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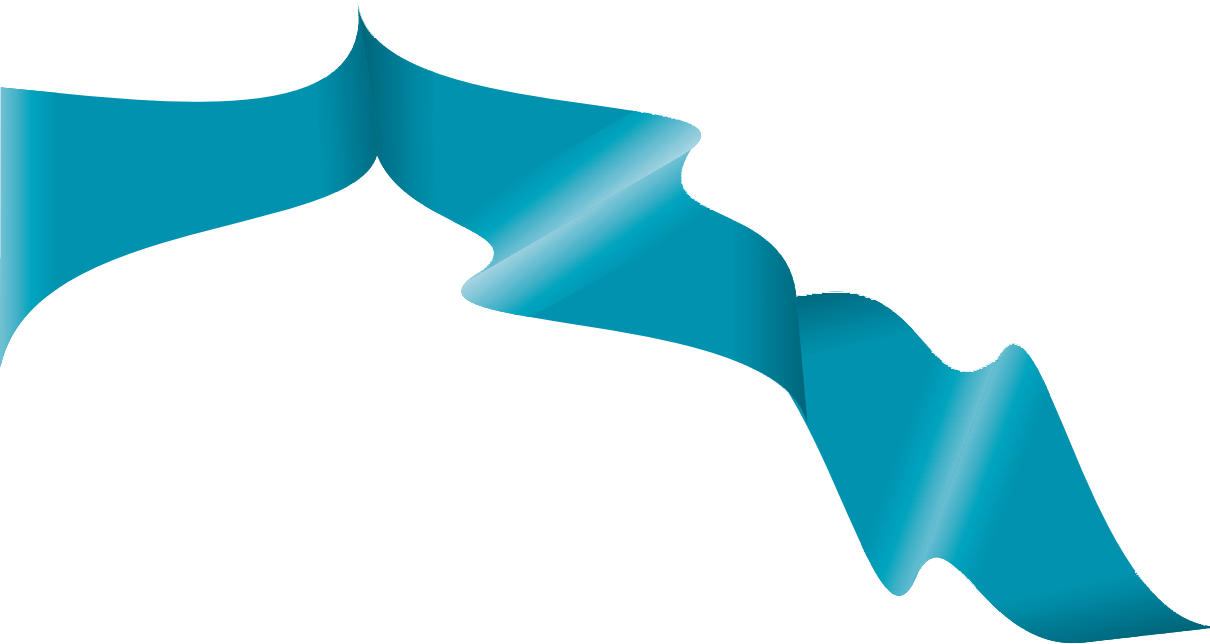
Regional School  
of Public Administration

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# INTEGRITY AND GOOD GOVERNANCE IN THE WESTERN BALKANS

Prepared and written by the Institute of Comparative Law,  
Belgrade, Serbia for  
Regional School of Public Administration, Danilovgrad, Montenegro  
With the support of the Centre for Integrity in the Defence Sector  
of the Kingdom of Norway (CIDS)

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Prepared and written by the Institute  
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in the Defence Sector of the Kingdom of Norway (CIDS)

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The Purpose of ReSPA is to support governments in the Western Balkan region develop better public administration, public services and overall governance systems for their citizens and businesses, and prepare them for membership in the European Union.

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\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244.

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# Introduction

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Fostering integrity and reducing corruption are important elements in the process of strengthening the capacities of promoting good governance and democracy based on the rule of law. Corruption undermines democratic nature of government and reduces trust of citizens in the government institutional framework. This is especially relevant for the countries of the Western Balkans, which are still in the process of building their democratic systems and aligning their legislation and institutional systems with the EU requirements in order to be able to become fully effective EU member states.

Despite the importance of these observations, there are few systematic comparative studies on building integrity in the Western Balkans countries. The present publication aims to redress this state of affairs by providing an insight into international standards in the area of integrity building, existing national integrity legal frameworks and best international and regional practices that can be used to address the key challenges to integrity in the public domain.

This publication also aims at providing practical and feasible instructions and solutions that can be used to help public sector employees implement the relevant international standards in their everyday work.

The integrity building mechanisms examined within the scope of this book are as follows:

- 1) Conflicts of interest handling arrangements;
- 2) Financial management and control and internal audit arrangements.
- 3) Transparency/freedom of information arrangements;
- 4) Administrative procedures.

In addition, the comparative analysis also addresses two high-risk areas susceptible to corruption/unethical behaviour:

- 1) Human resources management (HRM) and
- 2) Public procurement;

The selection of integrity-building mechanisms especially takes into account the requirements that Western Balkan countries need to consider in order to align their legislation, institutional framework and practices with OECD/SIGMA

Principles of Public Administration.<sup>1</sup> These principles constitute an important part of the European Commission's annual assessment of (potential) EU candidate states' readiness for EU membership.

The publication covers the following countries:

- Albania;
- Bosnia and Herzegovina (state level of Bosnia and Herzegovina and entities, Federation of Bosnia and Herzegovina and Republic of Srpska);
- Kosovo\*;
- Macedonia;<sup>2</sup>
- Montenegro and
- Serbia.

Each of the identified integrity building mechanisms (conflict of interest; internal financial control, free access to public information and administrative procedures;), as well as the two high-risk areas that are very susceptible to corruption (human resource management and public procurement), are analysed in separate chapters – each of which consists of six parts:

- 1) Overview of integrity challenges in the Western Balkans related to the given integrity building mechanism;
- 2) Brief overview of relevant international standards;
- 3) Comparative overview of the national legal frameworks (Constitution, primary and secondary legislation) in each selected country (with the cut off date of 31 October 2017);
- 4) Analysis of the key problem-areas in implementation of international standards and national legislation in the Western Balkans;
- 5) Best international and regional practices that could be used for training of public sector employees in the respective areas;
- 6) Practical training exercises.

In addition, the final chapter offers some practical answers and guidance on the ever-present dilemma on how a public sector employee should act if he/she gets illegal instructions from his/her superior.

Most of the chapters in the publication address the issues relevant for all public sector employees, i.e., public officials.<sup>3</sup> The first chapter on human

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1 SIGMA, *Principles of Public Administration*, OECD Publishing, Paris, 2014.

2 The former Yugoslav Republic of Macedonia is ReSPA Member as Macedonia

3 In the following chapters, the term "public official" is used in two ways: in its wider sense (which includes civil servants, local government officials, employees of health, education,

resources management, however, focuses only on civil servants, defined in accordance with the relevant civil service national legislation.

This publication presents a comprehensive and flexible tool that can be used for both initial and continuous training of public sector employees in all the countries included in the analysis. The ReSPA Working Groups on Ethics and Integrity – Integrity and Conflict of Interest has recommended that this publication be used for training of public sector employees in the Western Balkan countries. It may also be used as a textbook at universities and other educational institutions.

The publication clearly demonstrates the legacy of similar economic and social backgrounds and administrative organisations in the Western Balkans. Another important observation is directly related to the trend of fast-paced transposition of legislation that was not developed indigenously but was imported from outside. For the countries of the Western Balkans and for their public officials these two elements involve common challenges. Learning from each others' experiences may, therefore, help push the countries concerned forward in successfully completing their common goal of instituting democracy and an accountable public service that their citizens could trust.

And finally, a good legal setup that on paper looks like a robust good governance system is not enough. Efficient *implementation* of the legal rules is the key – they have to be lived by in practice. As experience shows in the Western Balkans and elsewhere, that may prove to be the most difficult part – to *internalise* a new administrative culture takes time.

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culture institutions etc.) and a narrow sense (office holders and high ranking civil servants). This distinction is especially relevant for the chapter on conflict of interest. In this chapter, in order to avoid confusion, the concept of a public official in the narrow sense (officials who are subject to the special conflict of interest rules such as asset declaration) is defined separately for each analysed country in a footnote.



# Human Resources Management in the Civil Service

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## 1. HUMAN RESOURCE MANAGEMENT IN THE CIVIL SERVICE AND INTEGRITY CHALLENGES IN THE WESTERN BALKANS

The human resource management system considerably affects the way in which civil service operates. Abuses in the human resource management system are an important source of corruption and may undermine civil servants' motivation, impartiality and professionalism, jeopardising efficiency of the entire civil service.

Corruption can have a negative effect on all aspects of human resource management (HRM). Nepotism and abuse of authority can be present both during the recruitment and selection process, and in the course of performance appraisal, promotion, rewarding and training. Even though the causes of corruption in HRM are numerous, in principle, it is enabled by excessive discretionary powers and the lack of integrity among key actors within the HRM system.

In order for one institution to become "resistant to corruption" in this field, it is important to ensure the observance of the merit principle, that is, of professional competence as the key measure at all stages of human resource management. In a wider sense, the merit system can be defined as the establishment of a particular civil service value system that is based on professionalism, competence and integrity, the objective of which is to serve the public interest. The respect of the merit principle assumes that all HRM processes, including the recruitment, appraisal, promotion, career development, rewarding, training and termination of employment, will be based on the professional capacities and competences of civil servants.

If human resource management is carried out in line with the merit principle and in line with ethical values,<sup>1</sup> civil servants will be motivated to work and

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1 Ethical values in the civil service are standards of behaviour expected of all civil servants, which include integrity, honesty, objectivity and impartiality. See, for example: *the*

do their best. An institution that has a developed HRM system will attract and employ quality staff, with adequate competences and the potential for advancement. To remain qualified such personnel would continuously advance their knowledge, skills and abilities. The system would motivate and keep quality staff through fair promotions and a merit-based reward system. As a result, the employees would work professionally, responsibly and conscientiously, thereby strengthening the reputation of the civil service. In short, a sound public HRM system would promote actions taken in accordance with the professionalism and accountability principles, in line with the purpose for which the public institution in question has been established.

Overall, human resource management practices in the civil service in the Western Balkans countries are still not sufficiently based on merit. Even with a sound regulatory framework on paper, human resource management rules are not effectively implemented and internalised. This has negative effects on civil servants' motivation and the effectiveness of the entire civil service.

Despite well-conceived recruitment and selection procedures, new personnel in the civil service is often not sufficiently qualified and is hired on the grounds of political, family or other types of "connections". Even in cases when mandatory written exams are prescribed, which should ideally guarantee impartiality in decision-making, the exam questions might have been leaked to a certain candidate in advance.<sup>2</sup> When interviews are conducted, it is even easier to ensure that candidates who have political or other kinds of support are rated better than those who do not enjoy such support. It is not unusual that some candidates first enter into employment under temporary arrangements (without a competitive procedure), which gives them a comparative advantage during the subsequent competition procedure, due to familiarity with the job and inside connections.<sup>3</sup>

In times of transition and economic crises, when the options for employment in the private sector may be limited, the pressures to obtain employment in the civil service may be particularly strong. In such conditions, the impact of the mechanisms that do not promote employment based on professional competences alone will be even more detrimental.

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*Constitutional Reform and Governance Act 2010 (C 25)*, Chapter 25, The Stationary Office Limited UK, 2010, available at: <http://www.legislation.gov.uk/ukpga/2010/25/contents>.

2 J. M. Sahling *et al*, "Improving the Implementation of Merit Recruitment Procedures in the Western Balkans: Analysis and Recommendations", paper presented at the ReSPA annual conference in Danolovgrad, November 2015, p. 30.

3 A. Rabrenovic, "Izazovi procesa zapošljavanja u državnoj službi u BiH – pravni i sociološki aspekt" [Recruitment and Selection Challenges in the BiH Civil Service – Legal and Sociological Aspect], *Strani pravni život [Foreign Legal Life]*, No. 2/2015, pp. 117–130.

