

FOR A BETTER LAW ON THE GOVERNMENT

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In September 2023 - almost a year after the public debate on the draft Law on the Government ended, some civil society organisations had the opportunity to familiarise themselves with the updated version of the draft of this legal act, albeit exclusively indirectly, through the expert mission of the Venice Commission, which is to submit comments on the said draft.¹

The new draft, which we are now familiar with, contains several notable changes compared to the previous version, which was submitted for public debate, and in relation to which Institute Alternative issued a series of comments, most of which were rejected (six proposals were rejected, two were partially adopted, and one was adopted).

Expecting the 44th Government to invest further into the development of this act, and discussions in the new convocation of the Parliament, we underline the need to review certain provisions. We welcome that some of our earlier proposals have been adopted. **It is particularly important to strengthen the aspect of accountability to the Parliament**, in the context of which the long-awaited Law on the Parliament will play a paramount role. We also believe that some progress can be made through the new obligation for the Government to submit annual work reports to the Parliament, which has not been the case thus far. Additionally, **provisions related to transparency of the Government** represent an important step in the right direction, because the definition of provisions in relation to the visibility of the work of the Government will not leave too much discretionary power to each subsequent Government to determine the scope of available information about its work.

However, certain provisions could complicate the implementation of the Law in practice, and others are burdened by ambiguities and vagueness, which can frustrate some of the fundamental objectives of this act, especially the ones concerning the regulation of the work of a Government whose mandate has expired, and the intermediate space between two governments.²

1 Draft Law on the Government, version dated August 28, 2023.

2 Information on the preparation of the Draft Law on the Government, which was discussed at a Government session in May 2022, clearly indicated the need for special provisions of this law to be dedicated to regulating the powers of the Government and its members from the end of their mandate until the election of a new Government (“technical mandate”). “Previous experience of the work of governments in a ‘technical mandate’ has shown that it is necessary to clearly regulate the legal space between the work of two governments, considering that there must not be a legal vacuum from the end of the mandate of the old Government until the election of a new one”. See: Government of Montenegro, Information on the preparation of the Draft Law on Government, May 2022.

What should be further reviewed?

- The draft that was presented for public debate, and its updated version, contain a provision that shortens the constitutionally defined period for proposing the composition and program of the Government, by the appointed prime minister designate, from 90 to 30 days:

The Prime Minister - designate must submit to the Parliament the program and proposal for the composition of the Government within 30 days of the day the President of Montenegro initially suggested the Prime Minister - designate.

Bearing in mind the wider context of political instability in Montenegro, caused by the weakening of the historically established political monopolies, we believe that this provision, despite its intention to improve efficiency of the Government formation process, may produce additional barriers in practice. Even in more developed countries, especially parliamentary democracies, the process of government formation often lasts longer than a month; for example, the process of government formation in the Netherlands in 2017 lasted as long as 225 days.³ Although the provision implies several attempts (iterations) if the Government is not formed within the deadline defined by the Constitution, we believe that it is inappropriate for the Montenegrin context. Additionally, we would like to remind the reader that, in the meantime, amendments to the Law on the President entered into force, which the Constitutional Court did not challenge in its decision, and which elaborate the procedure for the PM designate proposing the composition and program of the Government.⁴

- Compared to the original draft, which defined the structure of the Government in greater detail, in terms of the number and titles of ministries, the updated version prescribes an upper limit for the number of ministries (15), and only prescribes mandatory ministries, including:
 1. justice;
 2. defence;
 3. internal affairs;
 4. finance;
 5. foreign affairs;
 6. health;
 7. public administration.

These ministries and their mandates may not merge with other administrative areas. This, however, renders one of the original intentions of the Law meaningless, as it still leaves the possibility for drastic reorganisation of other ministries. Prescribing the upper limit for the permitted number of ministries in itself is not a guarantee of optimisation of the Government, because it is to a greater extent a matter of internal organisation and rationalisation of the number of employees.

³ Deutsche Welle, Dutch government sworn in after record talks, 26 October 2017. Available at: <https://www.dw.com/en/netherlands-dutch-pm-mark-rutte-and-government-sworn-in-after-record-coalition-talks/a-41126473>

⁴ Law on the President of Montenegro (“Official Gazette of Montenegro”, no. 042/18 from 29/06/2018, 140/22 from 16/12/2022, 076/23 from 27/07/2023).

It is also worth noting that none of the versions of the Draft Law on the Government was accompanied by an appropriate rationale and regulatory impact assessment. Such an analysis should clearly indicate the link between the proposed structure of the Government and the key sectors of public policies, as well as the criteria for the special emphasis on the seven departments, included in the latest version of the draft. In principle, we support the original approach to prescribe a more permanent structure of the Government, and to enable the required flexibility in the implementation of the exposé and the Government's political program through ministries without portfolio. However, we believe that neither draft considered all the arguments presented at the public debate, nor did they consider parallel processes that should be implemented through the Public Administration Reform Strategy, such as comprehensive analyses of the functionality of the public administration system in Montenegro. Therefore, the argumentation for the special emphasis placed on the seven departments remains unclear.

