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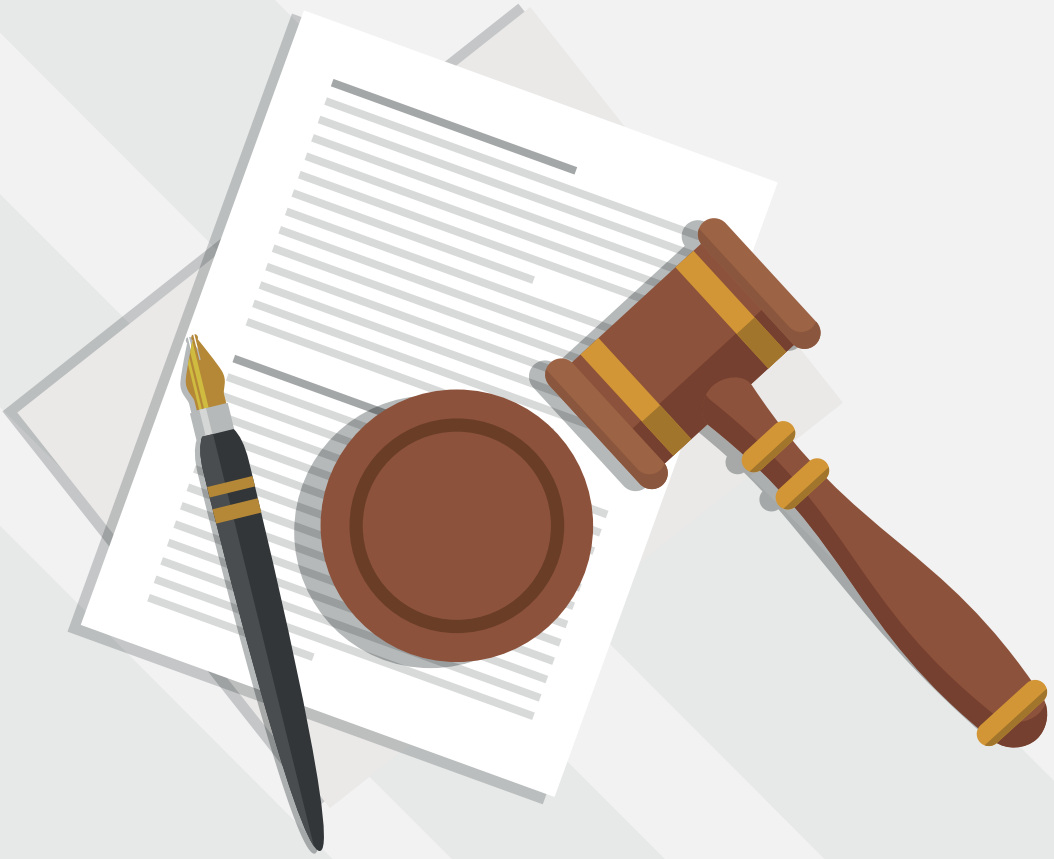
GAPS IN REPORTING ON REFORMS IN THE AREA OF RULE OF LAW



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INTRODUCTION

Even though the reforms in the area of rule of law started 20 years ago[1], the period of dynamic legislative and institutional changes has begun with preparations for opening negotiation chapters 23 and 24 in 2012. The adoption of the Action Plans for these two chapters in the following year, the contents of which was clearly and precisely guided by the recommendations contained in the screening reports, in the most comprehensive manner combines reform in a number of areas, like judicial reform, repression and preventive anti-corruption, all human rights, migration, asylum, border protection, the fight against organized crime, etc. [2]

Five years later, the question of "cumbersomeness" of the approach to reforms appears as one of the possible obstacles to better managed reforms which go into the core of problems in the given areas. The complexity of the areas, a large number of planned measures, the involvement of numerous institutions, related policy documents that are being implemented simultaneously, etc, have led to several parallel reporting processes. None of these reporting processes fully satisfied the criteria of good monitoring and evaluation, which are a prerequisite for quality management of reforms, timely response and correcting identified deficiencies.

