employees, Ministry of Interior, Government of Montenegro, Podgorica, June 2015, available only in Montenegrin)

¹⁸ Milena Milošević, Monitoring Report: Recruitment and Promotion In State Authorities In 2014, Institute Alternative, May 2015, available at: <http://institut-alternativa.org/monitoring-izvjestaj-zaposljavanje-i-napredovanje-u-drzavnim-organim-u-2014-godini/?lang=en>

national qualification system) and three years' work experience in management positions or "other appropriate jobs requiring autonomy of work".

In December 2017, Parliament adopted a new Law on Civil Servants and State Employees and a new Law on Local Self-Government, aimed at ensuring more merit-based human resource management in public administration. Nonetheless, both laws suffer from several shortcomings. According to the new Law on Civil Servants and State Employees, heads of organizational units should have the decisive role in selecting and assessing prospective candidates for jobs at ministries. This change will formally limit inappropriate political influence over this aspect of human resource management. However, the heads of organizational units have a discretionary right to choose among the three top-ranked candidates, which significantly limits the contribution this change to the law can make to excluding political influence from formal decisions on selection. The Law on Local Self-Government largely retains the principle that the rights and duties of civil servants at the central level are applied analogously at the local level, which has proved troublesome in the past.¹⁹

There is an asymmetry in putting more emphasis on civil service reform at the central level while the local level remains neglected by the EU. The European Principles of Public Administration and their accompanying monitoring reports encompass only the central level. The authorities have used this lack of attention on the local level to delay the reform. Although employment in local administration has been recognized as an area that is particularly prone to corruption, as addressed by the annex to Action Plan 23,²⁰ municipalities are failing to meet their obligation to proactively publish the number of newly employed people.

In January 2018, the government signed an agreement with the EU on budget support, the allocation of which is linked to progress in public administration reform.²¹ The agreement envisages improved human resource management as a specific objective, with a potential allocation of a total of 15 million euros, depending on progress with the reform. All tranches of the support will depend on meeting general and specific indicators in the field: the institutional framework for human resource management; a decrease in the number of public sector employees; workforce planning; civil service trainings; access to information; and effective exchange of data among administration authorities. The support also covers local administration, although it assigns the key oversight role to the UNDP office in Montenegro. Implementation of direct budget support in the field is conditional on meeting specific indicators and benchmarks, which are further operationalized in the Action Plan and the passport indicators for the PAR Strategy.²² While this provides an opportunity to advance the achievement of benchmarks, implementation of the agreement is still in the inception phase, and it does not specifically encompass merit-based recruitment as such.

The new laws in the field were adopted in late 2017, and were supposed to be accompanied by secondary legislation. However, at the time the laws were adopted, the secondary legislation was not available, meaning that the final shape of the expected reform is not clear.

19 In its most recent report, Institute Alternative pointed out numerous flaws in recruitment at the local level, which are reflected inter alia in failure to conduct the mandatory ability tests for 'local service' applicants. The mentioned flaws are largely the result of legal voids in this field and an inability to apply the rules from the central level. See more: Milena Milošević, Public Administration Reform: How far is 2020?, Institute Alternative, June 2015, available at: http://media.institut-alternativa.org/2017/10/Reforma-javne-uprave_engl_web.pdf

20 Operativni dokument za sprječavanje korupcije u oblastima od posebnog rizika – Aneks Akcionog plana za poglavlje 23 – Pravosuđe i temeljna prava, Vlada Crne Gore, mart 2016. godine (Operational document for the prevention of corruption in areas of special risk – Annex to the Action Plan for Chapter 23 – Judiciary and Fundamental Rights, Government of Montenegro, March 2016).

21 Informacija o Predlogu finansijskog sporazuma između Vlade Crne Gore i Evropske komisije o Godišnjem akcijskom programu za Crnu Goru za 2017. godinu - dio 2 s Predlogom finansijskog sporazuma, available at: http://www.gov.me/sjednice_vlade_2016/57 (accessed 31.1.2018.) (Report on the draft Financial agreement between the Government of Montenegro and the European Commission – available only in Montenegrin)

22 Public Administration Reform Strategy 2016-2020, Government of Montenegro, July 2016, available at: <http://www.mju.gov.me/en/library/strategije>

Addressing media intimidation and media independence

Benchmark 4: Montenegro ensures that freedom of expression and the media in the country is improved and applies a zero-tolerance policy as regards threats and attacks against journalists, prioritizing criminal investigations should such cases occur. Montenegro establishes a Commission to monitor the actions of competent authorities in the investigation of old and recent cases of threats and violence against journalists, including a murder case. Montenegro provides an initial track record of progress, effective prosecution and deterrent sanctions for perpetrators in these cases (Common position of the EU on Chapter 23)

Between 2013 and 2017, Montenegro made only cosmetic moves towards achieving the benchmark. It established the Commission for Monitoring Competent Authorities in Investigating Cases of Intimidation and Violence Against Journalists (further on the Commission) in 2014. Nonetheless, this body faced obstructions in performing its work in monitoring investigations of media attacks.

Between 2014 and 2017,²³ the commission encountered many challenges. The police and the Agency for Personal Data Protection and Free Access to Information blocked access to the personal data of people covered by investigations, and the police did not provide timely clearance for classified information about police officers who were being investigated. During its first term, the composition of the commission did not help it to work effectively, as it was disproportionately comprised of representatives of state institutions. Additionally, issues of conflict of interest arose, as some members of the commission who were investigating attacks on journalists had come from the police or the prosecutor's office, bodies which were the subject of scrutiny from the commission.²⁴

The government did not publish the commission's reports until 11 NGOs urged it to do so.²⁵ None of the Commission's proposals for amendments to the Action Plan for Chapter 23 were taken into consideration, while its recommendations on the effectiveness of investigations were not followed up.²⁶ The commission's actual monitoring of investigations started during its second term in 2016, when the majority of its membership were representatives of CSOs and the media and once it had fulfilled its legal obligations to adopt a rulebook on its work and form four committees to deal with major cases.

