

Montenegro:

Elections aftermath and the European Commission's 2016 country progress reports

Srdjan Cvijic, Stevo Muk and Zlatko Vujovic¹

8 November 2016

KEY POINTS

- ▶ October elections were marked by numerous irregularities and were held in problematic conditions;
- ▶ The Montenegrin Government and European Commission need to focus more on reforms in the area of the rule of law;
- ▶ The EU accession process remains unclear and lacks transparency.

Parliamentary Elections 2016: systemic failures

Politically, Montenegro finds itself in a paradoxical situation. At one level it is the champion of European integration in the Western Balkans when it comes to progress in the EU accession negotiations, but it is also the only country in the region that has not experienced a change of government since the introduction of the multi-party system in 1990. The same individuals, families and political and business elites have been controlling the country's politics and economy for more than 25 years. This situation is likely to continue after the recently held 16 October parliamentary elections where the ruling Democratic Party of Socialists (DPS) managed once again to secure most seats in the parliament although falling short of securing an absolute majority.²

The systemic problems in Montenegro range from the macro to the micro. The process leading to the 16 October elections; government control of most of the media, as well as numerous irregularities on the day of the elections, suggest that in some aspects the elections were organized under arguably worse conditions than the widely contested 7 April 2013 presidential election. Notwithstanding the composition of the "temporary, transition government" which allowed the entry of three opposition parties - United Reform Action (URA), Democratic Alliance (DEMOS),

¹ Srdjan Cvijic, Senior Policy Analyst, Open Society European Policy Institute; Stevo Muk, President of the Managing Board, Institut Alternativa; Zlatko Vujovic, President of Governing Board, CeMI Center for Monitoring and Research.

² Coalition "Sigurnim Korakom" led by the ruling Democratic Party of Socialists 41,4% (36 MPs); Democratic Front 20,3% (18 MPs); Coalition "Kljuc" DEMOS, SNP, URA 11% (9MPs); Democrats of Montenegro 10% (8 MPs); Social Democratic Party 5,2% (4MPs); Socialdemocrats of Montenegro 3,2% (2 MPs) Bosniak Party 3,2% (2 MPs); Albanians Decisively Forca DUA AA 1,2% (1MP) and Croatian Democratic Initiative HGI 0,5% (1MP). Other parties and electoral list stayed below the threshold to enter the Parliament.

Social Democratic Party of Montenegro (SDP) - into government, a level playing field for all political parties did not exist prior to the elections.

For example, Boris Maric, Minister for labor and social protection in the transition Government, (from the civic URA movement), had not been given timely access to the social card database, internal audit reports and other crucial documents. The situation was worsened by the fact that all data relative to procurement for the last 5 years has been destroyed according to the Law on Archive and related bylaws. Likewise Goran Danilovic, Minister of internal affairs in the transition government from the political party DEMOS had not been given access to contracts on procurement of biometric personal IDs dating back to 2007.

The political arrangement on the eve of the parliamentary elections led to an inter-party consensus against further professionalization and partial depoliticization of the State Electoral Commission. While the State Audit Institution (SAI) has conducted audits of political party regular financing and campaign financing since 2011, the impact remains insignificant. The conduct of political parties prior to the October elections and in their aftermath confirm that cooption mechanisms of the ruling party remained powerful, but also that opposition parties tend to use the contestation of the legitimacy of the electoral process as a mere tool in the political struggle, but are unable or unwilling to work towards the improvement of the system – even if they are in a position to do so (as they were to an extent during the period of the transition government). As a result, corruption remains deeply rooted in the electoral process.

While the macro systemic failures set the background for electoral flaws, these are then exacerbated by the accumulation of additional specific failures in process.

For example, contrary to expectations, the procedure to select the president of the State Election Commission (SEC) did not include consultations with independent civil society organizations, thus resulting in the appointment of a person without expertise in electoral matters and with a background of relations with the ruling DPS party.