The goal of this analysis is to point out to the gaps and omissions in reporting that make monitoring difficult and hamper the efforts towards reform processes attaining full impacts and expected effects. In addition, the analysis tends to provide an incentive for a shift in reporting from rigorously formalized (at the level of activities - "realized/unrealized") towards reporting focused on the impact and results and reporting which uses the process of collecting data to identify problems and obstacles towards attaining the results and ways to overcome them .

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1 / Example, the first program of judicial reform was adopted in 1998.

2 / The area of Justice, Freedom and Security in the framework of Chapter 24 is divided in 12 sub-areas. These are: asylum, migration, visas, external borders and the Schengen acquis, combating organized crime, combating drug abuse, anti-trafficking, combating terrorism, judicial cooperation in civil and commercial matters, judicial cooperation in criminal matters, police cooperation and customs cooperation.

Chapter 23, besides already mentioned, comprises the areas of rights of EU citizens and the cooperation of the Government with NGOs.

SOURCES OF INFORMATION AND THEIR "USE VALUE"

Rule of law is one of the broadest, but also the most challenging areas in the Montenegrin negotiations with the European Union because, among other things, it directly goes into the levers of power and broad discretion in decision-making that the Montenegrin administration traditionally held in several key areas.

Having in mind importance of the area of rule of law, the Government of Montenegro, as the bearer of reform in this area, regularly adopts several reports with information about the novelties in this area, out of which the following are key:

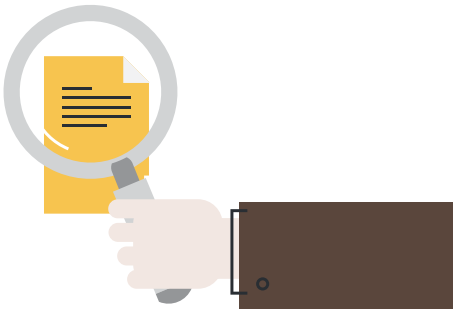
- Reports on the implementation of the Action Plans for Chapters 23 and 24, which are adopted twice a year;
- Tables with track record in Chapters 23 and 24, as Annexes to the Reports on the implementation of AP;
- Contributions to the European Commission report on Montenegro, which are also comprised twice a year;
- Reports on the implementation of sectoral strategies and action plans;
- Annual reports on the work of ministries and other state authorities, etc.

Judicial and Prosecutorial Council implement reform measures provided under the Government documents and submit information about this to the Government. They independently adopt the annual reports on the work of the courts and the State Prosecutor's Office.

In addition to the above-mentioned, the Government adopts ad hoc information and analyses on specific issues in these areas, while, on the other hand, the European Union has the possibility to collect the necessary data from the competent authorities directly within the so-called peer review missions.

While this represents a large number of sources of information about the state of play in the area of rule of law, with the constant tendency of proliferation and adoption of new documents, when we look at all this information from a qualitative point of view, there

are discrepancies between them, "useful vagueness", unspoken problems, "inflating" statistics by showing cases which are not of great social importance, irrelevant data, etc, which are all the reasons why the EU believes that the reporting must be improved.[3]



However, the key problem is that in the last several years none of these reporting tools has served as a mechanism for the intervention of the institutions and the Government in relation to the situation in the given areas, for instance by adopting conclusions and recommendations for the adoption of additional measures that would ensure the realization of the objectives.

The example which illustrates this practice is the realization of measures within the Chapter 23 "Judiciary and Fundamental Rights". In June 2017, publicly, at the meeting of the Working Group for this chapter, Institute Alternative reiterated its initiative to adopt additional measures to ensure fulfillment of the interim benchmarks in this chapter since the implementation of the remaining measures will not lead to this. Fulfillment of the interim benchmarks is a prerequisite for receiving final benchmarks from the European Commission for this chapter.

One of the arguments for this IA's initiative was that during the four-year period of the implementation of the Action Plan there were numerous obstacles to the successful implementation of measures and that during the application of the "new" legislation there were certain practical challenges which were pointed out to by the NGOs, as well as the representatives of the institutions covered by the reforms.

Besides IA's findings, data from the Government's report on the implementation of the Action Plan[4], which was deliberated at the same session, showed that the application of the law is still the exception rather than the rule. According to the Government's report, in the fifth year since the opening of negotiations, in the first six months of 2017, the key measures were not implemented or were implemented partially. (Examples of 20 such measures are available in Annex 1 of this report.)

