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Let's talk about effects!

...or gaps in reporting on public administration reform in Montenegro



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The Balkan Trust
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INTRODUCTION

Reporting on the implementation of reforms is an important mechanism for timely prevention of the potential negative outcomes, improvement of the implementation, but also creation of the basis for a comprehensive impact assessment, which should precede the adoption of the new decisions in the provided area. In this regard, in the context of the public policy cycle, this “tool” refers to the implementation stage of certain policies and their monitoring, but it should also be an “introduction” to the process of impact assessment - evaluation.

Result-oriented and impact-oriented reporting in Montenegro is **underdeveloped**. SIGMA - Joint Initiative of the European Commission and the Organization for Economic Co-operation and Development (OECD) assessed that the first report on the implementation of the Public Administration Reform Strategy focuses exclusively on the implementation of activities. With regard to the fulfilment of the European public administration principles in Montenegro, **the rating for reporting on the implementation of strategies has deteriorated**, because the reports discussed by the Government in 2015 and 2016 focus exclusively on the implementation of activities and not on the outcomes achieved as a result of these activities.¹ When it comes to reports on the work of institutions, it is especially highlighted that the annual reports on the work of the bodies subordinated to the ministries are “process-oriented” and overloaded with statistical data, which, however, are not linked to specific, measurable objectives or performance indicators.

Bearing in mind the aforementioned shortcomings of reporting on the implementation of strategies in Montenegro, **the aim of the analysis is to demonstrate the gaps in the current system and data management, and indicate the ways to make improvements, by using concrete examples of (non)reporting on the key measures and outcomes of public administration reform**. This could ensure that the reporting on the Strategy, but also on the work of the specific stakeholders, could ensure an informed decision-making and evidence-based discussion.

We will take the Public Administration Reform Strategy in Montenegro for 2016-2020 and accompanying Action Plans (for 2016-2017, and for 2018-2020) as a basis.² This Strategy is

¹ / Monitoring report: The principles of Public administration in Montenegro, SIGMA, joint initiative of OECD and the EU, November 2017, available on: <http://www.sigmaweb.org/publications/Monitoring-Report-2017-Montenegro.pdf> (accessed on 5 April 2018)

² / The documents are available at the following link: <http://mojauprava.me/strategija-reforme-javne-uprave-ucrnoj-gori-2016-2020/>

defined by a somewhat more developed structure than the previous ones, so the following basic levels of impact and outcomes of certain public policies can be identified as: general goals, i.e. key priorities for which specific indicators are defined, as well as specific objectives for the key areas of reform (organisation and responsibility, service delivery, civil service system and human resources management, public policy development and coordination, public finance management, special local self-government system issues, strategic management of the public administration reform process and financial sustainability). Each area consists of activities, sub-activities, those responsible for their implementation, deadlines, implementation costs and indicators. What makes this Strategy unique in Montenegro is that its implementation is accompanied by the so-called **indicator passports**, which contain their thorough explanation, frequency of publishing and data collection methodology compared to the indicators defined by the Strategy.³

We are focused on the effects and results, which should contribute to achieving the specific goals and key priorities of the Strategy. In that sense and in line with the definition used for the analysis, the results should indicate the change in the state of play in certain areas, “rather than a concrete, direct output of an activity, which would represent a lower level.”⁴ We analyse more thoroughly the shortcomings in the reporting by using the example of monitoring the implementation of the Law on Free Access to Information, and reporting on the work of the Administrative Inspectorate and the Administrative Court. Therefore, the paper structure follows these examples in this order. Examples have been selected on the basis of a two-year monitoring of the implementation of the Strategy, bearing in mind that responsibility of administration and service delivery are recognised as very important areas for the relationship with citizens. Based on the described shortcomings, we point to the necessity of including additional information in the reporting on public administration reform, which will, in addition to the predefined indicator passports, take into account the “unpredictability” of implementation and frequent legislative changes through continuous mapping of problematic areas that can hinder the realisation of key reform priorities.