A major problem in most Western Balkans countries is the widespread politicisation of senior managerial positions in the civil service.<sup>4</sup> After a change of government following elections, persons holding senior managerial positions are often replaced by “trusted people” of the new political elite, despite a well-established regulatory framework.<sup>5</sup> Such politicisation has adverse effects on continuity, quality of work, and to a large extent the stability of the civil service.

Another problem is the hierarchical structure of the civil service itself, which tends to restrict civil servants’ career development. Most civil service systems in the Western Balkan countries are position-based systems, where career development is possible only if there is a higher vacant position. Promotion to higher positions, however, often depends on factors such as personal or political connections.

All the above problems demonstrate a need for integrity strengthening in the civil service HRM systems in the Western Balkan countries. Special attention needs to be paid to the process of recruitment and selection, as well as performance appraisal and promotion, as these are the key elements of the ethical framework of any HRM system. Therefore, this chapter shall consider in greater detail the international standards, regulatory framework and practices in these three fields.

## 2. WHAT ARE THE KEY INTERNATIONAL STANDARDS IN THE AREA OF HRM?

### 2.1. EU – OECD/SIGMA PUBLIC ADMINISTRATION PRINCIPLES ON HRM

The fundamental internationally accepted standard in human resources management in the civil service is the merit principle. As mentioned earlier, the merit principle can be defined in a broad sense as the establishment of a separate civil service value system that is based on professionalism, competence and integrity, aimed at achieving public interest objectives.<sup>6</sup>

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4 Senior managerial positions in the civil service in most Western Balkan countries include the following posts: secretary-general of a ministry, head of department in a ministry and director general of an administrative body (administration, agency, institute etc).

5 SIGMA, *Monitoring Report: the Principles of Public Administration, Serbia*, OECD Publishing, Paris, 2017, p. 75.

6 P. W. Ingraham, “Building Bridges over Troubled Waters: Merit as a Guide”, *Public Administration Review*, 2006, pp. 486–495.

The merit system presents a counterbalance to the political loyalty system, known informally as the “spoils system”, in which civil service positions are obtained more or less exclusively based on political affiliations, rather than on professional merit.<sup>7</sup> All additional standards applied in HRM are indisputably founded on the merit principle.

Due to national differences, the area of human resources management is usually not a subject of international conventions or a part of the EU *acquis communautaire*. However, over the past decades, several important international legal acts have been adopted providing an international legal basis for regulation in this field. Furthermore, this area is also governed by the so-called “soft *acquis*”, which constitutes common standards as agreed by the EU Member States, and which influences indirectly the development of the national law.<sup>8</sup> Although they are not legally binding, these standards can have a significant practical impact on the countries seeking EU membership, as the European Commission uses them as benchmarks for assessing progress towards membership.

In order to develop the European HRM requirements further, the European Commission’s and OECD SIGMA programme<sup>9</sup> has developed a document named “The Principles of Public Administration”,<sup>10</sup> in which a prominent place has been given to the field human resources management in the civil/public service. The basic standards are defined in a quite detailed manner, in line with European legislation, and they also involve good European practices in the field of HRM and other public administration fields. The key human resources management principles in the public service developed by OECD/SIGMA are presented in the table below.

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7 The establishment of the “spoils system”, which is present in many countries even to this date, is interesting because it was actually considered to be the best public administration organisation system in a democratic society. President of United States Jackson thus pointed that: “In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another”. However, the functioning of the “spoils system” caused a massive expansion of corruption and abuse in the United States federal administration system and rapid abandoning of this system. See: E. Pusić, *Nauka o upravi* [Administrative Science], 1973, pp. 178–179.

8 M. Keune, “EU Enlargement and Social Standards – Exporting the European Social Model?”, *The European Union and the Social Dimension of Globalisation, How the EU Influences the World* (J. Orbie, L. Tortell), Routledge, 2009, p. 52.

9 Having recognised the importance of a well-regulated and organised public administration for the fulfilment of the membership requirements in all sectoral areas, in 1992, EU cooperated with the Organisation for Economic Cooperation and Development (OECD) to establish the SIGMA programme (SIGMA – *Support for Improvement in Governance and Management*). The Programme aims at providing support to public administration reform activities in (potential) candidate states. The programme is mainly funded by the EU and represents one of the main instruments of the European Commission in promoting capacity development in public administration in Central and Eastern Europe, as well as a technical assistance service to the candidate states.

10 SIGMA, *Principles of Public Administration*, OECD publishing, Paris, 2014.



Table 1: OECD/SIGMA Public Administration Principles related to Public Service and Human Resources Management

Principle 1: The scope of public service is adequate, clearly defined and applied in practice.
Principle 2: The policy and legal framework for a professional and coherent public service are established and applied in practice; the institutional set-up enables consistent and effective human resource management practices across the public service.
Principle 3: The recruitment of public servants is based on merit and equal treatment in all its phases; the criteria for demotion and termination of public servants are explicit.
Principle 4: Direct or indirect political influence on senior managerial positions in the public service is prevented.
Principle 5: The public servants remuneration system is based on the job classification; it is fair and transparent
Principle 6: The professional development of public servants is ensured; this includes regular training, fair performance appraisal and mobility, and promotion based on objective and transparent criteria and merit.
Principle 7: Measures for promoting integrity and preventing corruption and ensuring discipline in the public service are in place.

Since the beginning of the EU accession process involving Central and South-East Europe countries, OECD/SIGMA has been regularly assessing the human resources management situation in (potential) candidate countries; the same was done in new EU Member States both before and after their full-fledged membership.<sup>11</sup> Such extensive experience enables OECD/SIGMA not only to develop further but also to update its standards and recommendations in the field of human resources management, and thus improve their assessment of the countries that are currently preparing for the EU membership.<sup>12</sup>

Due to their importance for achieving integrity in the civil service, this chapter will elaborate in further detail the following underlying OECD/SIGMA principles: Principle 3, relative to recruitment and termination of employment of public servants; Principle 4, covering senior managerial positions; and Principle 6, which concerns performance appraisal, promotion and mobility of public servants. It should be noted that principle 6 also includes training of civil servants. However, due to the limited scope of this analysis, it falls outside of the span of this publication.

11 J. Meyer-Sahling, "Sustainability of Civil Service Reforms in Central and Eastern Europe Five Years After EU Accession", Sigma Papers, No. 44, 2009, OECD Publishing, Paris, 2009, available at: [10.1787/5kml60pvjmbq-en](https://doi.org/10.1787/5kml60pvjmbq-en) [15 September 2016].

12 SIGMA working paper, "Can Civil Service Reforms Last? The European Union's 5th Enlargement and Future Policy Orientations", [http://www.rcpar.org/mediaupload/publications/2010/20100311\\_SIGMA\\_can\\_reforms\\_last.pdf](http://www.rcpar.org/mediaupload/publications/2010/20100311_SIGMA_can_reforms_last.pdf), 4 December, 2012.

### 2.1.1. Recruitment and selection and termination of employment

Recruitment by way of competition is the fundamental pre-condition of a merit-based civil service system. How a public competition is managed is particularly important, as it should provide all citizens with the right to work in the public administration on equal terms. That right, in fact, is also constitutionally granted in many European countries. In addition, public competitions provide the possibility of finding the best-suited job seekers in the labour market.

According to good European practice, particularly promoted by OECD/SIGMA, competition procedures need to be carried out by recruitment and selection committees, operating independently from political influence. Members of these committees should possess a solid understanding of the tasks to be performed in the advertised position, along with the skills and competence required. They also need to be trained on selection procedures to be able to implement them in a consistent and fair fashion. The committees should be broadly composed and comprise representatives of various ethnicities, genders, etc.

The selection criteria should include knowledge, skills and personal characteristics (competences) required for performing the tasks of any advertised vacancy. Apart from the knowledge of the field relevant for the job, and the ability to acquire new knowledge, it is very important to include in the selection criteria the skills and abilities of the candidate that are necessary for efficiently carrying out of the work in practice.

Good practice in the EU member states demonstrates the advantages of conducting structured interviews during the later stages of the selection process.<sup>13</sup> Structured interviews include determining beforehand questions that all applicants will be asked, making detailed notes during interviews and a pre-determined system for evaluating answers received from applicants. In practice, structured interviews have proven to be an exceptionally valid job performance indicator for newly employed personnel, and the information obtained through structured interviews has proven to be more accurate and reliable than that obtained through unstructured interviews. As noted in practice — the skills needed to develop and ask relevant questions are not a natural gift, and therefore it is necessary that committee members (whether they are civil servants or external) attend training courses to learn how to ask proper questions that will enable them to test the knowledge, skills and

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13 See: Department of Finance and Personnel, *Recruitment Policy and Procedures Manual, Northern Ireland Civil Service*, 2010.

personal suitability of applicants, and how to evaluate the answers they receive during interviews.

In order to ensure the rights of all competing applicants, they should have the right to appeal the final competition results to a second-instance administration body (normally, an appeals commission), and to bring their case to a competent court in case they consider that they have been treated unfairly or illegally (for example, an administrative court). Furthermore, the criteria for demotion and termination of employment of a public servant should be explicitly stated by law. As in the case of appointment, civil servants should have the right of appeal decisions on their demotion and employment termination.

More specific recruitment standards included in OECD/SIGMA's Principles of Public Administration are provided in the table below.

Table 2: OECD/SIGMA Principles of Public Administration  
– Recruitment and dismissal standards

**Principle 3: The recruitment of public servants is based on merit and equal treatment in all its phases; the criteria for demotion and termination of public servants are explicit.**

1. The recruitment and selection process in the public service, either external or internal and regardless of the category/class of public servant, is clearly based on merit, equal opportunity and open competition. The public service law shall clearly establish that any form of recruitment and selection not based on merit is considered legally invalid.
2. The general eligibility criteria for applying for public service positions and general provisions ensuring the quality of the recruitment are established in the primary legislation. The detailed procedures, including specific requirements for entering each category/class, job descriptions, competency profiles, selection methods, scoring systems and composition of selection committees, are covered mainly by secondary legislation.
3. The recruitment and selection committees include persons with expertise and experience in assessing different sets of skills and competences of candidates for public service positions, with no political interference.
4. Candidates who are not appointed have the right to appeal unfair recruitment decisions.
5. Protection against discrimination of persons applying to and those employed in the public service is ensured by all administrative bodies, in accordance with the principle of equal treatment. In the cases explicitly established in the law, comprehensive equitable representation is taken into account in the recruitment process.
6. The objective criteria for demotion of public servants and termination of the public service relationship are explicitly established in the law. These provisions are applied in practice.
7. Public servants have the right to appeal against unfair demotion and dismissal.

## 2.1.2. Senior managerial positions

Although depoliticisation of senior managerial positions has long been one of the main principles in HRM in the civil service, the experiences of new EU Member States and the Western Balkan countries show that this ideal is very difficult to achieve in practice. It should not be forgotten that elements of politicisation are present also in many old EU Member States. Comparative experience demonstrates that achieving success in this crucial area of civil service reform requires much more than adopting new legislation. Establishment of trust and cooperation between political parties and interest groups is necessary to develop a common interest in establishing a professional administration without politicisation.

That is why OECD/SIGMA proposes that the The focus should be put on prescribing specific, transparent requirements (educational requirements, relevant work experience and competences) for applicants for the senior managerial positions. Competition is a mandatory standard in the selection process as it enables the testing of candidates' knowledge, skills and aptitudes (competences). Finally, termination of employment of senior managerial positions should be allowed only in explicitly defined cases (for example, appointment for a certain number of years clearly defined at the outset) or under a procedure determined in the law.