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3 / The attitude expressed in the interview with the representative of the EU.

4 / The fifth semi-annual report on the implementation of the Action Plan for the Negotiating Chapter 23 - Judiciary and Fundamental Rights for the period January - June 2017, with the Second half-yearly report on the implementation of the Operational document for prevention of corruption in the areas of particular risk - Annex of the Action Plan for the Negotiating Chapter 23.

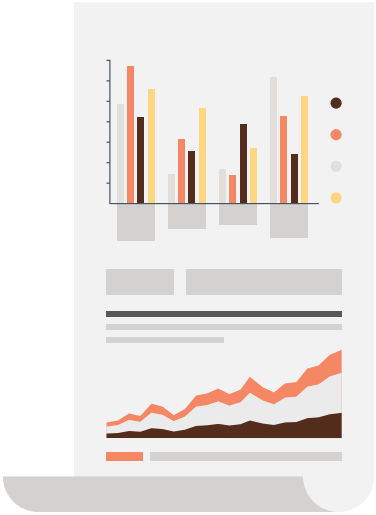
The question of accountability for lack of implementation or insufficiently successful implementation of the measures was not raised, nor were the causes analyzed or the additional measures to ensure full implementation proposed.

Paradoxically, the representatives of the Judiciary as well believe that the Action Plan is outdated and that the revision is necessary[5], but the Ministry of Justice, which coordinates the Working Group, shows no interest for improving the situation one year after the discussions about the IA's initiative.[6]

CONFLICTING STATISTICS

Although IA pointed out to the problems of reporting during the five years of duration of negotiations, the authorities failed to recognize interest in solving these problems.

Besides being incomprehensible, ambiguous and deliberately drafted in a way to make it impossible to track what happened in particular cases (when it comes to, for instance, corruption, organized crime, discrimination, attacks on journalists, etc.). This is true for all publicly available reports and the statistics kept in state authorities have been set up so that the work of interconnected bodies can not be monitored.



For example, the Police provide statistical reports on criminal offences, the State Prosecution reports on persons against whom proceedings have been initiated for specific criminal offenses, while courts report on cases (which may include more than one person and more than one criminal offense). Although it is clear that due to this kind of reporting, qualitative evaluation of work of these authorities can not be performed and that it can not be known which cases progressed from Police to "valid decision", there is no interest in making effort to improve the reporting and to standardize it.

5 / Information from the interview with the representatives of the judiciary and the attitude of the Association of Judges, publicly stated at a meeting of NGO representatives with the Chief Negotiator.

6 / Minutes from the meeting of the Working Group for Chapter 23.

Although the Government coordinates reporting of all authorities that keep different statistical data, it has taken no action in relation to these issues. That it is possible to overcome these differences shows the example of the Tripartite Commission[7] which operated from 2007 to 2012[8] and which coordinated the statistics of three authorities in charge of criminal offences in the area of corruption and organized crime.

EXAMPLES OF SUGGESTIVE REPORTING AND MISLEADING INFORMATION

In addition to inconsistency in the approach to reporting, there is also the problem of reporting which is misleading and does not show the real state of play in certain areas. One example is reporting where the difference between the frozen assets, temporarily and permanently confiscated assets and the cash part of the imposed sanction is not precisely explained, which is why a wrong impression about the success of financial investigations that does not fully correspond to the actual results is gained.

The second example is reporting in the area of free access to information where it is not explained that the data submitted by the Agency for Protection of Personal Data and Free Access to Information to the Working Group for Chapter 23 is not complete. Namely, this Agency does not receive data from all authorities, so the data it submits do not represent the accurate total number of free access to information requests submitted to all authorities, nor the accurate total number of requests which was responded to. In this regard, it was not acted to ensure that all authorities provide data to the Agency in accordance with the legal obligations that have.

The third example is reporting on the issues that envisage the right to an effective remedy and multistage decision-making. For example, on the disciplinary accountability of civil servants and state and police employees is being reported at the level of Dis-

7 / The Tripartite Commission was formed by the Decision of the Vice Prime-Minister for European Integration as of 10 October 2007, in order to enable analysis of cases of organized crime and corruption, as well as reporting and developing a uniform methodology of statistical indicators in the field of organized crime and corruption. The task of the Tripartite Commission is to perform statistical analysis of the data necessary for assessing the scope and prevalence of corruption criminal offenses and offenses related to organized crime, taking into account various criteria that the police, prosecution and courts take as grounds for monitoring and acting, based on the formulated unique methodology.