3 / Indicator passports were formulated in April 2017 and innovated in March 2018. A total of 51 indicator passport was formulated according to the following structure: indicator name, its goal or activity, data sources for tracking performance indicators, name of data collector, frequency of publishing data, short description of indicators and methodology (formula/equation), data on initial, targeted and achieved values.

4 / Manual for Monitoring and Evaluation of Public Administration Reform Policy, European Policy Centre, Foundation for the Development of Economic Science, Belgrade 2014, available at: http://cep.org.rs/images/me_studija/prirucnici/prirucnik_rja_srp_final.pdf (accessed on 25 April 2018)

FREE ACCESS TO INFORMATION: MYSTERIOUS PERCENTAGES AND FORGOTTEN TAX SECRET

The indicator passports for monitoring the implementation of public administration reform in Montenegro in the field of free access to information are the following:

- number of appeals against the decisions taken upon requests for free access to information;
- percentage of decisions annulled by the Agency compared to the total number of appeals;
- percentage of the Agency's decisions annulled by the Administrative Court, compared to the total number of lawsuits against the decisions;
- number of appeals about "administrative silence" upon requests for free access to information to the Agency;
- the percentage of information that the ministries pro-actively published, in accordance with the obligations under the Law on Free Access to Information.⁵



These indicators include important aspects of the Agency for the Protection of Personal Data and Free Access to Information's work (hereinafter referred to as "the Agency"), but also the work of all authorities, which are obliged to comply with the Law on Free Access to Information. However, **despite their passports, all indicators are not sufficiently explained, which leads to an incomplete practice.**

For example, the Agency has the key responsibility to calculate the proactive publishing of information and its reports are an undisputed source of information for the Government regarding the fulfilment of indicators.

Proactive publishing is a good example of the administration's openness that is not easy to calculate, since it includes twelve items - types of information that should be available on state authorities' websites.⁶ As a result, the Agency has calculated that 88.88% of ministries

⁵ / Indicator passports for the Public Administration Reform Strategy 2016-2020, Government of Montenegro, April 2017 (submitted to the Institute Alternative based on the request for free access to information)

⁶ / Information that should be proactively published in accordance with Article 12 are: 1) a guide to accessing information; 2) public registers and public records; 3) programmes and work plans; 4) reports and other documents on the work and state of affairs in the areas within their own remits; 5) drafts, proposals and final texts of strategic documents, and plans and programmes for their implementation; 6) drafts and proposals of laws and other regulations, as well as opinions of experts about these regulations; 7) individual acts and contracts on disposing of funds from public revenues and state property; 8) list of civil servants and state employees, with their titles, 9) list of public officials and lists of calculations of their salaries and other earnings and fees related to the performance of public office; 10) decisions and other individual acts that are of importance for the rights, obligations and interests of third parties; 11) information to which access is granted upon request.

complied with the obligation of proactive publishing, never explicitly explaining how it reached the percentage, although it is not in line with the reports on inspection control made by the Agency itself. Namely, by conducting inspections between March 2017 and January 2018, the Agency established that a total of six ministries, which is more than 30 percent of the total of 18 ministries, failed to publish lists of employees within the relevant sections ("info/guides" or "free access to information"). This coincides somewhat with an advanced search of state administration bodies' websites conducted by the Institute Alternative in August 2017, when only 10 ministries out of a total of 18 published lists of their employees, which is one of the items subject to the obligation of proactive publishing under Article 12 of the Law on Free Access to Information. Additionally, of this number, four ministries failed to publish lists of public officials' wages.⁷

On the other hand, after the development of the Strategy and the indicator passports, in May 2017, the Parliament amended the Law on Free Access to Information, introducing additional restrictions on access to information. The amendments prescribe, *inter alia*, that the authority may restrict access to information or part of the information in case of **"business" or "tax secrets"**. The Institute Alternative has already faced the negative effects of these legal solutions by being denied access to information because it represented a tax secret. The access to copies of the reports on the implementation of the Tax Administration's Plan for Debt Management and Strengthening of the Collection Measures for the period 2017-2021 and information on the fulfilment of obligations from the contract on tax debt restructuring by 16 municipalities was rejected on the pretext that these were tax secrets. The Network for Affirmation of the NGO Sector (MANS) was denied access to other important information, including the records on inspection control of certain taxpayers, requests for exemption from customs duties for construction materials, equipment and installations for the construction of the Bar - Boljare highway in accordance with the relevant law⁸, decisions on tax debt restructure for a number of companies, information on data for bank accounts and foreign currency accounts of 15 political parties, payments on the basis of payment of corporate income tax.⁹