Table 3: OECD/SIGMA Principles of Public Administration – senior managerial positions (principle 4)

**Principle 4: Direct or indirect political influence on senior managerial positions in the public service is prevented**

1. The category/class/level of senior managerial positions in the public service, at the interface of politics and administration, is included in the scope of public service (usually the positions of the secretary-general of the ministry and director-general of the administrative body determine the upper dividing line between public servants and political appointees).
2. The criteria for recruiting persons to the senior managerial positions are clearly established and disclosed.
3. The recruitment and selection process to the senior managerial positions, either external or internal, is based on merit, equal opportunities and open competition.
4. The termination of employment of public servants holding senior managerial positions is only admissible in cases explicitly provided for, and under the procedural provisions established in the law.

### 2.1.3. Performance appraisal, promotion and mobility of civil servants

Performance appraisal of civil servants is an integral part of a modern HRM system, aimed at of systematic monitoring their work and their professional development. For an appraisal to be purposeful, it needs to be conducted periodically and regularly (normally once a year). To ensure a systematic and unified approach, the basic appraisal principles should be established by law, while secondary legislation may be used to elaborate them in greater detail. Contemporary appraisal models are frequently based on an evaluation of the achievement of the key work objectives, along with the evaluation of other previously determined work criteria.<sup>14</sup>

For the purpose of setting up of a professional civil service, it is extremely important to provide incentives to employees by establishing objective promotion criteria and encouraging horizontal mobility. The conditions for promotion of civil servants (horizontal and vertical), should be defined by law, based on merit and objective and transparent criteria. In addition, mobility of civil servants should also be encouraged (secondment, temporary and mandatory transfer) and based on objective and transparent criteria. The table below presents SIGMA Principle 6, which further elaborates these areas.

Table 4: OECD/SIGMA Principles of Public Administration – Performance appraisal, promotion and mobility of public servants (Principle 6)<sup>15</sup>

**Principle 6: The professional development of public servants is ensured: this includes regular training, fair performance appraisal, and mobility and promotion based on objective and transparent criteria and merit.**

The principles of performance appraisal are established in law to ensure the coherence of the whole public service. The detailed provisions are established in secondary legislation. The performance appraisal of public servants is carried out regularly. The public servants have the right to appeal unfair performance appraisal decisions.

The mobility of public servants (secondment, temporary or mandatory transfer) is encouraged, established in legislation, based on objective and transparent criteria, and applied in practice.

The functional promotion of public servants (on-the-job, horizontal and vertical promotion) is established in the legislation, based on the merit principle and objective and transparent criteria, and applied in practice.

14 A. Rabrenovic, M. Matijević, "Comparagraphptive analysis of basic elements of civil servants appraisal systems in European countries" in: *Topical issues of modern legislation – Compendium of papers presented at the meeting of law practitioners held on 12–16 June 2011 in Budva, Budva Days of Law Practicioners*, Federation of Associations of Lawyers of Serbia and Republic of Srpska, Belgrade, 2011, pp. 515–528.

15 Professional development is also included in the principle 6 of SIGMA Principles of Public Administration, but is not presented here as it exceeds the scope of this analysis.

### 3. WHAT IS THE GENERAL LEGAL FRAMEWORK IN THE AREA OF HRM IN THE COUNTRIES OF THE WESTERN BALKANS?

This section provides a brief overview of the legal framework in the area of HRM in the civil service in six countries in the Western Balkans. The primary legislation that regulates the civil servant status is presented first. The subsequent analysis of individual countries comprises the following elements:

- Initiating recruitment process
- Recruitment commissions
- Selection process
- Appointments
- Senior managerial positions
- Performance appraisal
- Promotion
- Termination of employment

#### 3.1. ALBANIA

**Primary legislation:** Law on Civil Servants.<sup>16</sup>

**Initiating recruitment process:** The existing legislative framework prescribes the requirements for the development of a career system, with priority given to a competitive selection for lower-ranking civil service positions and ensuring conditions for career advancement. For this reason, before a public competition is announced, public authorities must make an attempt to transfer the existing civil servants to any given vacant position. Such transfers are done by selecting candidates who are in the same category as the vacant position; this task is entrusted to permanent internal commissions that are obliged to adhere to the principles of equal opportunities and merit.<sup>17</sup> Once this procedure is completed, the commissions appoint the most successful candidate, or end the procedure without an appointment, if none of the candidates meets

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<sup>16</sup> Law on Civil Servants, Nos. 152/2013 and 178/2014.

<sup>17</sup> Article 25, paragraph 3 of the Law on Civil Servants.

specific requirements for that position.<sup>18</sup> If a vacancy is not filled on the basis of a transfer, state authorities are obliged to announce internally such position with the purpose of promoting lower-level civil servants to a higher position.<sup>19</sup> However, at the beginning of a year, the Government may decide to use the public competition procedure for up to 20 percent of all vacancies, to ensure inflow of new human resources from the labour market – people with appropriate skills and knowledge for those positions. Public competitions are announced periodically for several positions at once (the so-called *pool recruitment*).

**Recruitment commissions:** The Law on Civil Servants has introduced permanent recruitment commissions with a term of office of one year. These commissions comprise one employee of the Public Administration Unit, one civil servant from the authority that fills a vacancy, and one external expert, normally a member of university staff.

**Selection process:** The selection is based on a written test, oral test or other selection methods, along with the assessment of work experience.<sup>20</sup> Successful candidates must exceed the 70% threshold of the total number of points that may be obtained, in which case they are included on the list of successful candidates.<sup>21</sup> The results of interviews account for 25% of the total number of points scored.

**Appointments:** Those included on the list of successful candidates, starting from the the highest-ranked person, can choose to be appointed to one of the vacant positions. If there are more successful candidates than vacant posts, they can be recruited once a new position becomes vacant within the period of next two years.<sup>22</sup> If, in the meantime, another recruitment procedure is organised for the same category of jobs, all successful and not appointed candidates will be re-rated in accordance with the new competition requirements.<sup>23</sup>

**Senior managerial positions:** The appointment to senior managerial positions requires that candidates have completed a comprehensive training course provided by the Albanian School of Public Administration.<sup>24</sup> Only middle-level

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18 Article 25, paragraph 4 of the Law on Civil Servants.

19 Article 26, paragraph 2 of the Law on Civil Servants.

20 Article 20, paragraph 2 of the Law on Civil Servants.

21 Article 22, paragraph 5 of the Law on Civil Servants.

22 Article 23, paragraph 3 of the Law on Civil Servants.

23 Article 23, paragraph 3 of the Law on Civil Servants.

24 Article 27, paragraph 4 of the Law on Civil Servants. The sole exception to this rule was made immediately after the adoption of the Law – when the first class of students was still in school the so top-level management positions were filled through a competition.

civil servants who meet specific requirements can apply for this training when the School announces a national competition. The Law, however, makes an exception to this rule, by allowing the Government to identify situations in which other candidates, outside the public administration, are eligible for the training. The selection of candidates for senior managerial positions is conducted by the National Selection Committee.<sup>25</sup> The candidates who scored the highest and exceeded the 70 percent threshold are appointed to senior managerial positions and, at the same time, they become members of the category of senior managerial positions. Persons who complete training for senior managerial positions, subject to their consent, may also be appointed to positions of special coordinators and middle-level management.

**Performance appraisal:** The performance of civil servants is appraised annually, on the basis of the work objectives set at the beginning of the year and the results obtained. There are four performance appraisal rating categories: a) very good, b) good, c) satisfactory, and d) non-satisfactory.<sup>26</sup> The senior managerial staff is appraised by the National Selection Committee.<sup>27</sup>

**Promotion:** Promotions to higher positions are based exclusively on internal competitions. The internal competition procedure is regulated more thoroughly by a decree adopted by the Government.

**Termination of employment:** Conditions for termination of employment are listed in the Law and are the same for senior managerial positions and other civil servants.

## 3.2. BOSNIA AND HERZEGOVINA

**Primary legislation:** Law on Civil Service in the Government Institutions of Bosnia and Herzegovina (BiH);<sup>28</sup> Law on Civil Service of the Federation of the Bosnia and Herzegovina (FBiH);<sup>29</sup> Law on Civil Servants of the Republic of Srpska (RS).<sup>30</sup>

25 The National Selection Committee comprises one representative of the Department of Public Administration, two representatives of the Albanian School of Public Administration, one representative of the top-level management staff and five independent experts. Article 31 of the Law on Civil Servants.

26 Article 62, paragraph 2, of the Law on Civil Servants.

27 Article 62, paragraph 3 of the Law on Civil Servants.

28 *Official Gazette of the BiH*, Nos. 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09, 8/10, 40/12, 93/17.

29 *Official Gazette of the FBiH*, Nos. 29/03; 23/04; 39/04; 54/04; 67/05; 08/06; 04/12, 99/15; Constitutional Court Decision of 28 June 2016.

30 *Official Gazette of the RS*, Nos. 79/2005, 81/2005 – amended, 83/2005 – amended, 64/2007, 67/2007 – amended, 116/2008, 104/2009, 99/2014, 57/16.



**Initiating recruitment process:** At the BiH state level and in the FBiH entity of FBiH, it is required that vacancies first be announced internally. Public competition is announced only in case that internal competition was not successful. In the BiH entity RS, internal competition does not need to precede the public competition.

**Recruitment commissions:** At the BiH state level, the competition procedure is carried out by a five-member recruitment commission – two members are proposed by the institution that is filling in vacancies, and three members are appointed by the Civil Service Agency from their list of experts.<sup>31</sup> The situation is similar in the FBiH, where the selection procedure is carried out by a commission made out of minimum three members – one representative of state authority that is filling in vacancies, one representative of a union, and one independent expert from the list of experts. The recruitment commission in the RS is comprised of three civil servants from the institution that is filling in vacancies and two experts from the list of experts.

**Selection process:** The applicants in a public competition at all levels are required to pass an exam on the public administration system in general, covering constitutional questions and questions related to employment in the public administration authorities, administrative procedure, dispute, and the like.<sup>32</sup> The objective of this examination is to identify if an applicant for a civil servant vacancy possesses an adequate level of knowledge in the field of public administration, necessary for the performance of civil servants' duties. Each level organises the examination in their own way. The state professional exam<sup>33</sup> is a special requirement in the Republic of Srpska for applying to all civil service vacancies.

At the BiH state level and in the FBiH, in the second stage of the selection process, applicants need to pass a more specific professional examination, both written and oral. At the BiH state level, the written part of the professional examination is comprised of four essay-type questions. All five members of the Commission evaluate the written part of the test. The highest and the lowest marks are not taken into account. What is used is the average mark from the remaining three. Minimum score for passing this part of test is 75%. In the FBiH, written tests are based on multiple choice questions, where the applicant needs to select one of the offered options. Minimum score for

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31 Article 26, paragraph 2 of the Law on Civil Service in the Government Institutions of Bosnia and Herzegovina.

32 This exam, conducted in different forms (using multiple-choice tests or orally) is also referred to differently: public examination at the BiH state level; general knowledge examination in the FBiH; civil servants exam in the RS.

33 Pursuant to Article 29, paragraph 1, point b 2) of the Law on Civil Servants.

passing the written part of the test within the FBiH is 70%. The RS does not require a written test. As a follow-up of the written examination, an important part of the selection procedure at all three levels is the interview, which has yet to be standardised.

**Appointments:** For non-managerial posts at the BiH state level, the Agency for Civil Service automatically appoints the best applicant on the basis of the results achieved in the testing process. In the FBiH, the Minister or another competent person has the mandate to select any applicant from the list of successful applicants. In the RS, the Civil Service Agency proposes to the head of the state authority (that initiated a public competition) and recommends appointing the applicant with the best results.