8 / The Tripartite Commission ceased to exist when the National Commission for implementation of the Strategy for fight against corruption and organized crime was abolished. The work of the National Commission continued through Working groups for Chapters 23 and 24, in terms of topics they cover, but not the method of functioning.

ciplinary Commission only, while the official reporting does not include the fact that numerous decisions are overturned by the Appeals Commission.

Finally, there are also substantive errors, as in the case when it was reported that a proceedings for determining disciplinary accountability of the State Prosecutor was reported, and there were no such cases in the reporting period.[9]

TRANSPARENCY AS A PREREQUISITE FOR PARTICIPATION

Although some progress has been made in terms of transparency of reporting, it is kept at the level of individual cases, and it is not a systemic approach to proactively ensure that the process is transparent.

Namely, the Law on Free Access to Information stipulates the obligation to publish all information submitted pursuant to this act. In this manner, and on the basis of free access to information requests submitted by IA, tables with track record in Chapters 23 and 24 were published. Although this data represents annexes to the report on the implementation of the AP for Chapters 23 and 24, they are not published with the reports published by the Government at its portal. However, state authorities did not initiate the practice of proactive publishing of this data every six months, but their publication is still waiting for someone's regular request for free access to information.

The second example of this kind are peer review reports prepared by the experts engaged by the European Union in which the situation in certain areas in the field of rule of law is being analyzed. After years of complaints[10] by IA against the Ministry of European Affairs (MEA), Institute Alternative received these reports on two occasions. On the basis of this decision, the reports have been published on the website of the

9 / „FOS story: Deceptive Government statistics on the road to EU", 4. 3. 2018, available at: https://fosmedia.me/infos/drustvo/fos-prica-varljiva-vladina-statistika-na-putu-ka-eu-foto

10 / More detail about this is available at: http://institut-alternativa.org/saopstenje-upravni-sud-usvojio-tuzbu-instituta-alternativa/

MEA. Although the court proceedings that IA led against MEA confirmed that there are no grounds for the confidentiality of these reports and even though their publication showed that no damage was inflicted upon their release, their proactive disclosure did not become a practice. However, unlike the tables with track record which are prepared every six months, barriers to regular request for submission of peer review report is the fact that the interested parties do not always know that a report is drawn up and that a field is analyzed by the experts of the European Commission, and they, therefore, can not request them.

Based on the peer review reports numerous decisions related to policy-making in Montenegro in the field of rule of law are being adopted and their lack of transparency prevents interested parties to participate in these processes on an equal basis.

In addition, since the process of preparation of peer review reports is insufficiently transparent, there is a risk that experts are mislead and lead to the wrong conclusions. An example is the expert report on the management of external borders in which the author states that the Ministry of Interior informed him that the Montenegrin border police lacks 600 police officers and he thus recommended urgent recruitment and training. However, the Ministry of Interior failed to explain that the Police has 280 unassigned employees[11] and that the Montenegrin police is the largest one in Europe per capita[12]. In this regard, it is crucial to note that this example shows that the space for debate about the rationality of certain recommendations decreases when there is an agreement between the Government and the EU about it, while other interested parties are excluded from the dialogue.

11 / More detailed information about unassigned police officers are available at: http://institut-alternativa.org/na-bijelom-hljebu-i-po-odlukama-na-crno/

12 / Comparative data on the number of Montenegrin police is available at: http://www.vijesti.me/vijesti/kriminal-opada-policija-se-ne-smanjuje-po-ubistvima-odmah-iza-kosova-992213

CONTRIBUTIONS TO THE EUROPEAN COMMISSION REPORT

The inadequacies of the previous reporting are best illustrated by the fact that the European Commission submitted to the Government 1289 questions at the end of 2017, with a recommendation to answer them through regular reporting. After the request for free access to information by IA, questions are also published on the website of MEA. However, when it comes to the area of rule of law, questions did not substantially affect the Government's Contribution and they are mostly not answered to.