Official reports of the Agency and the Government on the implementation of the Strategy do not contain any information about the denied requests or appeals based on the described restriction. The information system of the Agency, which is used for monitoring

7 / Public Administration Reform in Montenegro: Good Progress or Modest Preparation? - DRAFT, Institute Alternative, April 2018

8 / Law on Bar-Boljare Highway, Official Gazette of Montenegro 52/2014^{*}

9 / Letter of the Network for Affirmation of NGO Sector

the situation in the area of free access to information, also does not comply with the law amendments and does not contain information on the second-instance procedures - appeals received by the Agency against the first-instance bodies and decisions issued upon appeals. Consequently, there are no comprehensive data indicating the outcomes of the new provision on access restriction due to tax or business secrets.

The examples described indicate the importance of consulting civil society, which is a significant beneficiary of the right to free access to information, in the reporting on the implementation of policies in this area. Reports of the Information Commissioner in Croatia, which has the authority to analyze the situation in this area, represent an example of good practice in this regard. The reports of this institution are based on multiple data sources, not exclusively obtained from official institutions. It is particularly positive that they are based on a methodology, which includes self-evaluation by those obliged to comply with the law, as well as reports by relevant civil society organizations.¹⁰ As a result, the report clearly points to the challenges and shortcomings in the application of the law, which may be the basis for its improvement.

ADMINISTRATIVE INSPECTORATE: WHAT AFTER THE ESTABLISHED IRREGULARITIES?

The work of Administrative Inspectorate should particularly contribute to achieving the following specific objective of the reform: "Improved control over the legality and appropriateness of public administration bodies' work", although its contribution has not been explicitly translated into indicators relevant for achieving the goal. On the contrary, activities related to the Administrative Inspectorate were reduced mainly to capacity building through increased number of employed inspectors in the first action plan, and study visits and trainings, in another - current action plan.

Regular reporting on the work of the Administrative Inspectorate is an integral part of the Ministry of Public Administration's competencies, whose organizational aspect also includes this Department. **However, proactive reporting is lacking detail, which makes it**

¹⁰ / See: Information Commissioner, Report on the implementation of the Law on the Right to access to Information for 2017, Zagreb, March 2018, available at: <http://www.pristupinfo.hr/dokumenti-i-publikacije/> (accessed on 23 April 2018)

impossible to estimate the actual performance of administrative inspectors on the ground.

The Ministry reported that a total number of inspections carried out in 2017 was 438, of which 69 were regular, 293 extraordinary and 76 control surveillance, although the plan of inspection control for that year was never adopted.¹¹ A total of 266 irregularities were identified, potentially indicating a high share of identified irregularities compared to the number of inspection controls carried out. However, official reports do not contain any information about the inspection controls following the establishment of irregularities, nor to what extent were orders by Administrative Inspectorate regarding the elimination of irregularities respected.

Consequently, **the final figures on the established irregularities do not say much.** Official reports do not proactively indicate certain points of constraint in the implementation of the Law on Administrative Procedure, the Law on Free Access to Information or the Law on Civil Servants and State Employees, the implementation of which is subject to the Administrative Inspectorate's control, and therefore should also play the role of "corrective mechanism" in their implementation. No specific entities subject to inspection control due to identified irregularities have been listed, which could affect the overall system of accountability.

After sending the request for free access to information, the Institute Alternative gained access to the monthly reports on the Administrative Inspectorate's work, which were not proactively published.¹² These reports, although in a tabular format, contain some of the essential information for assessing the impact of the inspection control: the entity (institution) and the subject of supervision, the date of supervision and a number of the case, the irregularities identified, control supervision and the measures taken. Monthly reports also contain descriptions of identified irregularities, such as, for example, unlawful employment, and unlawful use of seals or administrative silence. Therefore, the basis for improving the performance indicators of the Administrative Inspection and reporting on its impact on the accountability system in public administration already exists.