While new attacks have emerged, old cases have not yet been fully resolved, including the murder of a chief editor in 2004 and the attempted murder of a journalist in 2007.²⁷ In 2017, for the first time in 10 years, the Constitutional Court highlighted such ineffective investigations and underlined the need for state authorities, to work harder on resolving attacks.²⁸ **Nevertheless, no one has yet been held accountable for ineffective investigations, and no progress has been made by the police and prosecution in resolving the attacks.** In 2016, Parliament formed a committee to supervise investigations of the attacks on journalists. The committee has held three sessions and one control hearing of the Chief Prosecutor and Chief Special Prosecutor in the case of the unsolved murder of the chief editor of daily newspaper *Dan*. Its last session was held in September 2016, ending Parliament's attempt to strengthen the institutional capacities to resolving attacks on journalists.

Montenegro's ranking on a worldwide scale indicates the worrisome media freedom situation. In 2015, the World Press Freedom Index ranked Montenegro as low as 114th out 180 countries worldwide. This has improved somewhat in the last two years, with Montenegro moving up to 106th place. Nevertheless, it remains one of the weakest countries in the region, with only Macedonia behind it, in 111th place.²⁹ For three years in a

23 In 2016, the Commission was formed again for a two-year term by the Government of Electoral Trust and with a majority of NGO and media representatives.

24 Some representatives of the police and prosecution have investigated some of the most famous cases of attacks, such as the murder of the chief editor of daily newspaper *Dan*.

25 Appeal by 11 NGOs: The government to monitor the investigation of attacks against journalists by providing access to information and publishing reports on the work of the Commission, available at: <http://institut-alternativa.org/apel-11-nvo-vlada-da-komisiji-za-pracenje-istraga-napada-na-novinare-obezbijedipristup-informacijama-i-da-objavi-izvjestaje-o-radu-komisije/>

26 Interview between IA researcher and the President of the Commission, December 2017.

27 There is still no final outcome of the case of the 2004 murder of Duško Jovanović, chief editor of daily newspaper *Dan*. One perpetrator has been given a prison sentence, while the other perpetrators remain unknown. There has also been little progress in resolving the 2007 attempted murder of Tufik Softić, a journalist for the daily newspaper *Vijesti*. After 10 years, the perpetrators of these acts have still not been found. The constitutional court passed a verdict of violation of the right to life and compensation of 7000 euros for Mr Softić.

28 Decision of the Constitutional Court on the adoption of the constitutional complaint ("Official Gazette of Montenegro", No. 088/17 from 26th December 2017)

29 The World Free Press Index ranks Serbia 66th, Albania 76th, Bosnia & Herzegovina 65th, Croatia 74th and Kosovo 82nd. Reporters without borders, available at: <https://rsf.org/en/ranking>

row, Freedom House reports have shown no progress in media independence, with Montenegro scoring 4.50 in 2015, 2016 and 2017 (1 is the best score, 7 the worst).³⁰

Furthermore, in 2017 the government, in close cooperation with Parliament, took more action to seize control of the public broadcaster and media regulators. Parliament dismissed two members of the board of public broadcaster RTCG and one member of the board of the Agency for Electronic Media. These moves followed decisions by the Agency for Prevention of Corruption, which determined that the three public officials had violated the Law on Prevention of Corruption. The Administrative Court later annulled the agency's decision that one member of the public broadcaster's board had been in a conflict of interest by directing a movie which was never broadcast on RTCG. Nonetheless, Parliament did not wait for the court's decision. Its moves have been widely criticized by CSOs, who argue that the ruling party wants to regain control of the public broadcaster. Long-term political control of the national public broadcaster had been endangered by the board's decision to dismiss the former head of RTCG.³¹

Over the years, the EU has repeated statements on the importance of ensuring media freedom in the country. In its most recent non-papers on the state of play in Chapters 23 and 24, it has particularly stressed the need to implement this benchmark more effectively and finally resolve the oldest cases of attacks on journalists. The European Commission has clearly stated the need to identify the indirect perpetrators, i.e. the co-accomplices of the attacks, as well as pointing out "shortcomings and delays in investigations that have not yielded results."³² Nevertheless, the government continues to disregard these recommendations and demonstrate a lack of political will to improve the state of affairs.

Antidiscrimination policies

Benchmark 5: Montenegro should undertake the necessary steps in accordance with its action plan in order to stop discrimination and systematically resolve discrimination in judicial and administrative proceedings (Common position of the EU on Chapter 23)

Under this benchmark, the Action Plan for Chapter 23 obliges the government to adopt amendments to the Law on the Prohibition of Discrimination and the Law on the Ombudsman for Human Rights and Freedoms in order to achieve compliance with EU and Council of Europe standards. The impact indicators associated with this benchmark also envisage regular reporting on the implementation of anti-discrimination policies and the number of discrimination cases registered with regular and misdemeanour courts, the state prosecution, the police and inspectorates.