**Senior managerial positions:** The selection of candidates for senior managerial positions at the state level of BiH is based on written examinations and interviews. The number of questions in the written test is double that for lower-ranking civil servants.<sup>34</sup> The Commission proposes to the respective authority the list of all candidates who have successfully passed the tests, which has to be approved by the Civil Service Agency. The management of the competent authority has the right to select any of the short-listed candidates.<sup>35</sup> If the appointment is not confirmed in this way within 30 days from the receipt of the Agency's conclusion and the short-list of successful candidates, the Agency appoints the most successful applicant *ex officio*.<sup>36</sup> In the RS, selection of top civil servants is performed in the same manner as the selection of other civil servants, that is, on the basis of the interview results.

**Performance appraisal:** At the BiH state level and in the RS, civil servants' performance is appraised once every six months, while in the FBiH, it is appraised annually. At all three levels performance is appraised on the basis of the objectives set at the beginning of the year and on the basis of demonstrated competences (such as, for example, independence, creativity, adaptability, etc.). There are four performance appraisal rating categories: a) very good, b) good, c) satisfactory, and d) non-satisfactory. Appraisal of

34 Rulebook on Announcement Procedures, Selection of Applicants, Transfer and Appointment of Civil Servants, Article 15, paragraph 4, *Official Gazette of the BiH*, Nos. 27/08, 56/09, 54/10.

35 Law on Civil Service in the Government Institutions of BiH, Article 28, paragraph 2. This procedure differs from the procedure applied in case of civil servants in other positions when the Agency for Civil Service appoints a civil servant on the basis of results achieved during the selection process. See Article 28, paragraph 1 of the Law on Civil Service in the Government Institutions of BiH.

36 Article 28, paragraph 3, of the Law on Civil Service in the Government Institutions of Bosnia and Herzegovina.

managerial civil servants is performed in the same manner as appraisal of other civil servants.

**Promotion:** At the BiH state level and in the FBiH, promotions to higher positions are exclusively based on internal competition. In the RS promotions are based on performance appraisal, provided there is a vacancy as defined by the Rules of Procedure on Internal Organisation and Systematisation and the Human Resources Plan.

**Termination of employment:** Conditions for termination of employment are listed in the Civil Service Law of all three levels and are the same for senior managerial positions and other civil servants.

### 3.3 KOSOVO\*

**Primary legislation:** Law on Civil Servants of the Republic of Kosovo\*.<sup>37</sup>

**Initiating recruitment process:** Vacancies are filled through a public competition. In order for the recruitment process to begin, the institution filling the vacancy has to obtain an approval of the Ministry in charge of the civil service. After obtaining the approval, the institution filling the vacancy advertises the competition in daily newspapers and through electronic media.<sup>38</sup>

**Recruitment commissions:** The selection process is carried out by an *ad hoc* commission appointed by the manager of the institution in question, in cooperation with the Ministry in charge of the civil service.<sup>39</sup> The Commission has five members who are all civil servants in the public authority conducting the competition, and the members must be of higher rank than the position advertised (it is allowed for one member to be in the same rank). If the position is a managerial one, the recruitment commission is formed by the Ministry in charge of the civil service.<sup>40</sup>

**Selection process.** Before evaluating an application, the recruitment commission first verifies its authenticity and the supporting evidence.

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37 Law on Civil Servants of the Republic of Kosovo\*, No. 03/L-149. adopted on May 13, 2010, *Official Gazette* No. 5 of June 25, 2010.

38 Articles 14, 15 and 17 of Ordinance No. 02-2010 on the recruitment process in the civil service.

39 Article 18, paragraph 8 of the Law on Civil Service.

40 The recruitment commission for managerial positions includes three Secretary Generals, one university professor and one civil sector representative. Two members of the commission are appointed by the head of the institution in which the vacancy is filled.

Applications are evaluated based on several criteria: the candidate's education and professional qualifications; work experience; skills; and other relevant factors. Maximum score for each of the four criteria is 20 points, and the minimum necessary for the second round of evaluation is 40 points.<sup>41</sup> In order for the selection process to continue, at least three candidates have to pass the first round of evaluation.

The follow-up selection process comprises a written test and an interview. The commission is required to prepare 30 to 50 questions for the written test, which include the following: 1) 3–5 essay-type questions on general knowledge; 2) 10–15 more specific questions on general knowledge and personality, intended to test the intellectual capacity of analytical thinking and reasoning; 3) 15–23 questions on knowledge in the work area related to the announced vacancy, half of which are essay-type, while the other half are multiple-choice questions; 4) a foreign language test for positions that require knowledge of a foreign language.<sup>42</sup> Candidates who pass the written test are subsequently interviewed. The interview covers the following three issues: 1) personal suitability and professional ambitions (interests, career plans, psychological readiness, etc.); 2) general institutional and economic knowledge; and 3) competence/knowledge related to the position to be filled. The total score is calculated as the average score in the written test and in the interview. Successful candidates are those who achieve at least 60% of the maximum possible score.<sup>43</sup>

**Appointments.** The Commission forwards the results of the competition to the person in charge of human resources, who checks whether the procedure was conducted properly and forwards the list of successful candidates to the manager of the institution<sup>44</sup> who is obliged to select one of the candidates from that list.<sup>45</sup>

**Senior managerial positions.** Candidates for senior managerial positions are recruited primarily through promotion of lower-ranking civil servants. However, if there are no interested candidates within the civil service, that is, if the candidates who have applied for the position do not meet the requirements, a public competition is announced and conducted.<sup>46</sup> The selection procedure is based on a public competition and carried out in the same way as that for other civil servants. Once the selection process has been concluded, the

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41 Article 28 of the Ordinance No. 02-2010.

42 Article 36 of the Ordinance No. 02-2010.

43 Article 40 of the Ordinance No. 02-2010.

44 Article 4 of the Ordinance No. 07-2010 on appointment of civil servants.

45 Article 7 of the Ordinance No. 02-2010.

46 Article 18 paragraph 3 of the Law on Civil Servants.

commission proposes the three best candidates to the Ministry in charge of public administration. The Ministry forwards the list of successful candidates to the manager of the institution that is filling the managerial position. The manager selects one candidate from the list, who is then appointed to the position by the Government, for a three-year period.<sup>47</sup> An important role in the recruitment process monitoring and streamlining the senior management staff's work is vested with the Senior Civil Servants Council, comprised of the Deputy Prime Minister, Minister of Public Administration, Minister of Finance, Minister of the Communities, and three members who hold the position of Secretary General.<sup>48</sup>

**Performance appraisal:** Civil servants' performance appraisal includes two basic elements: achieved work objectives and competences.<sup>49</sup> Achievement of work objectives amount to 60% of the overall appraisal, while the remaining 40% of the overall appraisal is the appraisal of competences. Appraisal is based on a one to five scoring system, and the overall appraisal grade is descriptive (excellent, very good, good, satisfactory, and weak). It is interesting that the Kosovo\* system prescribes mandatory performance appraisal quotas. Namely, the Ordinance on performance appraisal prescribes that only 5% of civil servants may be appraised "excellent", 15% may be appraised "very good", and 30% "good".<sup>50</sup>

**Promotion:** In the Kosovo\* civil service system, promotion to higher positions is based on internal competitions. The internal competition is first advertised at the level of the organisational unit in the institution that needs to fill the vacancy. If the number of candidates who apply is insufficient (fewer than three), the competition becomes open for all the employees in the institution.<sup>51</sup> The provisions on the public competition procedure apply also to internal competitions.<sup>52</sup>

**Termination of employment:** Conditions for termination of employment are listed in the in the Law on Civil Servants and the secondary legislation.<sup>53</sup>

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47 Article 15 of the Law on Civil Servants; Ordinance No. 06/2010 on the procedures for appointment to senior managerial position in the civil service of the Republic of Kosovo\*.

48 Article 7 of Ordinance No. 06/2010.

49 The competences of non-managerial civil servants are as follows: expert technical knowledge; initiative and creativity; teamwork; communication and presentation skills; and work efficiency. The performance appraisal criteria for senior civil servants are as follows: planning and organisation; decision-making; employee motivation; and equal treatment of employees. See Article 6 of Ordinance No. 19/2012 on civil servants' performance appraisal.

50 Article 8 of Ordinance 19/2012.

51 Article 5 of Ordinance No. 12/2012 on civil servants' career advancement.

52 Article 7 of Ordinance 21/2012.

53 Ordinance No. 06/2010 for senior civil servants.

### 3.4. MACEDONIA

**Primary legislation:** Law on Administrative Servants.<sup>54</sup>

**Initiating recruitment process:** Administrative servants are recruited through a public competition.

**Recruitment commissions:** The selection procedure is carried out by a commission appointed by the director of the Administration Agency, an independent public authority accountable to the Macedonian parliament for its work.<sup>55</sup> The Commission is comprised of a representative of the Agency's unit for selection of candidates, the manager of the human resource management unit of the institution at which the vacancy is to be filled,<sup>56</sup> the manager of the organisational unit in which the vacancy is to be filled, and an official from the Secretariat for Implementation of the Ohrid Agreement.

**Selection process:** The competition procedures comprise four phases. These phases are preceded by a technical examination of the applications, in which the applications of candidates who do not meet the requirements are dismissed. In the first phase of the selection, the following professional qualifications of the candidates are assessed: relevant professional experience, knowledge of foreign languages, and knowledge of software necessary for office-related tasks. After assessing these criteria, the Commission draws up a list of the ten top-rated candidates who enter the second phase of selection.<sup>57</sup> The second phase consists of taking a written test, which comprises two parts: 1) assessment of professional knowledge, in which the knowledge of the Macedonian constitutional organisation, local self-government system, administrative procedures, administrative dispute, etc., is tested, and 2) assessment of personality and intellectual capacity, carried out by applying computer-based psychological tests.<sup>58</sup> The following, third phase of selection consists of an assessment of the validity of the evidence supporting the application, and of an interview. Prior to the interview, the Commission is under the obligation to verify the validity of the documents the candidates have attached to their application. The interview is used to check the general competences required for working in the vacant

54 Law on Administrative Servants – consolidated text, *Official Gazette of RM*, No. 142 of August 1, 2016. Administrative servants are persons who carry out administrative jobs both in administrative bodies and in local self-government bodies, and in public services such as agencies, funds, public institutions on local and republican level. See Article 3 of the Law on Administrative Servants.

55 Article 13 of the Law on Administrative Servants.

56 If there is no human resource unit, the member of the commission shall be the person in charge of human resources in the administrative body in which the vacancy is filled.

57 Article 39 of the Law on Administrative Servants.

58 Article 40 and Article 41 of the Law on Administrative Servants.

position, and the special competences that are required in accordance with the job description.<sup>59</sup> The candidates who have obtained at least 60% of points in the written test and the interview pass on to the final phase of selection. The last, fourth selection phase comprises a personality test, which checks social skills, certain aspects of a person's integrity, personal potential, etc. The names of the candidates who successfully pass the latter test are included in the final ranking of successful candidates.<sup>60</sup>

**Appointments:** The recruitment commission chooses the best candidates from the list and proposes them in ranked order to the institution in which a vacancy is to be filled. The number of candidates who will be appointed depends on the number of openings envisaged in the institution's annual work plan.<sup>61</sup> The manager of the institution is under the obligation to make a decision on the appointment within five days.

**Senior managerial positions:** Senior managerial positions include two categories: Category A – Secretary Generals, and Category B – managing administrative personnel. The verification of a candidate's competences for a managerial position is identical to the one that applies to two other categories of positions – expert administrative servants (Category V) and assisting expert administrative servants (Category G). This means that the selection process rules, outlines above, are also applicable for senior managerial positions.