In some cases, there is a clear disconnect with legal standards. Personal IDs in Montenegro are not biometric. This is contrary to article 80 of the Law on Election of MPs and Councilors that states that the person shall be identified by “biometric ID card or passport.”³

In others, the technical and logistical infrastructure is inadequate. Computers at polling stations contained only data of voters for that particular polling station and were not connected to the overall register, thus allowing for possible manipulation (one voter could theoretically be registered on multiple locations without poll workers being able to verify this). Since ID cards are electronic but do not contain biometric data, it was theoretically relatively easy to falsify their content. Moreover, the procedure of using electoral indelible ink as a way to prevent multiple voting practices was not applied in this election.⁴ Combined, this indicates that multiple voting was theoretically easier than in previous elections, strengthening the popular perception that the conditions were not in place for free and fair elections.

The system of electronic identification of voters was implemented for the first time in Montenegro, at the national level, during the October parliamentary elections. Yet training for members of the polling stations and electoral administration enabling them to operate the software was not organized. This resulted in problems in several polling stations across the country.

³ Provision of the Law is clear - the person shall be identified by “biometric ID card or passport”. SEC adopted opinion on the identification of voters by ID cards, stating mainly how the Law on ID Cards shall be applied. There are no additional explanations on how this provision of the Law on Elections shall be applied in practice. This controversial opinion of the SEC produced problems in practice.

⁴ For the first time in Montenegro with the exception of the first multi-party elections in 1990.

The SEC has not carried out regular checks of the voters' register, allowing for irregularities to appear and potentially leaving space for abuse. The electronic register of the residence of the citizens from which the voters register is formed has not been updated since 2010 (meaning that administrative units used outdated data).

During the development of the new voter register, not only did the SEC not conduct regular updates, but the location of the polling station was changed for more than 120,000 voters (more than 20% of the electorate). The Ministry of Interior conducted an intensive campaign of informing citizens about changes of their polling stations prior to the election. Still, over 20,000 voters did not receive the official letters from the ministry on the day of the election. This resulted in a number of practical problems on Election Day. Additionally, more than 5 polling stations were not created in accordance with the provisions of the Law (i.e. having more than 1000 voters per each polling station). The Ministry of Interior established an information phone-line to provide status details from the voter register.

The SEC is responsible for verifying the electoral lists. Yet, it lacks technical capacities to verify the authenticity of citizens' signatures needed for a political party to run in the election. In accordance with findings from the observation of work of the SEC, there were a number of cases where citizens have signed more than one electoral list - which is not in accordance with the Law on Elections of MPs. It is evident that parties were in a position to misuse personal data from the voter register for the purpose of gathering support for their electoral lists.

The Agency for Anti-corruption (ASK) does not have a proactive role in monitoring political financing. The Law on Financing of Political Entities and Election Campaigns obliges political parties to open a special account for financing of their electoral campaigns. A more proactive role of the ASK to determine the source of campaign funding is needed in the future.⁵ Content of analytical cards (part of political parties reports), delivered by political parties and state institutions, was not complete prior to the elections and remains incomplete without a proactive engagement of the ASK. A purpose of payment category should be introduced in order to help identify possible fraud.

The Coordinating Body for Election Process Monitoring, formed on the initiative of Interior Minister Goran Danilovic had a limited role in the process of verification and updating of data in the voters register. Its institutional capability was derogated from the very beginning by refusal of the ruling DPS to allow parties from the leading coalition to take a meaningful part in the monitoring processes. Furthermore, there have been obstructions from the Ministry of Interior directorates that failed to provide requested information on voter registration list in a timely manner. In parallel, cooperation and coordination between the SEC (controlled by the ruling DPS party) and the Ministry of Interior regarding preparatory activities for the elections were limited.

Nevertheless, some improvements have been made in the run-up to the elections. These have enabled representatives of NGOs to get direct access to the voter register data in a controlled environment, as well as to take an initiative to make a procedure of the electronic identification system (The Automated Fingerprint Identification System - AFIS) unique identity check. Yet, these changes were achieved too late in the process to meaningfully improve the regularity of the electoral process.