The Law on Prohibition of Discrimination was amended in 2017, when, according to the government, it achieved compliance with EU standards.³³ The key changes included a more precise definition of direct and indirect discrimination and discrimination based on race, as well as streamlining the role of the Ombudsman in protecting against discrimination and prescribing additional sanctions to deter discriminatory behaviour.³⁴ The Law on the Ombudsman for Human Rights and Freedoms was also amended in 2014, with the aim of improving the position of the Ombudsman with respect to the eligibility criteria for certain positions, competences in the field and operational and financial independence.³⁵

Despite these legislative amendments, the track record in the field, also required for the benchmark, is more troublesome. Firstly, **data on discrimination cases, registered with official institutions are scarce and non-systematized.** The Ombudsman's most recent report on the situation in the field clearly states that courts, state

³⁰ Montenegro – Freedom in the World 2017, Freedom House, available at: <https://freedomhouse.org/report/freedom-world/2017/montenegro>

³¹ "Last Assault of DPS on the Independence of RTCG", <http://institut-alternativa.org/posljednja-ofanziva-dps-na-nezavisnost-rtcg/?lang=en>

³² European Commission, Non-paper on the state of play in Chapters 23 and 24 for Montenegro, November 2017 <http://www.mep.gov.me/vijesti/179297/MEP-je-objavilo-radni-dokument-EK-za-poglavlja-23-i-24.html>

³³ See more at: <http://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/181/1458-9287-23-3-17-3-3.pdf>

³⁴ Izvještaj o razmatranju Predloga Zakona o izmjenama i dopunama Zakona o zabrani diskriminacije, Odbor za ljudska prava i slobode, Skupština Crne Gore, 28. jun 2017. godine (Report on the discussion on the Draft Law on Changes and Amendments to the Law on the Prohibition of Discrimination, Committee for Human rights and Freedoms, Parliament of Montenegro, June 28, 2017 – Available only in Montenegrin)

³⁵ Zakon o izmjenama i dopunama Zakona o zaštitniku/ci ljudskih prava i sloboda ["Službeni list Crne Gore", br. 032/14 od 30.07.2014] [Law on changes and amendments to the Law on the Ombudsman for Human Rights and Freedoms, Official Gazette of Montenegro, No. 032/14 – available only in Montenegrin]

prosecutor's offices, misdemeanour courts, the police and inspectorates do not systematically collect data on the discrimination cases handled by these institutions, although they are obliged to do so by the Law on Anti-Discrimination.³⁶

The lack of systematic data on discrimination cases impedes quantitative overview of the situation in the field. It also reveals an inability to trace the impact indicators for the benchmark. Nonetheless, the Ombudsman's reports argue that it is clear that "discrimination as a phenomenon is reflected at almost all stages of social processes in Montenegro".³⁷

A 2015 public opinion survey on discrimination commissioned by the Ministry of Human and Minority Rights shows that **more than half of citizens (54.4%) consider that discrimination is highly or moderately present.** A third of citizens (31.9%) think that discrimination is present to a small extent or is not present at all.³⁸

A 2017 survey conducted by the NGO CEDEM reveals that employment is the specific area in which the most citizens (51%) perceive discrimination to take place. Regarding the basis of discrimination, they perceive discrimination based on political affiliation to be the most widespread.³⁹

These perceptions concur with the discrimination cases handled by the Ombudsman in 2016. In that year, the Ombudsman handled 151 discrimination cases, an increase of almost 82% in comparison with the previous year. The institution determined that there was no discrimination in only 23% of reported cases. The largest number of cases concerned discrimination based on maternity (19), on political affiliation (14) and on labour status (13).⁴⁰

In its 2016 report, **the European Commission noted weak implementation of the anti-discrimination framework and recommended more effective implementation.** It particularly stressed that the Roma minority remains the most vulnerable and most discriminated-against community in various areas of life.

Capacity-building for leading anti-discrimination institutions is another requirement. In May 2017, in a paper on Chapter 23, the European Commission reported on the **strengthened capacities** of the Ministry of Human and Minority Rights and the Ombudsman's office. The Ministry has 23 officials and intends to increase this number by four in the upcoming period. The Ombudsman increased the number of employees in the area of discrimination by two in 2015 and by another one in 2016.⁴¹ Nevertheless, the May 2017 peer review report highlighted concerns over the lack of staff and pointed out that despite the new recruits, the number of people expected to be in place by the end of 2016 had not been achieved. In one expert's opinion, this has inevitable consequences for the overall capacity of the Ministry to "implement activities of increasing quality".⁴²

36 Crna Gora - Zaštitnik ljudskih prava i sloboda Informacija o zaštiti od diskriminacije sa stanovišta djelovanja institucije zaštitnika ljudskih prava i sloboda crne gore za period 01.01 - 30.06.2017. godine, Podgorica, novembar 2017. godine (Report on protection from discrimination prepared by the Ombudsman for the period January - July 2017, available only in Montenegrin)

37 Crna Gora - Zaštitnik ljudskih prava i sloboda, Izvještaj o radu za 2016. godinu, Podgorica, mart 2017. godine

38 Public opinion survey, Citizens' attitudes to discrimination, 2015 <http://www.mmp.gov.me/biblioteka/istrazivanja>

39 Public opinion survey on discrimination, conducted by CEDEM in March 2017 <http://www.cedem.me/programi/istrazivanja/ostala-istrazivanja/summary/31-ostala-istrazivanja/1872-obraci-diskriminacije-analiticki-izvjestaj>

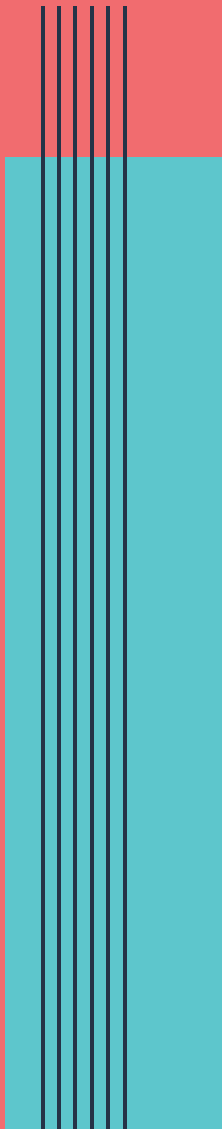
40 Crna Gora - Zaštitnik ljudskih prava i sloboda, Izvještaj o radu za 2016. godinu, Podgorica, mart 2017. godine