We previously outlined the importance of defining **possible offices and services of the Government**, either by prescribing them in the Law itself, or by determining the criteria for their establishment.⁵ Alternatively, a separate Article in the law should prescribe that the establishment of offices and services must be coordinated with the presentation of the mandate and the work program of the Government. Along with the proposal to establish an office and service, the Government should be obliged to submit a rationale with an **assessment of their fiscal effect**.

This suggestion was rejected in the report from the public debate, with the explanation that the matter should not be regulated by law, although comparative legal acts, which we referred to, such as the Croatian Law on the Government, contain a list of key offices that function under the Government.⁶ In addition, we did not receive an adequate response to our alternative proposal, that the establishment of new offices and services be accompanied by an assessment of their fiscal effect, and that it be harmonised with the exposé of the PM designate and the work program of the Government.

- In relation to provisions governing the relationship between the Government and the Parliament, we previously pointed out that the need to prescribe the basic elements that any Opinion of the Government on a draft law, initiated by MPs, should contain:

“The Government’s opinion on a draft law, other acts and regulations must contain an assessment of their financial effects and an analysis of the impact of the proposal on the environment, as well as the position of various social groups, especially in relation to gender and their socio-economic status.”

Such a provision would additionally strengthen current obligations in decision making and policy adoption, to take into account different aspects of potential impacts. The current practice of the Government submitting opinions on legislative proposals by MPs contains examples of evident difference in quality and of unequal treatment of legislative initiatives, which may be conditioned by the political affiliation of their proponents, and which should

5 For example, ahead of the formation of the 43rd Government, there was an announcement on formation of offices for foreign investments, gender equality and digital transformation, which was not accompanied by a rationale or analysis that would be available to MPs when voting on the Government. Subsequently, these offices were not formed.

6 Law on the Government of the Republic of Croatia (consolidated text of the law), NN 150/11, 119/14, 93/16, 116/18, 80/22, available at: <https://www.zakon.hr/z/170/Zakon-o-Vladi-Republike-Hrvatske>

not be allowed.⁷ This proposal also acknowledges the increase in legislative initiatives by MPs in the 27th convocation of the Parliament. **The share of bills initiated by MPs doubled from 24% in 2019 to 48% in 2022.**⁸ Our suggestion was rejected with the rationale that the opinion cannot have a strict form, although the spirit of our suggestion was not such but, rather, pointed to the key elements that should be taken into account when considering each legal proposal.

- The original draft of the Law did not contain any anticorruption provisions or provisions that seek to strengthen the integrity of the executive power. The updated draft introduces an obligation for the Government to adopt a Code of Ethics, as well as of all members of the Government to adhere to the ethical standards and rules of conduct specified in the Code.

However, such a provision only partially addresses international standards and creates an additional legal basis for the Guidelines for Strengthening the Ethics and Integrity of High-ranking Officials of the Executive Power, which the Government adopted in 2021.⁹ The GRECO Evaluation Report on Montenegro, published in 2022, outlined the importance of prescribing and implementing procedures for integrity checks of the holders of executive power, as well as special advisors to the Prime Minister and Deputy Prime Minister, who are nominated at their discretion without any prescribed checks, in line with the current legal framework.¹⁰ We retain the opinion that the Law on the Government should define provisions in line with these recommendations, in order to further strengthen the integrity of the members of the Government.

- The draft Law on the Government introduces a notable improvement in terms of the transparency of work, and we especially welcome the provisions by which the Government undertakes to publish the headings of the items on the agenda, marked as internal, and the minutes of the Government sessions, which is in line with our previous recommendations.

Nevertheless, it is still necessary to prescribe the obligation of taking and publishing minutes from the sessions of **temporary and permanent working bodies of the Government and the Government Inner Cabinet**. Bearing in mind the controversies that accompanied the work of these bodies in the previous period, including provision of housing loans on favourable terms, and the views of the Inner Cabinet on the justification of employment in the public administration during the implementation of the Public Administration Optimisation Plan in 2018 - 2020, we believe that an additional improvement in terms of transparency would be achieved through increased publicity of the work of the commissions formed by the Government, as well as all temporary and advisory bodies and the Cabinet.

7 Milena Muk, “*The Parliament passes the Decisions, but what is the procedure like*”, Institute Alternative, September 2021, available at:

<https://institut-alternativa.org/en/the-parliament-passes-the-decisions-but-what-is-the-procedure-like/>

8 Institute Alternative, *MPs legislative initiatives on the rise*, June 27, 2023. Available at:

<https://institut-alternativa.org/en/mps-legislative-initiatives-on-the-rise/>

9 Government of Montenegro, *Guidelines for Strengthening the Ethics and Integrity of High-ranking Officials of the Executive Power*, September 2021.

