institut alternativa

NEGOTIATIONS BETWEEN MONTENEGRO AND THE EU: DATA ACCESS FOR THE PRIVILEGED ONLY

By: Jovana Marović, Stevo Muk

INTRODUCTORY REMARKS

The negotiation process for Montenegro's accession to the European Union has placed a whole series of formal requests and recommendations for improvements to public policies before the country. Up to this date, 20 chapters of the aquis have been opened, of which 2 have been provisionally closed. While when it comes to technical fulfilment of preconditions for membership the negotiation process can be described as improved, as illustrated by the large number of chapters which have been opened, negotiations are nonetheless characterized by a lack of results and restrictions placed on access to information about the process. Although the process of Montenegro's negotiations with the European Union has been more specific and transparent in comparison to previous accessions, the following three important phenomena can be recognised as having contributed to the process's lack of transparency:

- Decisions on chapters related to the fight against corruption and organized crime being made "behind closed doors" as a result of the "increasing" role of the Rule of Law Council
- Imprecise and biased reporting on the implementation of the action plans for chapters 23 and 24 – Judiciary and Fundamental Rights; and Justice, Freedom and Security
- Access denied to the European Commission's opinion on key legislation, as well as the reports of the EU's peer review missions.

RULE OF LAW COUNCIL – NEW BODY, OLD PATTERNS

Montenegro's structure for negotiations with the European Union was established in February 2012, led at the top of the pyramid by the Collegium for Negotiations,[1] the highest political body responsible for deliberating all issues in the process. Below this body are the working groups[2] responsible for preparing negotiating positions for individual chapters.[3] Unlike countries that have previously negotiated for EU membership, the competencies of the Montenegrin working groups have been extended without any formal basis to the preparation of action plans for the opening of negotiation chapters. The basis for this further work by working groups was created in March 2014 through a government decision which defined new activities, such as monitoring the implementation of action plans, and ultimately the closing of chapters and the negotiation process itself. The modus operandi chosen by the government is especially interesting because since the expiry of the National Strategy for the Fight Against Corruption and Organized Crime and the cessation of the work of the relevant national commission, the action plans for chapters 23 and 24 remain the only strategic documents for the fight against corruption and organized crime, while the working groups for these fields of the acquis have become the only mechanism for coordinating the implementation of measures and reporting. In addition, negotiation working groups have included representatives of the non-governmental sector from the outset, which is a good model for transparency, oversight and the quality of the process. In accordance with the EU's new approach, which requires the most difficult chapters to be opened

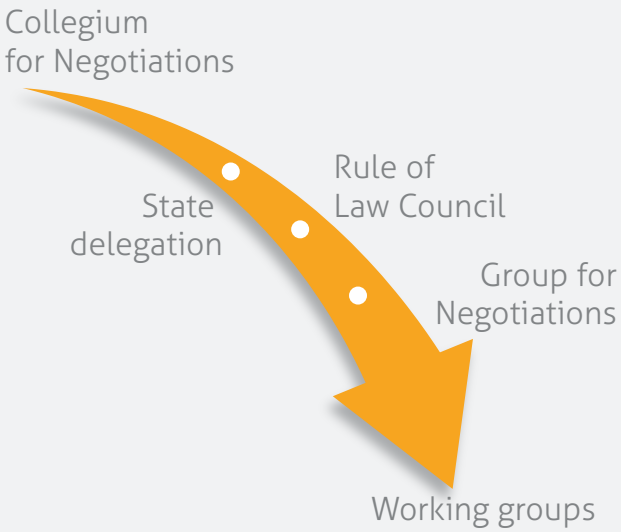
1 Composed of the Prime Minister, the Deputy Prime Ministers, the Minister of Foreign Affairs and European Integration and the Chief Negotiator for Negotiations on the Accession of Montenegro to the European Union

2 The structure also comprises a state delegation which represents the country at intergovernmental conferences, the Group for Negotiations consisting of, *inter alia*, negotiators by chapters, the Office of the Chief Negotiator and the Secretariat of the Group for Negotiations. See: "Decision on Establishing the Negotiating Structure for the Accession of Montenegro to the European Union", Official Gazette of Montenegro, No. 9/2012, October 10th 2012.

3 Starting positions or documents within which the country assesses its own capacities and the degree of compliance with the legislation within each chapter of the EU acquis.

at the beginning and closed at the very end of the negotiation process, the working groups for chapters 23 and 24 were the first to be formed and will continue their work until Montenegro's accession to the EU, while in other countries they ceased to function after the finalization of negotiation positions, or even before the chapter was opened. Assigning this important role to the working groups for the chapters related to the rule of law, with all data being made available to members of NGOs as well as to the public, would have been an adequate mechanism for objective, comprehensive and timely reporting on what has been achieved.