41 Annual work reports of the Ombudsman for 2015 and 2016, see more at: http://www.ombudsman.co.me/Izvjestaji_Zastitnika.html

42 Šelih Ivan, Dolčić Tone, Peer Assessment Report (Second Follow-up, 21-25 November 2016), January 2017; Roagna, Ivana, Peer review mission on the capacity of the Ministry of Human Rights, 3-7 April 2017, May 2017



BENCHMARKS WITHIN CHAPTER 24



Alignment of the Asylum Legislation

Benchmark 6: Montenegro is conducting an impact analysis with the EU's expert assistance, based on which it adopts the new Asylum Law in accordance with the *acquis* and prepares an analysis of all requirements to be met upon accession to the European Fingerprint Identification System (Eurodac) and the Dublin Regulation. (Common Position of the EU on Chapter 24)

Progress in legal alignment in the field has been observed, as reflected in assessments in the European Commission's reports on Montenegro.⁴³ The Law on International and Temporary Protection of Foreigners, introducing the Common European Asylum System, was adopted in late 2016 with implementation beginning in January 2018.

The interviewed stakeholders assess the new law as liberal. Among other things, it decriminalizes illegal border crossing and envisages the coming into force of the European Fingerprint Identification System (Eurodac). However, there have been setbacks in legal alignment. The 2014-2018 Strategy on Integrated Border Management (IBM) envisaged the adoption of a new Law on Asylum in 2015 with accompanying secondary legislation. These deadlines have been significantly postponed: the Law on International and Temporary Protection of Foreigners was adopted in late 2016. Although the accompanying secondary legislation should have been adopted in the first six months of 2017, its adoption did not meet the deadlines prescribed by the law. The key rulebooks (e.g. on application for asylum status, fingerprints and photography of asylum seekers) were adopted only in October and November 2017, two months before implementation of the law began.

The negative effect of these delays is two-fold. As with the systemic laws in the realm of public administration reform, both the EU and domestic non-governmental actors are deprived of timely insight into the key accompanying secondary legislation that further specifies implementation of the law. On the other hand, due to the complexity of the legal procedures, delays in adopting the secondary legislation can have a negative impact on the start of implementation and on the preparedness and capacities of key institutions. Benchmarks for adopted laws and secondary legislation are included under the improved border control indicator as prerequisites for IBM budget support. Still, the method of calculation for meeting the benchmark is to count laws and secondary legislation prepared and adopted, with no further criteria, which would imply the need for a qualitative review of the adopted secondary legislation.

Monitoring the implementation of asylum standards on the ground is especially challenging. For example, the 2013 peer review report on asylum noted that misdemeanour proceedings for illegal border crossing were launched against 517 foreign nationals in 2012. Since Montenegro was facing mixed migration flows at the time, it is not clear if these were actually asylum seekers, which would be in contradiction of the provisions of the 1951 Geneva Convention on refugee status.⁴⁴ The 2016 country report also stated that Eurostat was receiving migration flow data without metadata and had not yet received data from the Montenegrin authorities on asylum and the acquisition and loss of nationality.⁴⁵ Although the law stipulated that the UNHCR (UN Refugee Agency) could have access to data on asylum seekers and details of procedures, the 2013 peer review report revealed that the UNHCR was unable to monitor all cases. This shows the need for broader monitoring of the law's implementation.

⁴³ For example, the 2013 progress report noted that legal alignment in the field was at an early stage. While the 2016 report recognized certain efforts in the field, it also noted the need for further alignment.

⁴⁴ Cédric DARTOIS, Peer review mission on asylum and migration issues in the Republic of Montenegro (Podgorica) 22/04/2013 to 25/04/2013.

⁴⁵ European Commission, 2016 Montenegro Report, Brussels, 9.11.2016, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_montenegro.pdf

Anti-corruption Plan on the Borders

Benchmark 7: Montenegro addresses the twin-threats of corruption and organized crime at its borders through the implementation of a specific anti-corruption plan at the borders and provides an initial track record of an adequate follow-up of cases detected. (Common position of the EU on Chapter 24)

This benchmark is itself imprecise, since although it places emphasis on implementation of a specific anti-corruption plan at the borders and on an initial track record of proper monitoring of cases detected, it defines neither “proper monitoring” nor “proper implementation” more closely. Its substance can be better understood only indirectly, through an impact indicator for this benchmark which was incorporated in the Action Plan for Chapter 24.⁴⁶

The impact indicators associated with this benchmark are the following: the number of cases detected, awareness raising for employees of the police, the customs service and inspectorates, prevention of abuses of power, decreased corruption at borders and more efficient handling of citizens’ complaints. Nonetheless, **neither baseline nor target values are defined in the Action Plan**, which leaves room for manoeuvre in reporting on success in achieving the benchmark. Reports on implementation of the Action Plan for Chapter 24 regarding this measure differ from year to year: earlier reports focus on adoption of the plan and a general overview of implementation of its measures, while the 2016 and 2017 reports provide more detail, but in a descriptive manner.⁴⁷ Absolute numbers on training and controls carried out are not placed in an analytical framework which could assess the relationships between numbers across the different time periods, between baseline and target values, and especially between performed controls and actual achievements in corruption prevention. As such, they do not provide a complete insight into implementation of the benchmark.