10 GRECO (Group of States against Corruption), *FIFTH EVALUATION ROUND: Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies*, 25 October 2022, available at:

<https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/1680a8a108>

- The updated Draft Law retained the provision according to which the Government whose mandate has expired is prohibited from making appointments and giving consent to appointments that are not in line with regular or ongoing procedures. Institute Alternative previously outlined that this restriction does not include all public officials, taking into account that it does not apply to nominations and consents to nominations. We also pointed out that a paragraph should be added to limit the possibility of filling vacant positions, unless procedures have already been initiated in line with the Government's Personnel Plan for the current year. These provisions would additionally prevent abuse in a broader sense. **The opportunities for employing civil servants in lower positions, thereby abusing employment exceptions to the Personnel Plan, the adoption of which is mandatory for all Government ministries and services, would be further limited.**

The report from the public debate rejected these proposals with the rationale that, bearing in mind that such a provision is proposed for the first time, the measure is enough restrictive. However, as with the prescribed "mandatory" ministries, the relevant Ministry of Public Administration did not provide additional arguments, especially regarding the distinction between appointments and nominations. For example, decisions on nominations are made for directors of public institutions or state secretaries and special advisors in the Government, while appointments apply to general directors in ministries.

Additionally, bearing in mind the rather wide range of employment exceptions to the Personnel Plan, we believe that the relevant restrictions, as defined in the previous drafts of the Law on Government, will be largely rendered pointless in practice. The Law on Civil Servants and State Employees states that "exceptionally, the head of a state authority may adopt a decision on initiating procedure for filling a job position that was not envisaged by the Personnel Plan (...) provided that the position remained vacant after a civil servant and/or state employee left the state authority within a given calendar year, or if, due to organisational changes and/or the necessity of filling a position, consent of the Government is obtained".¹¹ In practice, organisational changes are made on the basis of a rather arbitrary procedure. As we pointed out in our [Map of Risk of Inappropriate Influences and Corruption in Public Sector Employment](#), the methodology for preparing acts on internal organisation and systematisation is not being observed. Equally, changes to acts on internal organisation and systematisation are, in practice, not accompanied by an analytical-documentary basis relevant for determining the merits and justification of the proposed changes. A state administration body is obliged to obtain an opinion from the Ministry of Public Administration, the Administration for Human Resources and the Ministry of Finance in relation to a proposal of the act on internal organisation and systematisation.¹² In practice, these opinions are not sufficiently standardised, nor are they always aimed at establishing an optimal internal organisation of state bodies. Furthermore, the very formulation of "need to fill a position" is too vague. If our suggestions were accepted, only timely planned recruitments, which are already provided for in the Personnel Plan, could be carried out, and thus the terms "regular procedures" and "procedures that are ongoing, or have already been initiated" would be more precisely defined in terms of employment in state bodies that are subject to the obligation to adopt Personnel Plans.

11 Law on Civil Servants and State Employees (*"Official Gazette of Montenegro"*, No. 002/18 from 10/01/2018, 034/19 from 21/06/2019, 008/21 from 26/01/2021).

12 A detailed overview of employment procedures in the public sector is available on an Institute Alternative webpage - [Map of Risk of Inappropriate Influences and Corruption in Public Sector Employment](https://mapa-rizika.me): <https://mapa-rizika.me>

- During the public debate, we underscored the importance of the Law on Government regulating the handover of duties between the Government whose mandate has expired and the new Government, which is taking over.

In the context of frequent changes of the executive power, we underlined that the need for prescribing an additional obligation to report on the situation and problems encountered by the new Government, because regular annual reporting cannot substitute this type of dedicated reporting during handover of duties. It should also be noted that ministries are late in preparing their regular annual reports. For example, the report on the work of the Ministry of Education for 2021 was not available in October 2022, while it is often the case that ministries report on their work for the previous year only after the end of the first quarter of the current year. These situations of not having clear reports with an overview of the context in key areas can negatively affect the transition period during the change of government, which is why the Law on Government should address them.

Although the report from the public debate indicated that our proposal was partially adopted, the updated Draft of the Law on Government did not standardise the process of handover of duties.

Only clear provisions guarantee good implementation

Certain burning issues that we outlined in this overview, confirm that efforts to regulate disputed situations from the current practice through the Law on Government are only half-hearted.

Therefore, we once again call on the Government and MPs to ensure that the Law on Government addresses the following issues:

- Organisation of the Government and criteria for the establishment of ministries and offices, and other services that function under the Government;
- Disallowing the process of filling vacant positions by a Government whose mandate has expired, outside the scope of the previously adopted Personnel Plan;
- Nominations and consent to nominations that are not in line with regular procedures and ongoing, i.e. already initiated procedures;
- The deadline for proposing the composition and program of the Government in accordance with the Constitution and the adopted amendments to the Law on the President, which have not been challenged by the Constitutional Court in the meantime;
- Transparency of permanent and temporary working bodies of the Government;
- Mandatory elements of the Government's Opinion on proposed laws, initiated by the MPs;
- Provisions on anticorruption, and integrity checks of members of the Government and their advisors;
- Handover of duties.