It is important to add that the provisions of the Law on Election of Councillors and Representatives that govern the distribution of seats are rather imprecise and incomplete, especially when it comes to minority representation. Hence the electoral legislation (i.e. the system of differential legal

⁵ Recently, ASK announced that it is going to initiate legal proceedings against the following political subjects: DF, "Kljuc" Coalition, SD and CDU for not respecting the provisions of the Law on financing of political subjects and election campaigns in relation to their obligation to open separate account for the purpose of financing of election campaign activities.

thresholds for different national minorities) places Roma in an unequal position to other minorities similar in size (e.g. Croatian minority makes 0.97% of the population, Roma 1.03%). Whereas Croats are mentioned in the Constitution as a minority this is not the case with Roma. The electoral threshold applicable for minorities that make less than 4% of the population of Montenegro (i.e. Croats) is 0.35%, whereas the threshold applicable for Roma is 0.7%, the same as for Minorities that make between 4-15% of the population.⁶

Apart from systemic failures in preparation of the election we witnessed numerous irregularities on Election Day itself. From the temporary ban of Viber, WhatsApp and similar online communication tools by the government Agency for Electronic Communications and Postal Services, to serious documented allegations of vote-buying practices by the ruling DPS, to the chaotic situation in some polling stations.

Irregularities registered by the monitoring mission of CeMI⁷ can be grouped as follows: lack of expertise of the members of the electoral commission at polling stations resulting in delays in several polling stations; technical failure of the system for the electronic verification of IDs at 4 polling stations in Podgorica, Cetinje and Kotor; registered violation of the secrecy of voting at several polling stations across the country; as well as problems related to identification of voters, caused by disorderly voter register.⁸

All indications suggest that the establishment of the temporary, transitional government had little impact on loosening the grip of the ruling DPS on the state, resources and consequently the electoral process.

Rule of Law: Ignoring weak progress

Action Plans

The backdrop to electoral inadequacies, flaws and failures is the minimal progress on rule of law. Local NGOs have highlighted a decline in the government's and, to an extent, the European Commission's attention to the implementation of Chapter 23 (Judiciary and fundamental rights) and Chapter 24 (Justice, freedom and security) of the Action Plans (APs).

Moreover, both the format of the APs (being either outdated or unclear) and the timeline of the reporting process suffer from serious deficiencies. Additionally, there is an increasing disregard of the input of CSOs to the negotiations process, leading to mediocre and doubtfully actionable

⁶ D'Hondt formula is used for the allocation of seats to political parties, with the use of differentiated legal electoral threshold. Only those lists that exceed projected electoral threshold will be included in the process of seats' allocation using this method. The party list must receive at least 3% of valid votes in order to participate in the process of allocation of seats, which is the legal electoral threshold in Montenegro. Different rules are applied for minority lists. The right of the positive discrimination for minorities is defined by Article 94, paragraph 2 item 1, is being used by lists of members of the specific – same minority people, more precisely, same minority national communication, with participation of up to 15% of total population in constituency, according to the data in last population census.

⁷ Center for Monitoring and Research has established an observation mission for monitoring the parliamentary elections in Montenegro in October 2016. The mission was consisted of: Head of Mission, Deputy Head of Mission, Legal Expert, Election Expert, Media Analyst. In addition to the Core Team, CeMI engaged teams of LTOs (long-term observers), as well as regional and local coordinators. CeMI also has accredited over 1,400 STOs (short-term observers) on E-day, in order to provide full coverage of polling stations. Observation Mission CeMI monitored the electoral process from the day of announcement of elections on July 11, 2016. Through its election observation mission (EOM), CeMI has been monitoring the electoral process since elections were announced on 11 of July 2016. The key conclusion of CeMI observation mission is that irregularities in the work of polling boards, disorderly electoral register, problems in the functioning of certain Municipal election commissions, as well as lack of competence of the State election commission to effectively organize and train the lower levels of electoral administration raise concern, even though their volume and character didn't jeopardize the overall regularity of the election process. Even though there are conditions for the elections to be repeated in some specific polling stations.