This benchmark is further defined by the Sector Budget Support for Implementation of the IBM Strategy, which provides a distribution of variable tranches of budget support, conditional, inter alia, on “improved prevention and detection of cross-border crime and corruption at the border, as well as irregular migration, human smuggling and trafficking”.⁴⁸ The budget support agreed in late 2016 consists of a total of 20 million euros, distributed in the following manner: a fixed amount of 8 million euros prior to the implementation of support starting and other two variable tranches of 8 and 4 million euros upon meeting specific indicators.⁴⁹

The budget support puts emphasis on increasing the amount of training performed by certified trainers (by 10% until 2017, and an additional 15% in the period 2017-2020) and increasing the number of random internal inspections of the working procedures of key institutions – the police, customs, inspectorates (by 15% until 2017, and an additional 15% in the period 2017-2020). Appendix 1 to the budget support stipulates that indicators, targets and baselines are only indicative and can be updated without amending the financing decision. **Although this allows flexibility in the implementation of benchmarks, it can also blur its transparency and deprive other actors, such as oversight bodies, Parliament and civil society, of access to the relevant data.**

The peer review on border management, compiled in mid-2017, provides a more detailed critical overview of the progress achieved so far. It states that the total number of staff employed by the Montenegrin border police is inadequate, as is their allocation across border posts. The report is imprecise regarding the number of corruption cases detected in the course of implementation of the anti-corruption action plan, stating that **“Some corruption cases have been detected”**. It reiterates the European Commission’s concerns over the lack of technical equipment at borders. It also states that the number of false documents detected in border checks is increasing, but that it can be still assessed as very low, arguing that this is probably the consequence of improper training paired with improper equipment (devices at the border).⁵⁰

46 Akcioni plan za poglavlje 24 – Pravda, sloboda i bezbjednost, Vlada Crne Gore, 16. februara 2015. godine (Action Plan for Chapter 24 – Justice, Freedom and Security, Government of Montenegro, February 16, 2015)

47 The data provided includes the amount of training implemented, disciplinary and misdemeanour procedures against border police officers, citizens’ complaints about their work, awarded officers etc.

48 Instrument for Pre-Accession Assistance (IPA II) 2014-2020, Annex IA Budget Support for the Financing Agreement for the Annual Action Programme for Montenegro 2015, Montenegro Support for Implementation of the IBM Strategy and revised Annex IA Budget Support for the Financing Agreement for the Annual Action Programme for Montenegro 2015.

49 The baseline indicators for budget support for 2016, indicate that basic and supplementary police training does not correspond to the needs of the border police. Hence, the training system needs to be improved. Montenegro’s border police had a total of 137 codified trainers from the “train the trainers” system. A limited number (81) of internal random inspections were performed.

50 Mika Rytkönen (FI), BORDER MANAGEMENT – Montenegro, June 2017

The most recent government report on the IBM Strategy paints a more positive picture: the implementation rate for 2016 is assessed as very high, with more than 96% of envisaged measures having been implemented, and only 1.6% of measures being entirely unimplemented. The report also fails to provide a more detailed overview of the implementation of the specific anti-corruption plan, apart from the vague statement that it is being implemented.⁵¹

The budget support for IBM stipulates that the data required to assess progress in meeting the objectives, outputs and indicators for the support will be collected through annual government reports on implementation of the IBM Strategy and the accompanying action plan, and that they will be cross-checked by peer review reports. **Differences between government and peer-review reports are thus a double-edged sword:** while it is good to cross-check official figures through impartial assessments from “outside”, the European Commission did not make clear how this data validation will be performed.

A specific monitoring methodology for the IBM Strategy was developed in late 2017 (Framework for performance evaluation for the IBM Strategy for the period 2018-2020, Methodology for the Framework of Result-Oriented Monitoring of Integrated Border Management In Montenegro). This can be assessed as a positive effect of EU conditionality in the field, since Montenegrin authorities were not previously accustomed to performing regular monitoring of their own activities. Nonetheless, progress in **achieving this specific benchmark cannot be assessed as satisfactory, due to still ineffective border oversight and a lack of clear progress in detecting corruption cases and preventing organized crime.**

Track record of investigations in organized crime

Benchmark 8: Montenegro establishes an initial track record of efficient and effective investigation, prosecution and convictions in organized crime cases (including money laundering, trafficking in human beings, cybercrime, cigarette and drug smuggling and arms trafficking) and demonstrates strong political commitment to domestic and regional action against serious and complex organized crime cases. (Common Position of the EU on Chapter 24)

Looking at reforms in the field over the previous decade, what is particularly striking is the extent to which **the European Commission’s demands are the same as they were ten to fifteen years ago.**

Thus, for example, the roadmap for visa liberalization for Montenegro, one of four requests issued on 27 May 2008, set a list of tasks related to “public order and security”. *Inter alia*, these obliged Montenegro to:

- a) Implement an action plan for the Strategy for Combating Corruption and Organized Crime;
- b) implement an anti-trafficking strategy;
- c) ensure strengthening of the implementation of anti-drug legislation, including through the Anti-Money Laundering Directorate;
- d) adopt and implement a strategy for the fight against drugs;
- e) adopt and implement legislation to prevent and combat corruption, as well as the corresponding conventions, standards and recommendations in all the above-mentioned areas;
- f) provide judicial cooperation in criminal matters; and
- g) ensure cooperation with Law Enforcement Agencies (especially the border police, the police, customs officers and the judiciary).

Likewise, the government’s 2005 Programme for the Fight Against Corruption and Organized Crime maps and addresses issues that are perfectly relevant today: the capacities of the special prosecution and of the police unit specialized in corruption and organized crime, financial investigations, money laundering, inter-agency cooperation, special investigative measures, drugs, human trafficking, smuggling, terrorism, protection of borders etc.