However, the decision to extend competencies to the working groups was followed by the establishment of a new body, the Rule of Law Council,[4] something which is also unique to Montenegro's negotiation process in comparison to the practice of previous accession negotiations. This council was tasked with the oversight of the negotiation process for chapters 23 and 24, with deliberating on key reasons for delays in the realization of measures and with issuing recommendations for urgent action in those fields. The idea behind the establishment of this body was to put "political pressure" on the working groups for chapters 23 and 24, after the modest results they achieved in these most important and challenging chapters, and the insufficiently active role of the Collegium for Negotiations in the process.



The experience from 2015 shows that **coordination of the process has been fully taken over by the Rule of Law Council**, while working groups do not receive official information about the conclusions of this body. The secretariat of the Group for Negotiations on Accession claims that the council's sittings are closed to the public, although this is not specified in the decision on the establishment of this body.[5] Furthermore, press releases from this body's meetings contain only approximate and descriptive assessments of the course of negotiations, without any conclusions or specific responsibilities for ministries or administrative organs.[6] Although formally the working group can propose a topic for discussion at a meeting of the council, this has not yet happened in the sessions of working group 23, which have been reserved exclusively for technical barriers to reporting. In addition, there are no NGO representatives from the working groups for chapters 23 and 24 on the Rule of Law Council. Specific information relevant to the work of the council cannot even be obtained by formal request, something which was attempted repeatedly this year by Institute Alternative. This gives rise to claims that access to information is provided selectively and that the position of NGO representatives in the working groups is unequal.[7]

Inadequate communication between the Council and working groups 23 and 24 and the exclusive focus of discussions on formal aspects of the process have led to the role of working groups being marginalized and reduced to the technical monitoring of measures and reporting. Coordination of the process has been "transferred" to the higher level of ministers and heads of administrative bodies, whose meetings are closed to the public, while their conclusions are not even available to the working group which implements the measures.

4 The council is chaired by the Deputy Prime Minister, who sits alongside his deputy, the Minister of Interior and 39 other members. See: Article 3 of the Decision on Establishment of the Rule of Law Council, June 2014.
5 Response of the Secretary of the Negotiating Group to a letter sent by Institute Alternative, June 5th 2015.
6 See: press release from the 4th sitting of the Rule of Law Council, April 6th 2015, available at: http://www.eu.me/mn/press/saopstenja/item/1103-markovic-ocekujemo-da-ispunimo-sva-privremena-mjerila-u-poglavljima-23-i-24 (in Montenegrin language only)
7 Letter of the Chapter 23 Working Group Members", Institute Alternative, July 29th 2014, available at: http://institut-alternativa.org/pismo-clanova-radne-grupe-za-poglavlje-23/?lang=en

"NEW FORM OF REPORTING ON THE REALIZATION OF MEASURES" – A SKILFULLY DISGUISED AVERAGE

Montenegro is the first country to start making amendments to the action plans for chapters 23 and 24 according to the guidelines in the European Commission's 2014 Progress report for 2014.[8] These amendments are necessary primarily due to delay in the realization of planned activities, poorly defined indicators of success, a lack of measurable results and poor process coordination and reporting. The resulting documents, which were finalized in early 2015, were mainly focused on defining new deadlines, meaning that the timeframes for 57 measures in the field of the fight against corruption[9] have been postponed, of which the status for 6 measures has been redefined to "continuous implementation". Thus, one-year of implementation of the action plan was marked by the postponement of the deadlines for almost half (48.7%) of the total number of measures in the field of the fight against corruption.

After the government approved adapted action plans in February, a new form and a new dynamics of reporting were introduced. Again, this was done in response to the European Commission's suggestions, which were inaccessible to the representatives of NGOs in the working group. The new form of reporting includes only measures that are due for implementation, rather than listing all measures, as was the case previously. The new dynamics means that the working group would now prepare only semi-annual reports on the implementation of action plans for chapters 23 and 24, instead of the earlier quarterly reports. Semi-annual reporting is bad both for the process and for communication of the progress of negotiations to the public. For example, if the deadline for implementation of a specific measure was March, but it is not likely to be realized until the end of June, the general public will not be informed of the reasons for the delay. The three-month delay in publishing reports on the implementation of key strategic documents, such as the Public Administration Reform Strategy, is problematic.