⁸ For more detailed information, see: "[CeMI Civil monitoring of the elections – Montenegro 2016: The Statement on the Preliminary Conclusions and Findings of Parliamentary and Local Elections held on 16th October 2016](#)".

documents. The Operational Plan (Annex of the AP 23 for high corruption risk areas) is a perfect example of this.

Special Prosecutor: a rare example of progress

The picture is not universally negative. The Special Prosecutor and his team remain an isolated example of progress in the rule of law field and should be applauded. This, in spite of the fact that the scope of his team's action remains limited to corruption prosecutions in Budva.

Encouraging the Special Prosecutor and supporting his efforts to further assert his role vis-à-vis other government institutions should be *the* priority in further EU accession negotiations. Nonetheless, the Chief Public Prosecutor and the Special Prosecutor face constant obstructions to their work.

The work of the Special Prosecutor's Office is hampered by a lack of cooperation from senior managers at the police force (i.e. the Director of Police appointed and controlled by the ruling DPS party). Additionally, salary cuts to the support staff of the Special Prosecutor certainly do not contribute to the efficiency of the office. Inability to fully rely on the work of the investigators assigned to work in the Office of the Special Prosecutor (due to the fact that they still remain engaged by other employers within the state apparatus) continues to present a serious limiting factor. Apart from the insufficient empowerment of the staff in the Office of the Special Prosecutor, serious problems are encountered in the lack of adequate IT infrastructure, inability to directly access the databases of other state authorities, as well as the lack of reliability of databases in general. Moreover, the inadequate legislative framework is a barrier to an efficient investigation. The fact that the Agency for Anti-corruption and Administration for Prevention of Money Laundering and Terrorist Financing remain to a large extent dormant⁹ certainly does not present a generally enabling environment for the work of the Office of the Special Prosecutor.

Agency for Anti-corruption fails to probe

Progress by the Special Contrast is in direct contrast to the performance of the Agency for Anti-corruption (ASK) – unequivocal failure. Bylaws adopted by ASK are misleading, unclear and inconsistent, and generally of poor quality. The data from the end of June 2016 show that ASK managed to verify only 20% of submitted assets declarations of public officials, thus demonstrating an obvious and severe lack of ASK's ex officio and proactive actions.

For example, during the local elections in Tivat, as well as during the early stage of parliamentary election process, ASK served only as financial data recipient not fulfilling its core function: one of the main government institutions tasked with the responsibility to conduct supervision over the implementation of regulations governing lobbying and financing of political entities and their election campaigns.

In the "Ramada hotel" case, with the public exposure of misuse of state funds for party purposes, the main whistleblower lost his job after disclosing corrupt practices. The intervention of Prime Minister Djukanovic at a very early stage of the investigation of this case has discouraged other potential whistleblowers in the country.

Corruption, especially political corruption, is accompanied by the total hijacking of the state by political parties. This situation changed very little from the period preceding Montenegro's EU accession talks. Legislative changes aimed to curb the politicisation of the state did not have a desired impact and are still paving the way for state capture by political parties in power.¹⁰ Most

⁹ Illustrated by the failure of the Kalic case including consequences related to temporary asset recovery.

¹⁰ [Professionalisation of Senior Civil Service in Montenegro: Between State and Politics](#), Podgorica, December 2014

appointments for independent and professional positions in the state administration are political placements. This is the case for almost all senior civil servants, heads of units in the government and ministries, managerial positions in other public services, educational institutions (from elementary schools to university), as well as oversight institutions (such as ASK, State Audit Institution, Agency for the Protection of Personal Data and the Free Access to Information etc.)

Transparency (or lack of) in the EU accession negotiations process:

In other countries the EU accession process has been noted for its negative side-effects and obscure or opaque processes. Montenegro is no different. Many of the flaws at the national level are compounded by the EU.

Fast tracking of regulations and strategies, followed by their weak implementation and superficial revision processes, indicates the inadequacy of the entire approach to reforms and the absence of the law and policy making capacity of Montenegro's institutions. Regulatory Impact Assessment (RIA) of bills in the Montenegrin parliament is missing. As a consequence, certain legislative solutions produce serious and unnecessary financial consequences (e.g. the new law on public sector wages). Both government (Law on wages in public sector) and opposition (amendments to the Law on children and social protection) laws and amendments lack appropriate accurate assessment of fiscal impact.