⁵¹ An interviewee from the Ministry of Interior recalled that the first tranche of budget support was distributed when it was assessed that progress in implementation of the Action Plan for Chapter 24 and IBM Strategy was satisfactory. He also said that there was a monitoring visit by experts in late 2017 which went through the measures and indicators upon which the disbursement of the second variable tranche depends. They gave a preliminary positive assessment.

In spite of this, according to the European Commission's 2016 Report,⁵² **Montenegro has achieved some level of preparation in the fight against organized crime.** Some progress has been made, notably on strengthening the legal, regulatory and institutional framework. However, the track record in organized crime cases remains a challenge, especially regarding trafficking in human beings and money laundering, where results are limited.

The most significant verdicts in organized crime cases have been overturned by the higher courts. The Court of Appeal overturned guilty decisions in the cases of Kalić (December 2015) and Šarić and Lončar (September 2017). The failure of these cases, symbols of Montenegro's progress in European integration in recent years, indicates a lack of sustainable criminal justice reform.

Montenegro is still implementing a series of sectoral strategies covering areas such as money laundering and trafficking in human beings, arms, and drugs,⁵³ as well as the Police Development Strategy. In other words, **exactly the same measures are being taken to improve the situation, although for a decade and a half they have not produced the expected results.** Nevertheless, strategic and action documents continued to proliferate during 2016 and 2017.⁵⁴

In July 2017, a new Special Prosecutor's Office for the fight against corruption, organized crime, war crimes, terrorism and money laundering was established. This was followed by the establishment of a new Special Police Unit, which acts only on the request of special prosecutors. According to an opinion poll conducted by the IA, by the end of 2017 most Montenegrin citizens (56%) did not think that this institution was contributing to the fight against corruption and organized crime, while one fifth of citizens did not recognize that the Special Prosecutor's Officej was making any contribution at all to solving this problem.⁵⁵

The government reports to the EU on its track record in several forms: reports on the implementation of action plans for Chapter 24, tables detailing the track record in annexes to the action plan reports; special contributions to the European Commission's reports on Montenegro; and directly as part of peer review missions.

Statistical data is inconsistently presented in all these reports. For example, in the "language" of the European Commission used in Chapter 24, organized crime includes cases related to drugs, human trafficking, terrorism, money laundering etc., but not high level corruption and "abuse of power committed in an organized manner". The last two are often included in the Special Prosecutor's Office's general statistics on organized crime, and in fact these cases (the so-called "Budva cases") are the majority of their work.

Statistical data is generally difficult to assess, but the results are still very poor. However, **there is a significant risk of inflating statistics with irrelevant cases.** According to data from the Special Prosecutor's Office, the following developments were noted between January 1 and December 31 2017:

- investigation of 88 persons for organized crime;
- indictments of 78 people (including terrorism);
- 26 verdicts (25 of them based on plea bargain agreements, all involving prison sentences);
- 18 financial investigations (17, plus one extended) initiated against 111 people, of which 14 are legal entities;
- investigation of 24 persons for the criminal offence of money laundering; and
- the opening of 40 criminal cases on notification from the Administration for the Prevention of Money Laundering.

A representative of the EU delegation in Montenegro interviewed by IA also notes that this statistic lacks qualitative explanation and points out that institutions will have to provide more information on specific cases in the forthcoming period.

⁵² European Commission, 2016 Montenegro Report, Brussels, 9.11.2016, available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_montenegro.pdf

⁵³ Strategy for the Fight Against Human Trafficking 2012-2018, Strategy for Preventing and Countering Terrorism, Money Laundering and the Financing of Terrorism 2015-2018 and Strategy for Preventing Drug Abuse 2013-2020.

⁵⁴ In April 2016, the National Security Council adopted a proposal for National Priorities in the Fight against Serious and Organized Crime for 2016-2017 and a proposal for the National Intelligence Model for Identifying Priorities, Managing and Assigning Tasks in the Field of Countering Serious and Organized Crime. Adoption of these acts was envisaged as a measure in the action plan for Chapter 24. At the end of 2017, a new SOCTA was adopted.

⁵⁵ Institute Alternative, Public Opinion Survey, 2017, More details available at: <http://institut-alternativa.org/vise-od-polovine-gradana-smatra-institucije-korumpiranim/?lang=en>

Financial investigations are still not systematically initiated in parallel with criminal investigations. This is particularly evident in the failure to seize property permanently.

At least 24 people have been murdered in the last three years in Montenegro in the war of criminal clans. Most such cases are unsolved and are not included in the “tables with track record” (Annexes to Report on Implementation of the Action Plan for Chapter 24).⁵⁶

In 2016, police seized 2,224 kg of drugs, of which 2,222 kg was marijuana. 2017 was characterized by slightly more intensive police activities. During the first eight months of 2017, the police conducted around 3,900 controls on organized crime groups, inspecting 550 properties. These checks resulted in 43 criminal reports and the seizure of 22 vehicles, 15 pistols and one explosive device.⁵⁷ However, **financial investigations of these groups are not initiated, meaning that their operations and businesses are not tackled.**

As a rule, peer review reports commissioned by the EU in the field of the fight against organized crime are not publically available. The leak of one such report to the media indicated two important flaws. Firstly, there were reporting inaccuracies stemming from biased interpretation of official statistics which was not cross-checked with civil society and independent experts. Secondly, preparation of the report’s recommendations, which overly relies on communication between expert and official institutions, results in practice in the domestic public being excluded from the creation of policies to combat organized crime. This particular case demonstrates the need for a debate about recommendations made by experts.⁵⁸

⁵⁶ Tables of the track record for Chapter 24 include cases of human trafficking, cyber crime, money laundering, seized drugs, and witness protection.