**Performance appraisal:** Performance appraisal criteria established by law are as follows: quality, work efficiency and effectiveness; observance of deadlines and level of accomplishment of established working objectives and tasks; level of involvement and dedication to work; contribution to realisation of the institution's strategic plan, realisation of the individual plan of professional advancement, and actual behaviour. The performance appraisal is carried out once a year, at the latest, by December 1 for the current year; semi-annual interviews (by May 31 of the current year at the latest) are also mandatory. The appraisers can grade the personnel on a scale from one to five, while the overall annual grade is descriptive (A, B, C, G and D). Interestingly, in Macedonia, unlike the other countries in the region, the grading is done not only by the employee's superior but also by his/her associates and persons outside the institution. The grade given by the superior amounts to 65% of the overall grade, while the remaining 35% is comprised by the average grade of the other four administrative servants with whom the appraised employee cooperates at work, and by two persons

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59 Article 42 of the Law on Administrative Servants.

60 Article 43 of the Law on Administrative Servants.

61 Article 44 of the Law on Administrative Servants.



who are not employed at the institution concerned but with whom the civil servant cooperates<sup>62</sup>.

**Promotion:** Promotion to a higher position is done through an internal competition. The selection procedure has two phases: administrative selection and interview. The administrative selection is based on the three last annual performance appraisals, and also on the professional training attended and mentorship-work conducted. Based on the results of the administrative selection, the commission draws up a list including five top-rated candidates, and then conducts interviews with them. Following the interviews, the commission draws up a final list of candidates and proposes the top-rated candidate to the Secretary General, that is, the manager of the institution, who makes the decision. If the top-rated candidate is not appointed, such a decision must be justified.<sup>63</sup>

**Termination of employment:** Conditions for termination of employment are listed in the Law and are the same for senior civil servants and other civil servants.<sup>64</sup>

### 3.5. MONTENEGRO

**Primary legislation:** The Law on Civil Servants and Employees.<sup>65</sup>

**Initiating recruitment process:** Civil service vacancies in Montenegro are first filled through internal vacancy announcement within the same administration body. If a vacant post has not been filled in this manner, internal vacancy announcement within public authorities is mandatory, and if a vacant post cannot be filled in this manner either, public a is used.<sup>66</sup> Senior managerial positions are always filled by public competition.<sup>67</sup>

**Recruitment commissions.** Recruitment commissions are comprised of one representative of the Human Resources Management Authority, one representative from the public authority that announces a vacancy, and one professional evaluator for specific skills.<sup>68</sup> In cases of recruitment for senior

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62 Articles 65 and 67 of the Law on Administrative Servants. If the civil servant does not come into contact with persons outside the institution at which he/she works, other appraisers are administrative servants of any level.

63 Articles 51 and 52 of the Law on Administrative Servants.

64 Article 98 of the Law on Administrative Servants.

65 The Law on Civil Servants and Employees, *Official Gazette of Montenegro*, Nos. 39/11, 50/11, 66/12, 34/14, 53/14 and 16/16.

66 Article 38, paragraphs 2–5 of Law on Civil Servants and Employees.

67 Article 38, paragraph 1 of the Law on Civil Servants and Employees.

68 Article 42, paragraph 2 of the Law on Civil Servants and Employees.



managerial position, the professional evaluator needs to be a reputable expert in the field of the public authority and activities where a vacancy is to be filled.<sup>69</sup>

**Selection process.** Candidate selection is based on a written exam and an interview, but it can also be done in a different manner if it is appropriate.<sup>70</sup> The Commission evaluates candidates on the basis of an competency test and the information on their professional and work qualifications, obtained from their previous employers (if a candidate has any previous work experience), as well as on the basis of the grade point average and duration of studies.<sup>71</sup> The Commission prepares a report on the basis of which a list of shortlisted candidates is drawn up, which is then submitted to the manager of the public administration authority. The list includes five top-rated candidates.

**Appointments.** The manager (head) of the public administration authority, as a rule, selects the best-rated candidate from the shortlist. However, in exceptional circumstances, after having interviewed all the shortlisted candidates, the head of the authority may select another candidate from the list of candidates, but such a decision needs to be justified in writing.<sup>72</sup> When deciding on the selection of candidates, the manager is obliged to take into account the proportional representation of ethnic minorities and groups, gender-balanced representation, and employment of persons with disabilities.<sup>73</sup>

**Senior managerial positions:** The evaluation of candidates' competences for senior managerial positions is based on a structured interview.<sup>74</sup> Similar to the selection of other civil servants, the selection commission proposes a list of five candidates to the Minister, who then, as a rule, proposes the best-rated candidate to be appointed by the Government. However, the Minister may also select another candidate from the list, but has to justify it in writing.

**Performance appraisal:** Performance appraisal criteria are as follows: accomplished work results, independence and creativity in performing duties, quality of cooperation with clients and associates at work; quality of work organisation of conducting affairs, as well as other merits, skills, and qualities related to how work is carried out.<sup>75</sup> Civil servants' performance is

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69 Article 53, paragraph 3 of the Law on Civil Servants and Employees.

70 Article 42, paragraph 4 of the Law on Civil Servants and Employees.

71 Article 43, paragraph 1 of the Law on Civil Servants and Employees.

72 Article 45, paragraphs 2 and 3 of the Law on Civil Servants and Employees.

73 Article 45, paragraph 4 of the Law on Civil Servants and Employees.

74 Article 53, paragraph 5 of the Law on Civil Servants and Employees.

75 Article 108 of the Law on Civil Servants and Employees.

appraised annually, at the latest, by 31st of January for the previous year.<sup>76</sup> Performance appraisal criteria for senior managerial positions are as follow: 1) work organisation of the organisational unit or sphere; 2) management quality; 3) level of accomplished relations and cooperation with citizens, public authorities and other subjects, non-governmental organisations and media 4) other merits and skills, as well as quality of obtained results.<sup>77</sup>

**Promotion:** Promotions to higher positions (as mentioned earlier) are made in different ways: 1) through internal competition within the public authority concerned, and if that competition is not successful, 2) through internal announcement among all public authorities and finally, if the vacancy is not filled in that way, 3) through public competition. In addition to a promotion to higher-ranked position, civil servants can be promoted into a higher salary class within the same position if, during a period of two years, their performance has been appraised as “excellent”.<sup>78</sup>

**Termination of employment:** Conditions for termination of employment are listed in the Law<sup>79</sup> and are the same to top-level management and other civil servants.

### 3.6. SERBIA

**Primary legislation:** Law on Civil Servants.<sup>80</sup>

**Initiating recruitment process:** Civil service vacancies in Serbia may initially be filled by a simple transfer of civil servants to a vacant position within the same authority or within another authority (with a possibility of promotion). There is also an option to carry out an internal competition within the respective authority or the entire civil service, which, however, is not mandatory. If the vacancy is not filled in either of these ways, public competition is mandatory.<sup>81</sup> Vacancies for managerial positions must be filled through either internal or public competition.<sup>82</sup>

**Recruitment commissions:** Candidate selection is carried out by a commission, which is usually comprised of two civil servants from the

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76 Article 109, paragraph 2 of the Law on Civil Servants and Employees.

77 Article 111 of the Law on Civil Servants and Employees.

78 Article 112 of the Law Civil Servants and Employees.

79 Articles 121–126 of the Law on Civil Servants and Employees.

80 Law on Civil Servants, *Official Gazette of RS*, Nos. 79/2005, 81/2005, 84/2005, 64/2007, 67/2007, 116/2008, 104/2009 and 99/2014.

81 Law on Civil Servants, Article 49 – order of actions in the process of filling executive positions in all public authorities.

82 Law on Civil Servants, Article, 66, paragraph 2.

respective authority and one civil servant from the Human Resources Management Service. In case of selection of senior managerial positions, the recruitment commission is established by the High Civil Servants Council (HCSC)<sup>83</sup> and is usually comprised of two members of the HCSC and one outside expert, or alternatively a civil servant from the public authority in which the vacant position is to be filled.<sup>84</sup>

**The selection process:** The recruitment commission has the right to choose the selection method, which may include written examination, interview or any other appropriate measure.<sup>85</sup> A quite common procedure consists of psychological tests assessing personal suitability and competences (such as analytical thinking, logical inference, organisational skills, and the like). If a candidate passes this test, he/she is seen fit to enter the following phase of selection process, i.e., an interview with the Commission. Final candidate rating depends exclusively on interview results, as psychological test results are eliminatory and are not taken into consideration for the final rating. After the conducted interview, the recruitment commission lists a maximum of three candidates with the highest scores.<sup>86</sup>

**Appointments.** The head of the public authority in question is obliged to choose one of the candidates from the proposed list,<sup>87</sup> without a possibility to annul the list and initiate a new competition.

**Senior managerial positions.** During the selection process for senior managerial positions, the candidates are assessed on the basis of the content of their application, their knowledge and competences.<sup>88</sup> In addition to testing technical sectoral knowledge of a candidate (related to the area of activities of the institution or authority to which the vacancy belongs, and to relevant EU law), the selection process also includes competency testing. Competences that may be tested include analytical thinking, logical

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83 High Civil Service Council is an expert body of the Government with the task to identify professional qualifications, knowledge and skills evaluated during the selection process and methods for their verification. The Council also prescribes criteria for recruitment to positions and adopts Civil Service Code of Conduct. High Civil Service Council has eleven members, appointed by the Government to a six-year term. Five members are appointed from experts in the fields important for the functioning of the public administration, and the remaining six members are appointed from civil servants proposed by the Minister competent for administrative affairs.

84 Law on Civil Servants, Article 68, paragraph 2.

85 Article 56, paragraph 2 of the Law on Civil Servants.

86 Article 16 of the Rulebook on Professional Qualifications, Knowledge and Skills Evaluated in the Appointment Procedure, Methods for Evaluation and Criteria for Appointment to Positions, *Official Gazette of the RS*, Nos. 64/2006, 81/2006, 43/2009, 35/201.

87 Article 57, paragraph 2 of the Law on Civil Servants.

88 Articles 18, 19 and 20 of the Rulebook on Professional Qualifications, Knowledge and Skills Evaluated in the Appointment Procedure, Methods for Evaluation and Criteria for Appointment to Positions.

reasoning, communication skills, organisational and management skills.<sup>89</sup> Logical and analytical reasoning, organisational skills and management skills are evaluated at the beginning of the selection process, using standardised tests. Evaluation of the candidates' knowledge and the professional capacity is carried out through an interview. Each member of the commission uses marks evaluates on a scale from 1 to 3 the information provided in the application and the answers to questions asked by the recruitment commission according to a predefined list of questions.<sup>90</sup>

At the end of the recruitment process, the commission proposes a list of maximum three candidates with the highest scores and the Minister has the power of discretion: to select one or none of them. The Minister, then, proposes the selected candidate from the proposed list to the Government, which makes the formal appointment. The Minister is not obliged to select any proposed candidate, but must justify such a decision to the High Civil Servants Council and the Human Resource Management Service.<sup>91</sup> If the Minister decides not to accept any of the proposed candidates, a new competition has to be conducted.

**Performance appraisal:** Civil servants' performance is appraised annually. Performance appraisal criteria for all positions are as follows: achievement of annual work objectives; independence and creativity; initiative; precision and diligence of work; quality of cooperation with other civil servants and other skills that are required for the position.<sup>92</sup> There are five performance appraisal rating categories: a) outstanding b) distinction c) good d) satisfactory, and e) non-satisfactory.<sup>93</sup> In case that a civil servant is appraised as "non-satisfactory", he/she is sent for additional professional training, and then re-evaluated after a period of 90 days. In case that the civil servant is appraised as "non-satisfactory" for the second time, his/her employment is terminated.<sup>94</sup>

**Promotion:** A civil servant may be promoted on the basis of a decision by a manager, if he/she has been obtained "outstanding" appraisal for two consecutive years, or "distinction" appraisal for four consecutive years. The

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89 Article 19, paragraph 3 of the Rulebook.