An appeal may be lodged against the decisions of the Administrative Inspectorate. However, apart from the total number of appeals lodged, there are no other details about the second-instance procedures and administrative disputes against the decision of the Administrative Inspectorate. These data could point to important complex aspects of the implementation of key regulations. Decisions to which the Institute Alternative had access indicate the importance of a qualitative assessment of the Administrative Inspectorate's work, without

¹¹ / Ministry of Public Administration, Report on work and state of affairs in administrative areas of the Ministry of Public Administration for 2017 with the report of the Human Resources Management Authority, March 2018, available at: http://www.gov.me/sjednice_vlade_2016/68 (accessed on 23 March 2018)

¹² / Ministry of Public Administration, Decision no: 01-069/18-UPJ-464/4, Podgorica, 4 May 2018

reducing its work to quantitative indicators only, without a more detailed explanation and narrative, which would point to key challenges in work and suggestions for improvement.¹³ As literature suggests, communicating the findings to citizens upon supervision plays a particularly important role. When the results of supervision are made available to the public, their positive effect on the performance of the authorities is evident.¹⁴

ON THE OUTCOME OF ADMINISTRATIVE DISPUTES: PING-PONGING WITH DATA

Even though **the Administrative Court** does not belong to the public administration system, **its reporting** should contain a set of data useful for the evaluation of work of both the court and the public administration, the decisions of which are revisited within the administrative dispute. In Montenegro, particularly in the context of the implementation of the new laws on administrative procedure and administrative dispute that started in July 2017, it is important to answer to what extent it is possible to monitor the efficiency of service delivery to citizens through reporting on the decisions of the Administrative Court.

One of the indicator passports for public administration reform monitoring is formulated so that it directly relates to the information held by the Administrative court: **"the average duration of the administrative dispute, indicated in months"**. This indicator is further elaborated so that it implies "the efficiency of the work of the Administrative Court, taking into consideration the duration of the disputes for the cases in which the decision was passed during the calendar year when the duration is measured".¹⁵ The main source of information is the Report on the Work of the Administrative Court.

The targeted duration of administrative dispute by 2020 is four months, while in the meantime, during 2017, the disputes lasted longer (nine months) than when the implementation of the Strategy had just started (seven months). Even though this information points out the challenges in the court's efficiency relating to one of the key issues not only for

13 / In the Second Report on the Implementation of the Public Administration Reform in Montenegro, we have pointed out the decision to adopt a complaint on the work of the Administrative Inspection, which has important implications for the de-politicization of the Montenegrin administration, because the annulled solution found irregularities when appointing persons who have been convicted of pre-election abuses to be acting heads of local self-government bodies. The decision was annulled because the position of Acting heads of local self-government bodies was not defined by the Law on Local Self-Government, which made it possible for people to be nominated for the positions for which they are de facto unworthy.

14 / Maria Gustavson, Does Good Auditing Generate Quality of the Government, The Quality of Government Institute, Department of Political Science, University of Gothenburg, Working paper series 2015:15

15 / Indicator passports for the Public Administration Reform Strategy 2016-2020, Government of Montenegro, April 2017 (submitted to the Institute Alternative based on the request for free access to information)

administration's accountability but also for the efficiency in service delivery, **it is necessary to answer to what extent the official reports allow monitoring of the efficiency and legality in different types of administrative procedures that preceded the dispute.** This is particularly one of the key questions both for the accountability of the administration and the efficiency of service delivery. It is also important to indicate the extent to which it is possible to gain not only data on the efficiency of the public administration but also on the legality of its work through an administrative dispute, since it represents one of the key elements of legal protection of citizens' system, therefore the system of the rule of law.