⁵⁷ TV show “Replika”, 25.09.2017. RTCG.

⁵⁸ Media articles on the findings of peer review reports (only in Montenegrin) available at:

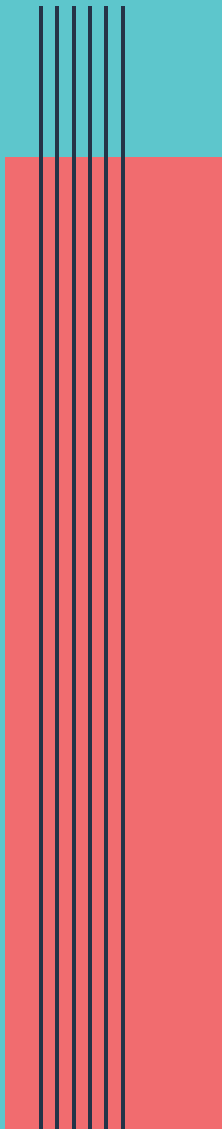
<http://www.vijesti.me/vijesti/specijalnom-timu-hitno-treba-jos-30-polica-jaca-932868>

<http://www.vijesti.me/vijesti/katnic-trazi-jos-30-polica-jaca-mup-i-vlada-ne-daju-956912>



CONCLUSION:

FROM PLANNING FATIGUE TO AN EFFICIENT SCRUTINY



The greatest progress is noted in capacity building for certain institutions, the organization of training and legislative activity. Track record benchmarks, emphasizing a merit-based public administration and judiciary and the fight against organized crime and corruption, face the most obstacles on the ground. Despite certain efforts in measuring the track record in the field of organized crime and corruption, a sophisticated monitoring methodology based on a combination of qualitative and quantitative indicators has never been developed.

Certain benchmarks are not fully developed, meaning they are subject to free interpretation. An example is the request to adopt a joint plan for the fight against corruption at borders. The plan's objectives and activities have never been clearly defined. This approach produces a series of documents – **plans envisaging new plans and strategies**. As a result, monitoring becomes more cumbersome and the details are hard to follow, since they are not clearly set by the benchmark.

The effectiveness of benchmarks cannot be perceived in isolation from the practices of the regular policy cycle. **The main deficiencies observed are connected with improper implementation and delays in policy formulation, which leaves the adoption of secondary legislation under-monitored.** The monitoring of benchmarks thus requires additional attention to be paid to the content of secondary legislation and its implementation, since in the Montenegrin context these regulations very often define the crucial procedural aspects of and pre-conditions for the effective implementation of laws.

Poor data management by government bodies is another horizontal challenge to both the implementation and monitoring of benchmarks. This is best illustrated by the failure of institutions to comply with legal obligations on data collection and the systematization of discrimination cases.

Government stakeholders argue that the EU has imposed no unilateral conditions on Montenegro, but that they have been agreed mutually. Still, civil society remains sceptical about Montenegro's capacities to achieve certain benchmarks, such as effective border oversight. On the other hand, interviewed CSO representatives recognize that the EU is increasingly incorporating non-partisan assessments of CSOs in their own reports, and that they are regularly consulted as part of peer review missions.

The EU often utilizes peer review reports to enable additional insight into the state of play and key issues. Yet, the role of such reports in official monitoring of benchmarks is ambiguous. Although they are produced by individual experts, they are used to assess the progress of EU membership talks. This is best illustrated by the budget support allocated in the area of IBM. The financing agreement states that progress will be assessed by a review of the Montenegrin government's official reports, which will be cross-checked with peer review reports. This poses a need for these reports also to be published in other countries, since outside actors would otherwise be deprived of full insight into the achievement of specific benchmarks. IA managed to obtain these documents only after a legal battle, taking the matter to the Administrative Court.

On the other hand, peer review reports do not reflect the government's official data or its interpretation of progress. Without a clear linkage between these different types of reports, **the proliferation of different data sources can create vast room for manoeuvre** – for both the European Commission and the government, as to how to interpret and present progress in meeting benchmarks.

The **budget support** allocated by the Instrument for Pre-Accession Assistance, which is linked to progress in the areas of public administration reform and integrated border management, **represents a potential way to increase the EU's leverage.** Nonetheless, the selected indicators for distribution of the tranches have so far not grasped the complexity of the problems on the ground, and have generally focused issues that are easier to measure. For example, the key indicators for support in the field of public administration reform do not envisage merit-based recruitment as such, although unfair recruitment represents a key mechanism of state capture in Montenegro.

Finally, **benchmarking cannot solve all problems, as they are often informal in nature and cannot be easily captured by a specific measure. The worrisome situation of media freedom and attacks on journalists is the best example of this.** Although these issues are prioritized in EU accession negotiations, there are regressive trends in the field. This indicates a need for the EU to use other mechanisms, potentially even an **imbalance clause**, stipulating that without substantial improvements in the area of the rule of law, technical talks on other chapters of the accession negotiations cannot be provisionally closed.

RECOMMENDATIONS

- to the EU:

- Overall, all benchmarks should be specified in a manner which does not allow the government to deliver results and reports on progress in meeting benchmarks that are only descriptive.
- Benchmarks requiring the adoption of new strategies and plans should be avoided and replaced by benchmarks which clearly define the key objectives of the required actions.
- Peer review reports commissioned by the European Commission should reflect on the progress reported in the government's official reports, in order to ensure consistent cross-checking and interpretation of the reported data.
- The scope of the monitoring process for standards for merit-based recruitment in public administration should be extended to the local level.
- In that respect, conditionality and standards in the area of public administration reform at the local level should be more clearly formulated and communicated with domestic stakeholders.
- Since the process of legal alignment has been largely completed in most areas, a caveat should be placed on the implementation of new procedures and the formulation of new impact indicators for the implementation of laws.
- Discrimination based on political affiliation should be more explicitly addressed in anti-discrimination benchmarks in order to address discriminatory practices characteristic of the Montenegrin context.
- In-depth qualitative analysis of certain cases is needed to determine actual progress in certain relevant but complex benchmarks, such as the merit-based selection of judges and prosecutors.