Nevertheless, these Government contributions are informational and useful sources of information, especially when compared to the Reports on the implementation of Action Plans for Chapters 23 and 24, which due to their complex structure are often incomprehensible for the representatives of state bodies[13] and especially for representatives of the EU, which most often seek additional information besides these reports.[14]

AD HOC DYNAMIC PLAN? PARALLEL STRUCTURES

Despite the fact that the Government persistently boasts with the participation of civil society in Montenegrin negotiations, it stubbornly continues to create a parallel negotiating structure and parallel documents in relation to those in force. NGOs are regularly excluded from the preparation and monitoring of these documents. Namely, following the establishment of the Rule of Law Council, the Government adopted the Dynamic work plan on the interim and final benchmarks for the negotiating chapters of Montenegro with the European Union in February 2018,

13 / Comment from the interview.

14 / Interview with the representatives of the EU.

as a parallel structure to the working groups for Chapters 23 and 24 with completely the same purpose.[15]

Since the contents of the Plan is not known, it is not clear what is the connection between this document and the action plans for these Chapters nor whether new measures to encourage the implementation of standards are provided.

Although Montenegro is the first country to include representatives of the non-governmental organizations in the official negotiating structure, in particular in the working groups for negotiating chapters, NGOs were not publicly asked to participate in the preparation, even for those chapters they are formally members of. This applies to the rule of law areas, as well (Chapters 23 and 24[16]).

Although none of the reasons for the unavailability of this document can be found[17], until the publication of this analysis the Ministry of European Affairs did not submit this Plan to Institute Alternative. Ministry of Justice as the bearer of reforms in Chapter 23 also did not provide the Plan to IA, but forwarded the request to the MEA, although it is in factual possession of this document.

It is particularly interesting that the Government stipulated that the Ministry of European Affairs shall "report to the Government on the implementation of Dynamic Plan on a monthly basis". From February 2018 until the end of May 2018, on the agenda of the Government, there were no reports or information on the implementation of the Dynamic Plan and the Ministry of European Affairs has been abolished in the meantime.

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15 / Information on the special session of the Government when the Dynamic Plan was adopted (held on 16.2.2018): http://www.predsjednik.gov.me/vijesti/181768/Vlada-odrzala-Posebnu-sjednicu-na-temu-Evropske-agende-ispunjavanje-obaveza-evropske-integracije-duznost-je-svih-segmenata-drust.html

16 / In the Working Group for Chapter 24 there are no representatives from the non-governmental organizations.

17 / Besides there is no basis for this document to be inaccessible to citizens, paradoxically, it is also inaccessible to the members of the working groups, even to those members who have signed a statement of confidentiality that commits them to data confidentiality in accordance with the law, such as is the case with the representative of IA. In this manner, the members of the working groups from the NGOs are brought in an unequal position, for the umpteenth time.

REPORTING TO WHOM?

Since the opening of negotiations in Chapters 23 and 24, the Government and relevant ministries have never published information oriented towards informing citizens about the key results of the reforms in the context of these two chapters. In addition to the official reports being written in an extremely bureaucratic language, they are also very voluminous and incomprehensible. For instance, the Report on the implementation of the Action Plan for Chapter 23 for the period July-December 2017 has 352 pages. The Report on the implementation of the Operational document for the prevention of corruption in the areas of particular risk[18] has an additional 60 pages. However, they contain very little about the impact of implemented measures and activities, although this Action Plan includes a number of impact indicators.

Although these are the reform processes of the biggest importance to the citizens, reporting is generally directed towards the EU and towards meeting the expectations of the EU, while informing the citizens is neglected.

CONCLUSIONS AND RECOMMENDATIONS

Strengthening the criteria and greater accuracy in monitoring of the reforms by the European Union in all negotiating chapters, particularly in the field of rule of law as a horizontal issue and a precondition for the success of all other reforms, is in the interest of the citizens of Montenegro.