The new Law on Administrative Procedure stipulates reporting on administrative proceeding of all administrative bodies and its inclusion in a single report. In November 2018, the Ministry of Public Administration adopted a **Rulebook** which elaborated this legal obligation, specifying the necessary data and electronic format of the requested registries.¹⁶

The Rulebook prescribes reporting on the number of the Administrative Court's decisions, as well as the data on administrative dispute (number of filed complaints, overall number of the decisions by the Administrative Court of Montenegro, number of adopted and declined complaints). However, this document was not comprehensive enough when it comes to one of the main lack of today's system, i.e. **procrastination of procedures** by continuously repeating them and lack of meritorious/final decision of the second-instance bodies and Administrative Court. Monitoring of the degree of the final decision-making is foreseen, but only by second-instance bodies, and not directly by the Administrative Court.

Therefore, not all the essential information that is an indicator of both the quality of the administrative services delivered and respect of human rights are still gathered in one place. These relate to the number of repeated administrative procedures and disputes, on one hand, and the number of the final decisions and disputes and their final outcome, on the other hand. So far, the statistics indicated a higher number of repeated than finalized procedures. For example, according to the Report on the Work of the Administrative Court for 2017, this Court made only 16 final decisions.¹⁷ This could be prevented if the bodies that are subjects of the Administrative Court's decision were proactively publishing information regarding the final disputes and repeated procedures/disputes.

The Administrative Court is facing inadequate prerequisites for reporting on repeated

¹⁶ / Ministry of Public Administration, Rulebook on the content of the annual report on procedures in administrative affairs and closer content and method of keeping records of procedures in administrative affairs, 28 November 2017

¹⁷ / Administrative Court of Montenegro, Report on the work of Administrative Court for 2017, Podgorica, February 2018, available at: <http://sudovi.me/uscg/izvjestaji-o-radu/> (accessed on 20 April 2018)

disputes. The Law on Administrative Dispute does not include special obligations on reporting¹⁸, while the Law on Courts foresees the obligation of the courts to submit specific reports necessary for reporting to the European Union and international organisations, as well as for monitoring the implementation of the legislation.¹⁹

However, the advancement of registry of the courts in Montenegro represents a priority and is part of the Action Plan for Chapter 23 measures (Judiciary and Fundamental Rights) in the European Union negotiation process. In that respect, the Instructions on the production of statistical reports on the work of courts in accordance with the guidelines of the European Commission for the Efficiency of Justice (CEPEJ) were established.²⁰ The Instructions also relate to the administrative disputes subcategory, and puts most emphasis on the duration of resolution of cases via automatic data processing, as well as the duration of all the stages of the court procedure (for example, first-instance, second-instance, etc) and its registry within the judicial information system (PRIS).

The Judicial Reform Strategy in Montenegro for the period 2014-2018 indicates that the basic functions of PRIS are not fully developed. At the time of the drafting of the Strategy, statistical indicators had not yet provided full information on the duration of the trials and work of the courts, and there is a lack of reliable statistical system for measuring the charging cost collection rate and the duration of enforcement procedure.²¹ Although the system improvement was planned, the monitoring of the so-called ping-pong effect was not prioritised. This, however, should not be an incentive to the courts and other competent institutions to stop proactive reporting on the number of repeated cases, since one of the basic objectives of the new legislation was precisely to reduce the ping-pong effect²². The European Court of Human Rights also considers the duration of administrative dispute not only from the moment of filing a lawsuit that starts an administrative dispute, but from the moment when a citizen first lodged an appeal or used another kind of legal protection in relation to a specific administrative act.²³

18 / Law on Administrative Dispute (Official Gazette of Montenegro 054/16)

19 / Law on Courts (Official Gazette of Montenegro 011/15)

20 / The Judicial Council of Montenegro, Instructions on the production of statistical reports on the work of courts in accordance with the guidelines of the European Commission for the Efficiency of Justice (CEPEJ), Podgorica, December 2014

21 / Judicial Reform Strategy 2014-2018, Podgorica, March 2014

22 / Dr Ivan Koprić, Dr Polonca Kovač, Dr Vedran Đulabić, Dr Jasmina Džinić, Comparative Study Legal Remedies in Administrative Procedures in Western Balkans, Prepared and written by the Institute of Public Administration, Zagreb, Croatia for Regional School of Public Administration, Danilovgrad, Montenegro, 2016

23 / European Court of Human Rights, CASE OF BOŽIĆ v. CROATIA (Application no. 22457/02), JUDGMENT, Strasbourg, 29 June 2006

WHAT'S NEXT?