90 Mark 3 is given to a candidate who fully meets the requirements for appointment, mark 2 is given to a candidate who partially meets the requirements for appointment, and mark 1 is given to a candidate who does not meet the requirements for appointment. A candidate's score is calculated as the average mark obtained by a candidate, except in the case when a member of Competition Commission has given mark 1 to a candidate, Article 20, paragraphs 3, 4 and 5 of the Rulebook.

91 Article 71, paragraph 2 of the Law on Civil Servants.

92 Article 82, paragraph 2 of the Law on Civil Servants.

93 Article 84, paragraph 1 of the Law on Civil Servants.

94 Articles 85–86 of the Law on Civil Servants.

Law also provides for a promotion in case a civil servant has precisely obtained two “outstanding” appraisals and one “distinction” appraisal in a three-year period.<sup>95</sup>

**Termination of employment:** Conditions for termination of employment are listed in the Law<sup>96</sup>, including special reasons for termination of employment for positions. These are also defined in detail in the Law on Civil Servants.<sup>97</sup>

## 4. WHAT ARE THE KEY ISSUES IN THE IMPLEMENTATION OF THE LEGAL FRAMEWORK COMMON TO WESTERN BALKAN COUNTRIES AND HOW TO OVERCOME THEM?

The summary of the legal framework governing the HRM system in the countries in the region shows that all key elements of modern human resource management are included in the regulatory framework. What is frequently missing, however, is adequate and effective implementation of the rules. Recently conducted analyses in the countries in the region show that HRM rules are applied in order to satisfy the formal requirements, but often do not achieve the desired practical effects.<sup>98</sup> Such formalism is notable in recruitment and selection and performance appraisal procedures, and to a certain extent also in training procedures, where considerable attention is given to the planning and delivery of training, but without effective instruments for tracking training effectiveness, that is, the effect that the training has on the civil servants’ performance in practice.

One of the main problems in the recruitment and selection process lies in the fact that job descriptions (from rulebooks on internal organisation and staffing plans) normally do not provide a good basis for initiating recruitment and carrying out the selection process. Job descriptions are an instrument that in principle should help give visibility to the expected

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95 Article 88 of the Law on Civil Servants.

96 Articles 126–132 of the Law on Civil Servants.

97 Articles 76–81 of the Law on Civil Servants.

98 P. Miklic *et al*, “Analysis of HRM in the Civil Service in BIH”, September 2014, report prepared at the project *Modernisation of HRM in the Civil Service*, financed by the EU; Sahling J. M *et al*, “Improving the Implementation of Merit Recruitment Procedures in the Western Balkans: Analysis and Recommendations”, paper presented at the RESPA conference in Danilovgrad, November 2015. D. Droli, F. Ohaja, “Discussion paper: Kosovo\* Civil Service Reform”, paper prepared for a round table on civil service, [http://www.mei-ks.net/repository/docs/Discussion\\_Material\\_Civil\\_Service\\_Reform.pdf](http://www.mei-ks.net/repository/docs/Discussion_Material_Civil_Service_Reform.pdf).

contribution of each employee in an organisation. In practice, there is often a considerable gap between a given job description and what a person in that job actually does or is expected to do. This is usually a consequence of dated rulebooks on internal organisation and staffing (for example, when rulebooks have not been changed in a long period of time) but also a lack of a proper job analysis that could be used as the basis for preparing good job descriptions.

Table 5. What is job analysis?

A job analysis is a process that includes collection and analysis of information about civil service jobs with the primary aim to prepare valid and high-quality job descriptions. Information may include the purpose of a particular job within the organisation, the main tasks and responsibilities to be carried out, as well as the educational level, experience and skills (competences) required to perform these tasks and responsibilities. Section 5.1 of this chapter provides more information about the concept of job analysis, its importance and good practice in the field.

Job descriptions in most civil service systems in the Western Balkans also do not list all the competencies a civil servant should have in order to perform efficiently. Job descriptions should clearly define the knowledge and skills, both technical and behavioural, that a civil servant needs in order to effectively carry out his/her job (see Table 6. below). In most of the countries in the region, behavioural competences are still not included in the job descriptions.

Table 6. What are the Competences in the Civil Service?

Competences include knowledge, skills and behaviours needed for effective performance of a job in an organisation. Competences in the civil service can be technical and behavioural. Technical (or functional) competences include the knowledge necessary to perform a certain job (e.g., the knowledge necessary for being an accountant, lawyer, engineer, IT expert, etc.) and the technical skills necessary for the fulfilment of the particular role to be filled (e.g., project management, budget management etc.). Behavioural competences or *soft skills*, are equally important – for example, communication skills, integrity of an employee, the ability to work in a team, etc.

Both technical and behavioural competences should be identified in a job analysis and should constitute an integral part of the job description. The list of required competencies should take into account the purpose of the job and the most important tasks that constitute the job. While job descriptions in the countries of the Western Balkans normally do comprise technical competences (the professional knowledge required for the job), behavioural competences are normally not part of job descriptions. For this reason, specific technical competences (professional knowledge) are much more often tested during the selection process than the behavioural competences.

However, the importance of behavioural competences has been recognised. Most of the analysed countries have developed competency frameworks.<sup>99</sup> Competency frameworks include a wide spectrum of behavioural competences of civil servants, such as: professional development; problem-solving; achievement of results; communication; team work; management and leadership skills (for managerial positions). Behavioural competences of prospective candidates have also started to be tested during the selection process, as part of the general selection criteria. For example, in Montenegro, the written part of the selection process now tests the following competences of candidates for all jobs: analytical approach, accuracy, clarity and logic of expression, while communication skills are tested in the course of the interview.<sup>100</sup> In Serbia, the following competences are tested during the selection process: analytical thinking and logical reasoning, organisational skills, leadership skills (tested by standardised tests), and communication skills.<sup>101</sup> However, the mechanisms for assessment of competences at the various stages of the HRM process (and in particular during the interview in the selection process) are still not sufficiently developed.

As mentioned in the section dealing with European standards, one of the main guarantees of the implementation of the merit principle is the existence of a professional/competent and impartial competition committee/commission, the composition of which varies from country to country. Most of the analysed countries establish *ad hoc* commissions for each advertised post, comprising representatives from the public authorities in which the vacancy is to be filled, representatives from the central human resource management institution, and independent experts. In Albania, as described above, the new Law on Civil Servants has established permanent commissions with a one-year mandate.

It is interesting to note that, even in the countries in which the composition of the commission best guarantees the impartiality of its work – where the number of independent experts is significant – such experts are often under pressure to conform with the opinions of civil servants coming from the institutions in which the vacancies are to be filled.<sup>102</sup> This practice clearly indicates that in

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99 See, for example, the competency framework of Macedonia presented in the Rulebook on Competences for Administrative Servants. Cf. The Rulebook on the Framework for General Working Competences for Administrative Servants, *Official Gazette of Macedonia* No. 142, adopted on 29/9/2014.

100 Article 13 and Article 15 of the Decree on the Ways to Test Abilities, Criteria and Assessment of Candidates for Carrying out Jobs in State Administration Body, *Official Gazette of Montenegro*, No. 04/13.

101 Article 9 of the Rulebook on Professional Capabilities, Knowledge and Skills Tested in the Selection Process and Selection Criteria, *Official Gazette of the Republic of Serbia*, Nos. 64/2006, 81/2006, 43/2009, 35/2010 and 30/2015.

102 A. Rabrenovic, A. Cesic, V. Vlajkovic, "Analysis of State of Play and Challenges in the Area of Recruitment and Selection of Civil Servants in the Civil Service Structures of BiH",



most countries in the region, a lack of objectivity in the recruitment process is frequently in conflict with the merit principle. This has proved to be a particular problem during the recent global economic crisis, as job safety, which is an important feature of civil service jobs, has been very important.

A significant problem related to the work of the recruitment commissions relates to the capacity of their members to carry out the selection process competently and on the basis of objective criteria and a neutral methodology. Recent research on the recruitment process in the Western Balkan countries shows that the work of the selection commissions is rated quite low in most analysed countries.<sup>103</sup> The insufficient competence of the members of these commissions is less prominent in permanent recruitment and selection commissions (e.g., in Albania), as they function for a longer period of time. Furthermore, the employees of central human resource management units (agencies, services) and human resource management units in the public authorities generally, do usually have the necessary knowledge to successfully conduct the selection process in accordance with the principles that should be applied.

The problem of the lack of competence of the selection commission members refers to members who perform this role occasionally, such as the representatives of the public authority in which the vacancy is announced or outside experts. The common practice is that experienced commission members, such as the representatives of the central civil service agencies or of human resource management units in public authorities, make an effort to give instructions to other commission members during the selection process. In most cases, however, this practice does not necessarily result in a better process, mostly due to the lack of time to explain the mechanisms of a correct selection process, which in turn does not rectify an inadequate understanding of the entire process.

Even though interviews are the most important part of the selection process in several countries, there are no instructions on how to conduct a competency-focused interview. Most of countries do have basic rules and procedures on how to conduct interviews (e.g., how many points to assign for a particular question, etc.). The problem, however, is that commission members do not know how to assess a candidate's competences (e.g., analytical thinking, communication skills, etc.), which considerably undermines the intended use of the merit principle in the selection process, both for managerial and non-managerial positions.

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Sarajevo, July 2014, report prepared at the project *Modernisation of HRM in the Civil Service*, financed by the EU.

103 Sahling J. M *et al*, "Improving the Implementation of Merit Recruitment Procedures in the Western Balkans: Analysis and Recommendations", p. 23.



Bearing in mind that structured competency-based interviews, according to European experience, have proven to be a reliable indicator of success of new employees in their job performance, to apply structured competency-based interviews in all Western Balkan countries would be very useful. As mentioned in the section dealing with European standards, structured interviews imply that concrete questions to be used with all candidates should be decided in advance, and detailed notes should be taken during the interview to help determine the performance of each candidate and to compare the candidates. Furthermore, bearing in mind that the skill to prepare and ask good questions is not a natural talent, it is important for the commission members to undergo training that will teach them how to ask the right questions, enabling them to assess the candidates' competences that are of key importance for job performance.

In order to assist the competency testing process during the interview, section 5.2. of this chapter provides a list of questions that could be used by members of competition commissions. These questions are currently being used to test competences of prospective civil service candidates at the BiH state level.<sup>104</sup>

In the phase of selection based on a written examination, the main problem lies in the fact that the questions to be asked are frequently "leaked" to some or all candidates before the beginning of the testing. This problem is not easily overcome; however, one solution might be to ensure the candidates' anonymity through assigning a code to each candidate. The candidate would participate in all stages of the competition, up until the interview, under a code, which would promote objectivity and impartiality in the selection process, and also the protection of candidate's personal data. By giving the central human resource management institution the authority to manage the entire selection process, as is the case in Belgium, Spain and Portugal,<sup>105</sup> the abuse of position to assist a candidate during the selection process would be substantially reduced, or even eliminated. Such a decision, however, is at the heart of human resource management policy, and would depend on the Government in power.

In most of six countries analysed above, the discretionary powers of managers in the course of the recruitment and selection process may jeopardise the full implementation of the merit principle and, thus, the integrity of the process. The responsible manager of the recruiting institution often has considerable power to influence in all stages of recruitment, starting from the decision on whether there is a need to fill a particular vacancy to the final selection

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104 Rulebook on Character and Content of Public Competition, Carrying out of the Interview and Interview Form, *Official Gazette of the BiH*, Nos. 63/16 and 21/17.