The experience of countries that have joined the EU in recent waves of enlargement (Hungary, Bulgaria, Romania, Poland, Croatia) shows that the accession is followed by fatigue of the political elites and administration, which then become much less sympathetic to democratic standards. Reforms, therefore, should lead to the state where the new way of functioning of institutions is a new "natural" state, and not fake practice that only serves the statistics of the European Commission. Consistent monitoring and

18 / Areas of particular risk are included in the Action Plan for Chapter 23, and the Operational document constitutes the Annex to the Action Plan and covers the areas of public procurement and privatization of urban planning, education, health, local government and police.

evaluation of reforms are tools for continuous improvement of the implementation of the reform and that is why they must be given more attention. In this respect, it is necessary to:

Begin work on the revision of the Action plans for Chapters 23 and 24, in which, among other things, impact indicators would be better formulated thus enabling monitoring of the effects of the reform, not only their implementation.

Publish the Dynamic action plan for interim and final benchmarks of the Montenegrin negotiating chapters with the EU.

The Government and ministries to proactively publish non-papers, peer review reports and tables with track record.

Publish the minutes of all meetings of the working groups for negotiation chapters.

Establish a working group modeled after the Tripartite Commission, which will deal with the harmonization of statistics of the police, prosecution and courts.

The negotiating structure should show more flexibility for cooperation and less formalism, and should establish an additional mechanism for participation of NGOs in working groups for negotiations, as observers rather than full members, especially when issues where NGOs can contribute are on the agenda.

Members of NGOs should be provided access to all relevant documents for monitoring reforms in the area of rule of law, including the analysis of EU experts.

Parallel to the official reports, the Government and ministries should prepare information for citizens on key results and changes in the field of rule of law written in simpler language.

ANNEX 1:

The degree of implementation of key measures within Chapter 23, according to the Government's report:

- New rules for promotion and evaluation of work of judges and state prosecutors are partially implemented.
- In the same period, there were 155 cases taken from the judges, but none of the judges lodged a complaint due to removal from the case. Therefore, there were no proceedings for determining accountability of the presidents of courts due to non-compliance with the Law on Courts with regard to taking assigned cases from the judges.
- Modernization and rationalization of the judicial network, which would include the reduction in the number of courts and judges, has been postponed to March 2019.
- The minimum number of judges that would justify the existence of the court was not determined.
- Equal workload of judges and number of cases according to established standards is still not ensured.
- In the magistrates' courts cases are not given by "random assignment", within the framework of PRIS.
- In the same period there were no proceedings against judges and state prosecutors for violations of the Code of Ethics nor had any judge or prosecutor been dismissed.
- A disciplinary measure was imposed against one judge and one prosecutor.
- According to PRIS data, the number of backlog cases in courts (older than three years) on 25 June 2017 was 4202.
- Although the Action Plan foresees a measure "to ensure the protection of witnesses in war crime cases, in accordance with the Code of Criminal Procedure, during the course of the proceedings and out of the proceedings, in accordance

with the Witness Protection Law", no witness has yet gained trust and requested protection.

- According to the data from the Central Personnel Records, the number of civil servants, i.e. state employees with disciplinary measures is: five for a serious disciplinary offense and two for a minor disciplinary offense.
- Privatization and Capital Projects Council, at the session held on 17.9.2013, adopted the Conclusion obliging the line ministries to submit all concluded privatization contracts with the aim of unifying and forming a database of concluded privatization contracts. To date, the database has not been published.
- During the reporting period, one criminal complaint was lodged against a police officer on grounds of reasonable suspicion that he had committed a criminal offense - abuse of office.
- In the period from January to June 2017, investigations into the corruption in the MOI and the Police Administration in two cases were carried out in cooperation with Special State Prosecution Office and Basic State Prosecution Office (the Bosfor case and the Šekspir case).
- Criminal charges have not been filed for high-level corruption in the MOI and the Police Administration.
- When the Parliament is in question, there were no control hearings in the reporting period, there was no initiative to open a parliamentary investigation, and no interpellations about the work of the Government were considered and discussed.
- No citizen complaints were submitted to the Anti-Corruption Committee and there were no laws that were amended as a result of the use of control mechanisms in the reporting period.
- In the period from January to June 2017, there were no cases of confiscation of property gain acquired through criminal acts based on convictions in cases of criminal offenses of corruption.
- No overdue media attacks have been resolved.
- A system for monitoring corruption cases from criminal prosecution to indictment has not yet been established.

ABOUT INSTITUTE ALTERNATIVE (IA)

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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