The first reports adopted after the adaptation of Action plans show a high proportion of successfully implemented measures. For example, the 2015 Action Plan for chapter 23 shows an implementation rate of 77%, or 231 of 300 measures.[10] However, this high percentage of successfully implemented activities is the result of bad forms of reporting and the descriptive assessment of the implementation of measures. Thus, the bulk of measures were labelled as either "partially implemented" or "continuous realization". Overall, 68 of 99 measures and sub-measures for the implementation of the part relating to the fight against corruption are marked in this way. Even in cases where the explanation of a measure's implementation shows no realized activities, it is labelled as "partially implemented". An example of this is a measure related to the spatial and technical conditions for the work of the Special Prosecutor's Office.[11]

> *Measure No. 2.2.1.6 Ensure spatial and technical conditions for the work of the Special Prosecutor's Office–*
>
> *The process of ensuring spatial and technical conditions for the work of the Special Prosecutor's Office is pending.*[12]

A certain number of measures in the semi-annual statistics are reported as "implemented" as they are indicated as being in continuous realization, although no training or round tables were organized in the reporting period. It is additionally problematic that the measures to be implemented by the end of the negotiating process are not broken down into semi-annual benchmarks to be met in each reporting period.

> *Measure No. 2.2.5.3 Conduct training for persons in charge of managing, monitoring and reporting on statistics for criminal acts of corruption–*
>
> *There were no activities conducted in the reporting period.*[13]

8 More at: "European Commission's Progress Reports In Numbers", Institute Alternative, November 8th 2014, available at: http://institut-alternativa.org/izvjestaj-evropske-komisije-u-brojkama/?lang=en
9 In total, 117 measures (with 29 sub-measures) in the action plan for chapter 23.
10 First semi-annual report on the realization of the action plan for chapter 23, July 2015.
11 Remark: Featured examples of integrated measures are carried over from the fourth report on the implementation of the action plan for chapter 23.
12 Ibid, p. 118.
13 Ibid, p. 132.

Neither the members of working group 23 nor the interested public can be sure if certain measures were actually partially implemented if it is not possible to gain an insight into the prepared material.

Measure No.2.1.1.5.1 Adopt bylaws necessary to implement the Law–

The Ministry of Justice submitted drafts of bylaws prepared by DACI to the Secretariat for Legislation on June 3rd.[14]

There are still numerous examples of both entities responsible for carrying out activities and impact indicators being poorly defined. For example, the indicator "a number of procedures" requires specification if it is to become clear whether the number of procedures is too high or too low.

An example of a poorly defined indicator is the number of indictments, as it is questionable whether an increase in indictments for corruption against officers of the Police and Ministry of Interior acts to reduce the risk of corruption or merely shows that corruption remains pervasive.[15]

The action plan still contains incorrectly defined entities responsible for carrying out activities. In certain places it is pointed out that the entity responsible has no data on the indicators of the success of a certain measure. For example, the Department for Internal Control of the Police lacks information on the number of indictments filed upon the number of criminal charges. This is controversial because it means that the impact indicators have not been defined properly.

Another example of imprecise and inaccurate reporting concerns the measure related to the establishment of transparent procedures for public procurement. The indicator for this measure is *the number of public procurement services established in local government*, and such services have not been established in all local government structures, as was claimed in the report, because one public procurement officer is not a substitute for a whole service, although the report presents the two as equivalent.

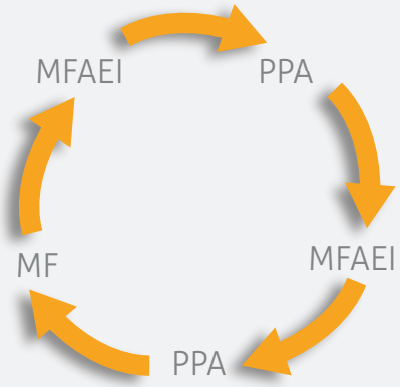
The adaptation of action plans has not eliminated arbitrary assessments and poor definition of indicators and the entities responsible for the implementation of activities, shortcomings that have contributed to poor reporting until now. In addition, neither before adaptation nor since do reports provide a clear picture of the actual progress of implemented activities and their effects. Together with the elimination of quarterly reporting on the implementation of action plans, this creates a necessity for reporting to be carried out and information provided to the public in a more proactive manner.