105 A. Rabrenovic, A. Cesic, V. Vlajkovic, p. 35.

of the candidate. In Serbia, Montenegro, BiH Federation, and until recently, in Macedonia, the manager had the right to select one of the candidates from the list of successful candidates, regardless of their internal ranking. The manager's right to not select the candidate ranked as number one is a serious problem, particularly as the manager does not need to explain and justify such a decision. Furthermore, in some countries there is no time limit set for the manager's decision on the selection of a candidate, which provides room for prolonging the entire procedure infinitely. That, in fact, may give the manager a free hand to obstruct the entire recruitment procedure. This problem, however, cannot be resolved without changing the regulations and reducing the manager's discretionary powers, while also introducing the obligation for the manager to select the candidate who was ranked first in the list of successful candidates.

Finally, one of the most important "bypasses" in the merit-based recruitment process is to engage a civil servant under a fixed-term employment contract, in which case there is no obligation to conduct any assessment of potential candidates.<sup>106</sup> Since there is no public announcement of the vacancy in the case of fixed-term employment, the vacancies are mostly reserved for candidates who have personal support within the institution concerned. A frequent practice is to publicly announce the vacancy for the given position after a certain time, and the person who is already employed under a fixed-term employment contract may then apply with a built-in advantage. Naturally, that person may win the competition more easily as he/she is already well acquainted with the job-related duties and responsibilities. In this way, temporary employment may be used as a strategy for giving a person a permanent civil service position. This is why it is important that the practice of fixed-term employment is restricted and only used in extraordinary circumstances.

A key recommendation related to improvements in the merit-based recruitment process is to invest in the professional competence and integrity of the recruitment and selection commission members. That seems particularly important concerning top officials and outside experts – they must clearly understand the professional requirements they are supposed to adhere to. A recent ReSPA study also recommends the development of easy-to-use manuals, organised training, more standardised evaluation forms, and introducing certification of knowledge in the field of recruitment and selection,<sup>107</sup> which should be taken into account in the efforts to strengthen the integrity of the recruitment process.

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106 J. M. Sahling *et al.*, p. 14.

107 *Ibid.*, pp. 9–11.

The instrument of regularly assessing the performance of civil servants, through a formal appraisal process, has been institutionalised in all Western Balkan countries. Again, what is lacking in most of the countries is the capacity to effectively implement this instrument. In most of the countries, performance appraisal is seen primarily as an opportunity to reward or sanction a civil servant, rather than an instrument to help develop his/her full working potential.<sup>108</sup>

Civil servants mostly complain about the subjective nature of the performance appraisal process; in fact, it is heavily criticised and contested. The main objection is that the managers who serve as appraisers, or who have the main role in performance appraisal, do not have sufficient information on the work of a civil servant and are thus unable to objectively assess it. The result may often be a bad working environment, which adversely affects the morale of the entire organisation. To remedy such a negative situation, managers often resort to awarding high-level grades to the majority of their subordinates, which subsequently leads to inflation of grades.<sup>109</sup> Some countries (i.e., Kosovo\*, as mentioned above) have introduced performance appraisal quotas, but that has apparently not yielded the expected results.<sup>110</sup> We may, therefore, question whether a complex performance appraisal system is worth the time and efforts that are invested in it.

Improving the effectiveness of performance appraisal is not an easy task and may require considerable time and efforts. First, it would be important to change the awareness about the purpose of performance appraisals – it should primarily be seen as a tool for promoting individual professional development, and not as a tool for rewarding or punishing a civil servant. Second, effective performance appraisal requires good managers (as appraisers) who would be well acquainted with the work of their subordinates and learn how to motivate them to exhibit their best performance. Third, performance appraisal of an individual civil servant should be seen against the performance of the whole organisation. In order to achieve this, work objectives of a civil servant should be linked to the objectives of the whole organisation. Fourth, even with the best of efforts, performance appraisal of individual civil servants may indeed create “divisions” between civil servants, as some of them with the highest potential may be rewarded with the best marks, which may demotivate those who also work hard, but cannot achieve such a high level of performance and hence receive lower marks. For this

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108 B. Stojanovic, A. Rabrenovic, *Manual on Performance Appraisal of Civil Servants: A Guide for Successful Performance Management in Civil Service Structures in BiH*, Djikic Consulting Services, PARCO, 2011.

109 J. Meyer-Sahling, “Sustainability of Civil Service Reforms in Central and Eastern Europe Five Years After EU Accession”, p. 50.

110 We thank Florian Qehaja for the input on this matter.

reason, some countries consider introducing group performance appraisal instead of individual one.<sup>111</sup> Fifth, performance appraisal should also be better linked with other human resource management functions, especially with civil servants training. Performance appraisal may be a valuable tool to identify the training needs related to a person's concrete career aspirations, which is very important if there is a desire to keep good and ambitious people in the civil service.

Finally, we may conclude that despite constant modernisation efforts, human resource management in the Western Balkan countries is still, to some extent, understood and carried out in the traditional sense of "staff management". The traditional "staff management" function was to keep regular records of employees, draft and enforce rules, and file and keep files of all personnel. The HRM function is still not sufficiently recognised as a strategic tool that enables public authorities to achieve their objectives through a professional, competent and efficient civil service.

In order for human resource management to obtain strategic importance, as a means to advance institutional integrity and good governance, it is necessary to continuously raise awareness and increase the capacities of all key institutional actors, the top civil servants in particular. A frequent misconception is that in times of crisis, savings may be found in reduced investments in human capital – in public human resources. The truth is quite the opposite, since investing in human capital is the key to an effective public sector. Savings may be achieved by managing human resources efficiently, and that is what good HRM is all about.<sup>112</sup> Good managers are crucial for constructive change in any field of public administration, and in the field of human resources in particular. If managers stimulate change, change happens fast – if they oppose change, nothing is likely to change. It is, therefore, very important for managers to recognise the importance of good and competent human resource management, to respect and promote it. Managers often forget that HRM is a vital part of the generic description of any managerial job. For example, a responsibility they often tend to forget is to systematically develop the potentials and competences of their employees. This is why a focus on the managers' capacities is so important in all organisations, including public administration. If the managers have proper managing skills and pay the needed attention to employees' motivation and professional development, the organisation

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111 World Bank, *International Public Administration Reform: Implications for the Russian Federation*, Washington DC, 2003.

112 P. Miklic *et al*, "Analiza upravljanja ljudskim potencijalima u državnoj službi u BiH", September 2014, report prepared on the Project *Modernisation of HRM in the Civil Service*, financed by the EU.

develops improved results, job satisfaction and morale in the organisation is increased, and the quality of services provided to citizens improved. This all results in strengthened professional integrity and improves the resistance to any form of corruption.

## 5. INTERNATIONAL AND REGIONAL PRACTICES THAT COULD BE USED FOR TRAINING OF CIVIL SERVANTS

### 5.1 JOB ANALYSIS<sup>113</sup>

#### 5.1.1 Introduction

Job analysis is a process that includes collection and analysis of information about civil service positions with the primary aim to prepare high-quality job descriptions. Information is collected as a basis for the job analysis in order to define the purpose of a particular job within the organisation, its main tasks and responsibilities, as well as education level, experience and skills (competences) required to perform the tasks and responsibilities at that particular position.

Quality job analysis is important for any organisation because it represents the basis for other processes in the human resource management, such as:

- human resource planning (defining the future requirements for the job);
- recruitment and selection (preparing the specifications, i.e., the knowledge and skills that will serve as the basis for filling the position);
- performance appraisal (defining the factors that will be taken into account when determining the objectives and skills to be assessed);
- human resource development (providing information about the competences necessary for the work to be performed, which should be included in a training programme);
- development and maintenance of a computerised information system for human resource management (indicating what should be registered in the data base).

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113 Text taken from the chapter: A. Rabrenović, V. Vljakovic, D. Ahmetović, "Job Analysis and Analytical Job Evaluation", in *Human Resource Management in the Civil Service of Bosnia and Herzegovina* (P. Miklič, S. Godec eds.), T&T Koncept Sarajevo, 2015, 73–86.

The job analysis process comprises two main phases:

- data collection
- preparation of a job description.

### 5.1.2 Data Collection

Data collection is the first phase in job analysis and it includes compilation of different types of information pertaining to the position being analysed. Such information may be obtained by analysing the existing job description in the rulebook on internal organisation, organisational charts, as well as different procedures or instructions concerning the job. In addition to the analysis of relevant documents, information about the specific nature of a job may be obtained from interviewing the employees in the position or similar positions, that is, from civil servants who have practical experience in performing the tasks of a given position, including, if considered useful, from the immediate supervisor of the particular position.

Data collection, as well as other phases of job analysis, should be performed by the job analyst – an employee who works with HRM and organisational issues, or other employees selected by the head of the relevant public administration authority. The job analyst should collect all information that is relevant for the performance of tasks and responsibilities of a specific position and conduct interviews, as required, with civil servants who are familiar with the position and what it requires. A job analysis questionnaire that may be used as the basis for such interviews is found in Annex I of this chapter.

### 5.1.3 Preparation of Job Descriptions

A quality job analysis should provide the basis for an accurate and detailed job description. New trends in human potential development require job descriptions that provide sufficient information about the required qualifications and competences as that will inform training programmes. In addition to the technical information about a position (e.g., work post title, organisational unit, number of similar positions), it is necessary to specify clearly the purpose of the work and to describe the different tasks that particular position is meant to handle. That should include the concrete results that should be achieved, as well as the expected amount of time necessary for carrying out the different tasks. The job description should contain detailed information about a technical profile of the incumbent of the position, specifying the education level and work experience required, as well as necessary professional

knowledge, skills and competences (including personal characteristics). At the end, the job description should also contain the title/category of the work position in question, which should be commensurate with the qualifications and experience needed to fill the position. The format of the job description is presented below as a sample job description.

**Purpose of work** is a brief description why a particular civil service position exists and includes what the incumbent is expected to do and why. It is desirable to describe the purpose in a single sentence (usually up to 40 words). When defining the purpose, the following should be considered:

- Which part of the tasks/objectives of the public administration authority/organisational unit is performed through the position (from the rulebook on internal organisation and staffing, i.e. organisational charts)?
- What is the contribution of these tasks to the overall objectives of the organisational unit in comparison to other positions in the organisation?
- How may the above be summarised in one sentence as the overall responsibility of the position?

**Description of tasks and responsibilities** should be in accordance with the purpose of the position. Each position should represent one or several separate areas and the intended results should be in line with the purpose of the work. What is expected from the person who fills a particular position follows from that. Theory as well as practice indicates that most public positions comprise 5 to 9 specific tasks and responsibilities. Less than five tasks may indicate that something has been left out and more than nine tasks that more secondary and less important activities were included in the list.

When defining tasks and responsibilities, it is necessary to pay attention to the core functions that a position is expected to fulfil:

- all tasks and responsibilities should be linked in a realistic way to the key results expected from the incumbent of a given position;
- each position should be unique and represent a specific area in which the expected results should be achieved;
- each of the positions should be focused on *what* is required and not on *how* the work should be carried out;
- the tasks should be prioritised, starting from the most important ones for achieving the purpose of the work; this may often be a function of the amount of time necessary for their execution;
- the tasks and results should be defined in a measurable way, if possible.

Each of the tasks should be defined in line with the principle that “something needs to be done in order to achieve a certain result or standard”. It is desirable that the description of tasks begins with words such as: preparing, creating, planning, organising, testing, maintaining, developing, supervising, providing, etc. Percentage of workload for each of the tasks and responsibilities should refer to a regular time period of twelve months. This information will help to categorise all jobs based on the most important and frequent tasks performed in a given job.