- to the government:

- In order to increase the transparency of policy making, key pieces of secondary legislation should be the subject of public debate and consultation with the European Commission alongside the key legal texts.
- Result-oriented monitoring of implementation of laws should encompass scrutiny of the quality and implementation of secondary legislation, which was adopted with significant delay.
- Overall, data management practices in government bodies need to be improved, and as far as possible underpinned by technological solutions which minimize potential mistakes in data collection. This is an overarching precondition for effective monitoring of benchmarks.
- Data on asylum should be provided to EUROSTAT in order to ensure that EU member states can compare statistics and that key statistics can be interpreted in the field.

ANNEX 1

Benchmark [xxx]

[Country]

Date created:	[dd.mm.yyyy]
By:	[Organisation]

0. Benchmark basics	
Method of introduction <i>[E.g. laid out in document...]</i>	
Year introduced	
Content of the benchmark and actions required <i>[Please list actions required as bullets as per EC last report/specific document]</i>	
Type of benchmark and actions required <i>[E.g. Adoption of a policy document (Pol); Adoption of legislation (Leg); Implementation; etc.]</i>	
1. Data analysis/methodology	
Documents subject to analysis <i>[Desk research e.g. EC reports; OSCE reports; own monitoring reports - please include hyperlink next to each document]</i>	
Interviews <i>[Number of interviews and type of respondents]</i>	
Focus groups <i>(if applicable)</i>	

<p>Quantitative indicator findings <i>[Here inserted you have the indicators for each of the benchmarks – since we will fill out a separate template for each benchmark, please delete the rows of the benchmark you are not filling in and appropriately copy paste the rows for each of the benchmarks in their separate adequate template – you should at the end have 8 identical templates in which the sole difference is this section. In these regards note that we have taken the same indicators for the two benchmarks in the area of judiciary.]</i></p>	<p>Merit-based career system for the judges Judicial academy reforms</p>	<p>Freedom house – Nations in Transit Judicial Framework and Independence score <i>(insert the score for your country for the last 3 years)</i></p> <p>Balkan barometer – Figure 86: Do you agree that the following institutions are independent of political influence? (by economies) (NEW QUESTION) <i>(fill in the score for your country for this year for judiciary)</i></p> <p>Table 16: To what extent do you agree or not agree that the following categories in your economy are affected by corruption? (by economies)(NEW QUESTION) <i>(fill in the score for your country for this year for judiciary)</i></p> <p>BTI – Rule of Law – Independent Judiciary <i>(insert the score for your country for the last 3 years)</i></p>
	<p>Merit-based career system for civil servants</p>	<p>Balkan barometer – Table 16: To what extent do you agree or not agree that the following categories in your economy are affected by corruption? (by economies)(NEW QUESTION) <i>(fill in the score for your country for this year)</i></p>
	<p>Track record for addressing media intimidation; attacks on journalists; media independence</p>	<p>Freedom house – Nations in Transit Independent Media - <i>(insert the score for your country for the last 3 years)</i></p> <p>Freedom house - Freedom of the Press Scores Total Score; Legal Political and Economic Environment - <i>(insert the score for your country for the last 3 years)</i></p>
	<p>Implementation of Law on prohibition of discrimination</p>	<p>European Equality Law Network – <i>(Source for Macedonia, Montenegro and Serbia. The rest of the countries: Kosovo; BiH and Albania please insert relevant grey literature reference.)</i></p>
	<p>Law on Asylum aligned with EU acquis</p>	<p>Findings from interviews and EC country report from the last 3 years</p>
	<p>Specific anticorruption plans; providing adequate follow up of detected cases; cooperation on borders</p>	<p>Findings from interviews; FOI request for track records and EC country report</p>
	<p>The role of intelligence services and the oversight mechanisms that are introduced; established initial track record of investigations in organised crime</p>	<p>Findings from interviews and EC country report from the last 3 years</p>

2. Overview of findings

Timeline/evolution of the benchmark over time <i>[Please add as many rows as needed in the table]</i>	<table border="1"> <thead> <tr> <th>Event/document/juncture</th> <th>Year</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> </tr> </tbody> </table>		Event/document/juncture	Year				
	Event/document/juncture	Year						
Narrative timeline of the benchmark <i>[Please briefly explain the evolution of the benchmark over time guided by the info that you have inserted in the table]</i>								
Key findings on the implementation and monitoring of the benchmark <i>[Please provide a critical evaluation and incorporate your findings from the interviews/desk research/organization expertise – please reference in this process]</i>								
Key findings on the effectiveness of the benchmarks <i>[Please provide findings from interviews and findings from quantitative indicators accompanied with a critical evaluation – please reference in this process]</i>								
Key challenges for the implementation/effectiveness of the benchmark <i>[Briefly state in bullets]</i>								
Observed trends <i>[Briefly state in two sentences]</i>								

3. Recommendations

Recommendations for strengthening the monitoring mechanism/the effectiveness of the benchmark <i>[Please list in bullets; add rows if needed.]</i>	To the government/specific institutions	
	To the European Commission	

4. Conclusions

[Please mention briefly the conclusion of your findings related to the specific benchmark.]

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