The competent institutions do not monitor the systemic effects of legalizing restrictions to the right to free access to information aiming at protecting tax and business secrets. The Administrative Inspectorate performs a certain number of inspection controls on an annual basis, but it does not report about the degree of fulfilment of the orders of this body to eliminate irregularities. The new legal framework for administrative procedure and administrative dispute aims to improve service delivery and achieve a more effective protection of citizens' rights. However, there is no explicit obligation, even within a strategic framework, to systematically monitor the final decision-making process and the duration of administrative disputes, not only in the individual stages of the court proceedings, or from the lowest to the highest instance, but also in the broader sense - from the initiation of an administrative procedure, i.e. dispute, until the final decision is made.

The indicator passports for the implementation of the Public Administration Reform Strategy in Montenegro partially addressed only one of these issues - the duration of administrative disputes. However, this one relevant indicator takes into account only the duration of disputes for cases in which a decision was made during the calendar year in which the duration was measured. A wider picture of the ping-pong effect as one of the main enemies of citizens in exercising their rights before the administration is thus lost, as it mostly concerns a long-term framework.

The literature already recognised the danger that in the event of the request to carry out a supervision of institutions by external actors, **the measurability of the activity becomes more important than the type of activities that these institutions implement.**²⁴ Similarly, the recently initiated processes of establishing good governance practices in Montenegro, which are unfortunately mainly encouraged by external actors through conditionality in the course of negotiations with the European Union, pose a threat that indicators, with often insufficiently clearly define values and formulas for calculations, will cast a shadow on the essence of the key challenges in the reform progress.

²⁴ / Maria Gustavson, Does Good Auditing Generate Quality of the Government, The Quality of Government Institute, Department of Political Science, University of Gothenburg, Working paper series 2015:15

RECOMMENDATIONS:

In addition to the predetermined indicators in the monitoring of the Public Administration Reform Strategy, reports on the implementation of the Strategy and the relevant institutions should also include information on the implementation of public policies and decisions passed outside the strategic framework, which undoubtedly influence the state of affairs in this area;

.....

The official information on the fulfilment of certain indicators by the competent institutions – those responsible for carrying out the activity, should contain a detailed explanation of the established value of the indicator and the calculation formula;

.....

In order to assess the state of affairs in their respective areas, the competent institutions should to a greater extent use credible reports produced by civil society organizations and the outputs of their research;

.....

In order to encourage result-oriented reporting, the laws should prescribe the obligation to report on the implementation of public policies within the provided competence;

.....

The Agency for the Protection of Personal Data should regularly and proactively report on all the reasoning behind denial of requests for free access to information, including tax and business secret, and on second-instance proceedings - appeals in relation to this legal provision, in order to monitor its outcomes on the transparency of the administration's work;

.....

Reports on deciding in administrative matters should contain detailed statistics on the Administrative Court's decisions, with an emphasis on the number and content of the final decisions regarding a specific administrative matter, that is, the number of decisions based on which the administrative matter was subject to a new decision-making process;

.....

.....

Reports on the work of the Administrative Inspectorate, among other things, should include:

- descriptions of identified irregularities during inspection controls and information on whether the identified irregularities have been eliminated within the legal deadlines,
 - data on appeals on the decisions of the Administrative Inspectorate and on the decisions of the Ministry of Public Administration regarding the appeals lodged, by the body to which the appeal relates.
-

The Administrative Court should introduce the practice of reporting for longer periods (for example, for a period of three or five years), instead once a year, in order to enable monitoring of the so-called ping-pong effect in administrative procedures and disputes.

.....

SOURCES:

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We function as a think tank or a research centre, focusing on the overarching areas of good governance, transparency and accountability. Our research and advocacy activities are structured within following programme strands: Public Administration, Accountable Public Finance, Parliamentary Programme, and Security and Defence. 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 is organised since 2012. Institute Alternative was granted with the licence to conduct research activities in the field of social sciences by the Ministry of Science in 2013.

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