Concerning the Public Financial Management (PFM), the lack of a proactive role and capacity of the Protector of Property and Legal Interest of Montenegro resulted in poor performance of the institution, producing at times increased budgetary costs for the organization. Additionally, institutional and legal position of the Protector remains unclear. This situation curtails both transparency and accountability of the PFM (lack of an appropriate oversight and unwarranted delays in reporting).¹¹

NGOs sitting in the Council for NGO Development,¹² have refused to take part in this body until the written guarantees of the Chair of the Council are submitted to ensure that conclusions made will be presented at government sessions in original form (i.e. that the NGO input will be presented in a form unaltered by the interpretations/conclusions of the Chair).

Peer Review Mission Reports, expert opinions on draft legislation, Reports of TAIEX¹³ experts and reports prepared with twinning projects remain inaccessible to stakeholders in Montenegro outside of the executive branch. Even the Parliament does not have full access to these documents. Despite attempts of CSOs to get access to the above mentioned documents, the European Commission (EC) refused to do so claiming ownership of the documents and thus a right to decide who receives them.

¹¹ Budget transparency in Montenegro is at a low level. Data on actual financial transactions are either unavailable, declared confidential or presented in such a manner that obscures more than it reveals (through the so called analytical cards, that have no single legal definition, but are interpreted by each body separately). Discretionary expenditures from the budget reserve have been declared confidential, "Internal" degree, providing space for doubt that they have been misused for party purposes.

¹² The Council has a president (Government Representative) and 22 members (11 from the Government and 11 from NGOs) appointed by the Government for a period of 4 years. The main goals of the Council are to monitor the implementation of the Strategy for Development of NGOs in Montenegro with its Action Plan for the implementation for the period 2014-2016; as well as the implementation of the Action Plan for Chapter 23, Judiciary and Fundamental Rights with reference to the cooperation with the NGOs. The Council is also tasked to give opinions on draft legislation, initiate adoption of new legislation or amendments to the existing one etc.

¹³ TAIEX is the Technical Assistance and Information Exchange instrument of the European Commission. http://ec.europa.eu/enlargement/tenders/taix/index_en.htm

Due to the fact that the agreed goals defined in the Action Plans remain sufficiently vague, the government is able to manipulate the achieved results and interpret them in an unrealistic way to other relevant stakeholders in the process and to the general public. Oversight of the reports by NGOs and the general public would make potential manipulations much more difficult.

The lack of full transparency of the EU accession process is especially damaging for the EC since the government will be able to continue presenting the outcomes of the accession negotiation processes in an overly positive light, thus creating unwarranted expectation amongst the general public when it comes to the assessment of the fulfilment of the interim/closing benchmarks of negotiating chapters. When these are not met, or when the chapters are not closed, the public will be surprised and the government will be more inclined to blame the EC (i.e. political considerations within the EU) for the blocking of the negotiations. As a consequence the legitimacy of the EU could be even further eroded amongst the population in Montenegro.

Recommendations to the European Commission, European Parliament and the EU Member States

On Elections:

- Apply pressure on the Montenegrin government to ensure the full implementation of the Law on Election of MPs and Councilors (Article 80) stating that the person shall be identified by “biometric ID card or passport”: issue biometric ID cards for all citizens and create the conditions for the full implementation of the Automated Fingerprint Identification System – AFIS (including the ID photo matching system);
- Offer support to the Montenegrin government to start the process of verification of data in the voter register and other related state registers (register of permanent residency, register of citizens), as well as assure constant updating by the Ministry of the Interior and other competent authorities. In relation to this, assure that the government fully enables representatives of civil society to have direct access to the voter register data;
- Encourage the government to create an integrated electronic voter register that enables the automatic exchange of data between individual polling stations and ensures that multiple voting is impossible;
- Push for the reform of the State Election Commission: transformation of the SEC from the "party delegate" model to an institution composed of recognised professionals with international experience and CSO representatives. Exclude political party representatives from the decision making process of the SEC; and
- Provide support to the government for the timely and appropriate training of SEC workers and future poll worker trainers for the implementation of the Automated Fingerprint Identification System – AFIS;
- Encourage the Parliament of Montenegro to improve the legislation and control mechanisms of the funding of political parties as well as prevent foreign campaign financing.