THE EU'S OPINIONS AND REPORTS – A GAME OF HIDE AND SEEK WITH FREE ACCESS TO INFORMATION

From the beginning of the negotiation process, the Government has refused to make the European Commission's opinions on relevant draft laws and proposals for laws which are being adopted as part of the European integration process available to the public, non-governmental organizations, or even members of the Parliament of Montenegro. Therefore, for the series of laws it is impossible to get an insight into the EU's opinion. The following indicates how the bureaucracy works in response to a free access to information about the European Commission's comments about the Draft Law on Amendments to the Law on Public Procurement:

> *Institute Alternative submitted a free access to information request to the Public Procurement Administration (PPA) in July 2014, in which we sought access to the European Commission's comments on the Draft Law on Amendments to the Law on Public Procurement. However, the response of the PPA informed us that they were not in possession of the information and that they had submitted a formal request to the MFAEI, attaching a copy of the forwarded requests. The MFAEI did not answer the forwarded request, but we were informed that the opinion of the*

14 Action plan for chapter 23
15 First semi-annual report on the implementation of the action plan for chapter 23, p. 96.



*European Commission had been submitted to the PPA and that we should contact it again, as it is the body **competent** in the field of public procurement. On May 26th 2015, immediately after the amendments to the law came into force, IA submitted a new request to the PPA, again asking for the comments. The PPA did not respond to our request within the legal deadline to respond to a repeated demand, but we received an answer from the Ministry of Finance on July 23rd 2015, in which we were informed that they are not in possession of the requested information and that the request had been forwarded to the MFAEI and the Secretary of State for European Integration – Chief Negotiator, because they are competent "to act in this specific administrative matter." Regardless of the formal request sent to the MF, IA has addressed the MFAEI on August 31st 2015 and obtained the comments after more than a year. Delivered comments are in fact the correspondence between the Ministry of Finance and the European Commission, which makes it unclear how MF could claim that it was not in the possession of the documents.*

The unavailability of the European Commission's opinion on key legislation raises a number of issues. First, the extent to which the adopted solutions correspond to the European Commission's suggestions is unclear if the interested public cannot gain insight into their contents. In this particular case, it is also problematic that the institutions responsible for enforcement of this law, as well those charged with the coordination of legislative changes, PPA, is not in possession of the European Commission's opinion, raising the question of what is directing the process of "improving" the legislation. Finally, the persistent switching of competencies and responsibility from one address to another is problematic from the point of view of process coordination, as well as for the openness of institutions, and at the same time shows that a formal request submitted by one state institution to another does not oblige the latter body to act, which represents the intentional obstruction of the delivering of comments, or the enabling the insights when it becomes irrelevant and untimely.

In addition to the fact that the public knows nothing about the opinions and comments of the European Commission about the frequent changes in the law, the reports of expert missions are also unavailable, despite the fact that in the past three years such missions have been analysing, inter alia, areas such as conflict of interest, money laundering and the financing of terrorism, the effectiveness of the judiciary and the fight against corruption and organized crime.

We "experienced" limited and incomplete responses to free access to information requests to the Ministry of Foreign Affairs and European Integration (hereinafter: MFAEI) when requesting the reports of peer review missions related to seven areas, carried out during 2012, 2013, 2014 and 2015. These reports are classified as confidential, as evidenced in the response submitted by the MFAEI to Institute Alternative on 16th June 2015, informing us that the reports were marked with the designation "restricted", but not providing any reason for this. Considering that this is not and can neither be adequate justification nor the basis for classifying these documents as confidential, IA filed a lawsuit with the Administrative Court in July. In response to our public insistence that there was no basis for classifying the reports of expert missions and making them unavailable, the MFAEI claimed that the documents were the property of the European Commission, which had itself labelled them as classified. However, in response to a new request by IA for access to this claimed decision by the EC, on August 3rd the MFAEI delivered its correspondence with the representatives of the Directorate for Neighbourhood Policy and Enlargement of the European Commission which states that not all

reports can be published and submitted and that the EC, in communication with the MFAEI, shall decide separately on each case whether or not the report should be available. This interpretation by the EC also affects the transparency of the process, but it is essentially different from the MFAEI's initial response. Thus, not all reports are classified and under the designation "restricted", but the European Commission reserves the right to decide on the availability of each report individually.