On the Rule of Law:

- Support the full depoliticization of the independent oversight institutions in the country;
- Focus attention and mainstream financial support on the anti-corruption institutions such as the Special Prosecutor, to encourage investigations of financial crimes;

-
- Deprioritize encouragement of soft and preventive mechanisms that depend exclusively on the will of heads of target institutions (integrity plans, internal control etc.) and focus on issues that bring concrete results in the anti-corruption field;
 - Insist that deferred prosecution agreements are not practiced in cases of corruption (in the wider sense of the definition) and in cases involving public officials; and
 - Insist that plea-bargain verdicts and deferred prosecution agreements are rendered publicly accessible with no exception (as is the case with other verdicts).

On the EU accession negotiation process:

- Provide thorough and transparent assessment of progress in the EU accession negotiations in the chapters relevant to good governance and rule of law;
- Strengthen the objectivity of indicators assessing progress in the implementation of objectives in these fields;
- Render public all the benchmarks for the assessment of progress in the fields of rule of law and good governance;
- Allow access for all relevant stakeholders (CSOs, the parliament) to Peer Review Mission reports, expert opinions on draft legislation, reports of TAIEX experts, reports prepared with twinning projects. Instead of directing local NGOs towards EU Regulation EC 1409/2001 regarding public access, the issue should be resolved through a political decision of the European Commission;
- Strengthen support to CSOs working in the rule of law and good governance fields through core and institutional support; and
- To the European Parliament's Delegation to the EU-Montenegro Stabilisation and Association Parliamentary Committee:
 - Invite representatives of CSOs as speakers to the EP-Montenegro Interparliamentary Meetings and include the NGOs (through the Council for NGO Development) in the elaboration of the agenda for these meetings.

Open Society European Policy Institute contact on Western Balkans – Srdjan Cvijic, Senior Policy Analyst
srdjan.cvijic@opensocietyfoundations.org

Tel: +32 (0)2 505 4646

Centre for Monitoring and Research – CeMI – Zlatko Vujovic, President of the Governing Board
zlatko@cemi.co.me

Tel/fax: +382 (0) 20 511 424

Institute Alternative – IA – Stevo Muk, President of the Governing Board
stevo@institut-alternativa.org

Tel/fac: +382 20 268 686



The Open Society European Policy Institute (OSEPI) is the EU policy arm of the Open Society Foundations. We work to influence and inform EU policies, funding and external action to ensure that open society values are at the heart of what the European Union does, both inside and outside its borders.

OSEPI brings into EU policy debates evidence, argument and recommendations drawn from the work of the Open Society Foundations in more than 100 countries.

The foundations' priorities include human rights, justice and accountability pursued through a wide range of policy areas including education, health, media, information, arts and culture.

ia

Institute Alternative (IA) is a non-governmental organization, established in September 2007 by a group of citizens with experience in civil society, public administration and business sector.

IA mission is to contribute to strengthening of democracy and good governance through research and policy analysis as well as monitoring of public institutions performance.

IA objectives are to increase the quality of work, accountability and transparency, efficiency of public institutions and public officials; to encourage open, public, constructive and well-argument discussions on important policy issues; raising public awareness about important policy issues, strengthening the capacity of all sectors in the state and society for the development of public policies.



The Centre for Monitoring and Research – CeMI is a nongovernmental, non profitable organization, founded in March 2000, whose main goal is to provide infrastructural and expert support for continuous monitoring of the overall process of transition in Montenegro.

During its long and consistent work CeMI has contributed to changing social and political circumstances in which it was created, and consequently expanded the scope of its work towards legislative initiatives, public opinion polls, fight against corruption and respect of human rights and freedoms.