In response to our specific request for access to all the reports of expert missions, the MFAEI has not acted in accordance with the European Commission's suggestion that it should be decided on an individual basis whether each report can be published, and has used its own "interpretation" to deny access to all the reports. It is incorrect to claim that all the reports are classified. While the MFAEI must maintain the confidentiality of the EU's data, as stipulated by the Law on Data Confidentiality, the designation "restricted" can only be applied by the European Commission.[16] The position of the European Commission that the reports of expert missions may be classified is itself problematic, as this substantially limits the transparency of the process, prevents insight into the EU's opinions and encourages the government to keep its work even more closed to the public. This is particularly striking, given that the same reports are available in Turkey on the website of that country's EU Delegation.[17]

HOW TO OBTAIN MORE TRANSPARENT AND PRECISE INFORMATION ON THE NEGOTIATION PROCESS

The aforementioned problems indicate that the Government regrets opening the negotiation process to the public and now publishes information under the motto of "new forms of reporting". The transparency of the negotiation process for full EU membership has been "infringed" by the restructuring of the negotiation structure, the elimination of quarterly reports on the process, arbitrary assessment of progress and the manipulation of the publication of the European Commission's comments and reports.

In relation to the above-mentioned problems, we make the some recommendations aimed at making the following improvements:

- **In order to better coordinate activities within the negotiation structure and make them more transparent:** Sessions of the Rule of Law Council should be opened up, and working group members hailing from the NGO sector should be enabled to attend these meetings. Only in this manner would it be possible to obtain congruence between what the council sees as priority measures and the activities of the working group which monitors the realization of those measures.
- **In order to improve reporting:** The controversial qualification of the degree of fulfilment of measures – the designations "partially implemented" and "continuously realized"– should be abolished. For measures which are to be realized under the current definition of "continuously" it is necessary to establish quotas for realization on a semi-annual timetable and identify measurable indicators, since in most cases the current indicators are not indicators of success.
- **In order to achieve highly participatory preparation of quality legal solutions:** European Commission opinions on draft laws and proposals for laws should be provided as supporting documentation when the text is submitted to the parliamentary procedure, meaning that they should be available to all interested parties. The European Commission should also provide access to the reports of its expert missions, while protecting personal data or information on investigations that are in progress, or that may harm the implementation of the aforementioned.

16 Law on Data Confidentiality, "Official Gazette of Montenegro", No. 14/08, February 29th 2008; No. 76/09, November 11th 2009; No. 41/10, July 23rd 2010; No. 40/11, August 8th2011; No. 38/12, July 19th 2012; No. 44/12, August 9th 2012; No. 14/13, March 15th 2013; No. 18/14, April 11th 2014.

17 See website of the EU Delegation to Turkey, available at: http://avrupa.info.tr/eu-and-turkey/accession-negotiations/peer-review-reports.html

LITERATURE REVIEW

Action plan for chapter 23, September 2013

First semi-annual report on the realization of the action plan for chapter 23, July 2015

Montenegro Progress Report 2014, October 2014

The Decision on Amendments of the Decision on Establishing the Negotiating Structure for the Accession of Montenegro to the European Union, March 6th 2014

Decision on Establishment of the Rule of Law Council, June 2014

Response of the Ministry of Finance to free access to information request submitted by Institute alternative on July 23rd 2015

Responses of the Ministry of Foreign Affairs and European Integration to fee access of information requests submitted by Institute Alternative on June 16th 2015 and August 3rd 2015

Response of the Public Procurement Directorate to fee access to information request submitted by Institute Alternative in July 2014

The Decision to Establish the Negotiating Structure for the Accession of Montenegro to the European Union, Official Gazette of Montenegro, No. 9/2012, February 2nd 2012

Adapted Action plan for chapter 23, February 2015

Press releases from sittings of the Rule of Law Council

Law on Data Confidentiality, Official Gazette of Montenegro, No. 14/08, February 29th 2008; No. 76/09, November 11th 2009; No. 41/10, July 23rd 2010; No. 40/11, August 8th 2011; No. 38/12, July 19th 2012; No. 44/12, August 9th 2012; No. 14/13, March 15th 2013; No. 18/14, April 11th 2014

ABOUT INSTITUTE ALTERNATIVE

We function as a think tank and research centre, focusing on the overarching areas of good governance, transparency and accountability. The fields on which we focus are structured within five main programme strands: public administration, accountable public finance, security and defence, parliamentary programme and social policy. On the basis of our programmes, we monitor the process of accession negotiations with the EU, actively participating in working groups for chapters 23 and 32. Our flagship project is the Public Policy School, which we have organized since 2012. Since 2013, IA has been licensed by the Ministry of Science as a scientific-research centre.

www.institut-alternativa.org
www.mojgrad.me
www.mojauprava.me
www.mojnovac.me

institut alternativa