**Contacts** are to specify the main internal and external contacts of the incumbent at a given job and their purpose and frequency.

**Requirements for a position include:** education level, work experience, professional knowledge, skills and competences. In addition to the specification that should specify the education level and relevant work experience needed, professional knowledge and skills (such as, for example, knowledge of a specific subject area of relevance to the work, knowledge of foreign languages, technical knowledge such as computer programmes as proved by certification, etc.). This part of the job description should also provide an answer to the question which competences – knowledge, skills and behaviour – are necessary in order to perform the job efficiently.

**Category/rank of a position** is determined in accordance with an evaluation of where the position is placed in the organisation, the degree of independence of the work, the level of qualifications needed, etc., in line with the general methodology used in the civil service system.

## 5.1.4 Sample job description

### Job Description

#### 1. Main information about the work post

*Institution: Ministry of Labour*

*Title of work post: Head of Labour Inspection Section*

*Sector/department/service: Labour Inspection Section*

*Number of staff /number of targeted staff: 1/1*

*Title of immediate supervisory work post: Assistant Director – Chief Labour Inspector*

*Title and number of directly subordinated work posts and staff members: 13 labour inspectors*



## 2. Purpose of the work post:

Managing the Labour Inspection Section within the Department with the aim of efficient performance of inspection controls in the field of labour and work protection.

## 3. Work post tasks and responsibilities

Tasks and responsibilities	Percentage of workload
Conducting complex inspection controls, producing minutes, decisions and misdemeanour warrants in accordance with the control performed	30%
Cooperation with the chief inspector on preparation of inspection plans on monthly and annual level	20%
Cooperation with heads of field offices concerning the implementation and monitoring of implementation of the inspection operational plans	20%
Managing the Section, supervision of the work of inspectors and reporting to the Assistant Director on conducted inspection controls	10%
Entry of data into the IT system and production of reports on inspection controls	10%
Monitoring of regulations in the field of labour and work protection and harmonising best practices in the inspection	10%

## 4. Contacts:

Daily internal contacts with heads of field offices and chief inspector concerning the planning of implementation of inspection activities. Regular contacts with local labour inspectors with the aim of adequate delegation of tasks. Contacts on a weekly level with the Ministry of Labour, administrative inspectors, the police in order to exchange information with the aim of a more efficient control.

## 5. Requirements for the work post (education level, work experience, professional knowledge and skills, and competences):

Required education level, type and work experience	University degree – level VII, faculty of economics or law, 3 years of work experience in the field of inspection control
Required professional knowledge and skills	Law on Administrative Procedure, Labour Law, Law on Inspections, Law on Work Protection and other regulations, coordination of ideas and resources necessary to achieve the objectives, data analysis, making conclusions and resolving problems
Required competences	Communication, management, continued development, tactfulness, strategic planning and decision-making

## 5.2 CONDUCTING A COMPETENCE-BASED INTERVIEW<sup>114</sup>

### 5.2.1 Questions that can be used to test competencies during the selection process

Competencies required for all civil servants

Competency	Example competency-based interview questions
<p><b>1.0 PROFESSIONAL DEVELOPMENT AND INTEGRITY</b></p> <p><i>The application and continuous acquisition of the necessary knowledge, skills and behaviours to achieve high levels of work performance, including the ability to transfer knowledge and experience to others.</i></p>	<p>How do you keep yourself informed, adopt and apply new knowledge and skills relevant to your professional development?</p>
<p><b>1.1 Continuous acquisition of knowledge and skills necessary for the job</b></p> <p>Ensures they have the knowledge and skills necessary for the job, takes steps to find out if there are gaps/changes and then addresses them.</p>	<p>Tell me about a time when you realised that you did not have sufficient knowledge or skills to do a part of your job. What did you do?</p> <p>Tell me about a time when you learned something unexpected, which has since proved useful.</p> <p>How do you keep yourself up to date with factors influencing your field of expertise?</p> <p>How do you keep up to date on new developments in your field? What was the last occasion you did this and what was the development? How did this improve the service to your client(s)</p> <p>How do you keep up to date on new developments in your field? What was the last occasion you did this and what was the development? How did this improve the service to your client(s)</p>

<sup>114</sup> Material developed under the EU project “Modernisation of HRM Systems in the Civil Service”. See: S. Williams, “Using a Competency Framework to Improve Recruitment and Selection”, in *Human Resources Management in the Civil Service of Bosnia and Herzegovina* (P. Miklic, S. Godec eds.) T&T Konzept Sarajevo, 2015, 105–130. See also: Rulebook on Character and Content of Public Competition, Carrying out of the Interview and Interview Form, *Official Gazette of the BiH*, Nos. 63/16 and 21/17.

<b>Competency</b>	<b>Example competency-based interview questions</b>
	How do you keep up-to-date with current legislation and how it impacts on the institution and, more specifically, your job?
<p><b>1.2 Commitment to personal and professional development</b></p> <p>Takes responsibility for personal and professional development, displaying motivation and a commitment to learning and self-improvement.</p>	In the last year what steps have you taken to develop personally or professionally?
<p><b>1.3 Knowledge sharing</b></p> <p>Shares knowledge and information gained with others so they can learn</p>	<p>When was the last time you shared some new information or learning with any of your colleagues? Tell me how you did this.</p> <p>Give me an example of when someone came to you for help or guidance. Why did they need your support?</p> <p>Tell me of a time when you had to work with someone less experienced than yourself.</p>
<p><b>1.4 Integrity</b></p> <p>Engenders the trust and respect of others through consistent honesty. Abides by the Civil Service Code of Conduct.</p>	<p>How do you gain the trust and respect of others? Give me a specific example.</p> <p>Describe a situation where you had to deal with an unpleasant or dissatisfied client.</p> <p>Tell me about a time when you showed integrity and professionalism.</p> <p>Tell us about a time when someone asked you something that you objected to. How did you handle the situation?</p> <p>Have you ever been asked to do something illegal, immoral or against your principles? What did you do?</p> <p>When have you had to lie or withhold the facts to achieve your aims? Why did you do so? How do you feel you could have achieved the same aim in a different way?</p> <p>Give me an example of a time when you had to work hard to build up a good relationship with other people (e.g. colleagues / clients).</p> <p>Tell me about a time when you realised that a fellow employee was breaking the rules of your organisation. What did you do?</p>

Competency	Example competency-based interview questions
<p><b>2.0 PROBLEM SOLVING, INITIATIVE AND CHANGE</b></p> <p><i>The ability to act proactively and to respond positively, creatively and constructively to changing situations and new demands,</i></p>	<p>Give us an example of when you took the initiative in your field of work.</p>
<p><b>2.1 Initiative</b></p> <p>Acts with initiative within his/her scope of work</p>	<p>Give us an example of a situation where you had to make a decision in the absence of your superiors but knowing you would be judged on your decision.</p> <p>When did you depart from the established policy to accomplish your goal?</p> <p>Which decisions do you feel able to make on your own and which do you require senior support to make?</p> <p>Have you ever gone beyond the limits of your authority in making a decision? If so, please let us about that situation.</p>
<p><b>2.2 Innovation of new work solutions</b></p> <p>Develops fresh ideas that provide solutions to workplace challenges; encourages new ideas and innovations; open to change.</p>	<p>Tell us about a situation where you trusted your team to derive a new approach to an old problem. How did you manage the process?</p> <p>Tell us about a time when you had to convince a senior colleague that change was necessary. What made you think that your new approach would be better suited?</p> <p>What is the most difficult problem you have had to resolve in the last 12 months? What made it difficult? What processes did you use to resolve the problem? Who else did you involve?</p> <p>What ideas have you identified to improve the way you work? How were these implemented?</p> <p>Give me an example of when you instigated a major change What initiated the change? How did you manage the impact on people? How did you communicate the changes?</p> <p>What methods do you adopt to elicit new ideas from others?</p> <p>Give me an example of when you changed your working practice to be more efficient. How did you know that an improvement was necessary? What steps did you take?</p>

Competency	Example competency-based interview questions
	<p>Tell me about an occasion when you developed and implemented a new approach to organisational practices or processes. What research did you undertake to inform your approach? What options did you identify? To what extent were you able to bring about change?</p>
<p><b>2.3 Creativity</b> Develops creative insights into situations and questions conventional approaches</p>	<p>Tell us about a project or situation where you felt that the conventional approach would not be suitable. How did you derive and manage a new approach? Which challenges did you face and how did you address them?</p> <p>Give me an example of when you came up with a novel/different approach to a problem/situation. What suggestions did you make? Which ideas were put into practice? What was the outcome?</p>
<p><b>2.4 Problem-solving skills</b> Presents not just problems but proposes solutions to issues</p>	<p>What ideas have you developed and implemented that have impacted on the long-term development of your function? What were the challenges? What was the impact on your function's operation? How did you evaluate the effectiveness of these changes in the long term?</p> <p>What is the most difficult problem you have had to resolve in the last 12 months? What made it difficult? What processes did you use to resolve the problem? Who else did you involve?</p>
<p><b>2.5 Ability to resolve difficult or complicated challenges</b> Resolves difficult or complicated challenges</p>	<p>When do you feel that it is justified for you to go against accepted principles or policy?</p> <p>Describe a situation when you came up with a solution to a problem.</p> <p>Tell me about a particularly difficult piece of work you have faced. How did you tackle it?</p>
<p><b>2.6 Helping others with change</b></p>	<p>Tell us about a time when you had to convince a colleague that change was necessary. What made you think that your new approach would be better suited?</p> <p>Give me an example of when you instigated a major change. How did you achieve that? How did you manage the impact on people? How did you communicate the changes?</p> <p>Tell me how you have accommodated operational change in your unit's activities</p>

Competency	Example competency-based interview questions
<p><b>3.0 TEAMWORK</b>  <i>The ability to work well in groups and teams, to cooperate with other members and to contribute through active participation in order to achieve collective goals.</i></p>	<p>Tell me about the last time you worked as part of a team. What did you do?</p> <p>How do you ensure that every member of the team is allowed to participate?</p> <p>Give me an example of how you dealt with a conflict in your team.</p> <p>Do you incline more to individual or team work? Please give us an example.</p>
<p><b>3.1 Building constructive working relationships</b>  Builds constructive working relationships through cooperation, acceptance and respect for others.</p>	<p>Tell me how you went about building an effective working relationship with a colleague/ team. What effect did your actions have on the success of the team?</p> <p>How did you know?</p> <p>How do you build relationships with other members of your team?</p> <p>Give me an example of a time when you had to work hard to build up a good relationship with other people (e.g. colleagues / clients)</p>
<p><b>3.2 Facilitating teamwork</b>  Promotes cooperation and commitment within a team to achieve goals and deliverables</p>	<p>How did you encourage other team members to co-operate?</p> <p>Give me an example of when you helped improve the performance of your team. What improvement did you identify? How did this improve team performance?</p> <p>How do you ensure that every member of the team is allowed to participate?</p>
<p><b>3.3 Helping others resolve conflicts</b>  Helps others resolve complex or sensitive disagreements and conflicts</p>	<p>Describe a time when you had to win someone over, who was reluctant or unresponsive.</p> <p>Give us an example where you worked in a dysfunctional team. Why was it dysfunctional and how did you attempt to change things?</p> <p>Give an example of a time when you had to deal with a conflict within your team? What did you do to help resolve the situation?</p> <p>How do you bring difficult colleagues on board?</p> <p>Give us an example where you had to do this</p> <p>Give me an example of a difficult people situation that you have had to handle within your team.</p> <p>Tell me about a time when you found it very difficult to get the agreement of others to an important proposal. How did you tackle this?</p>

Competency	Example competency-based interview questions
<p><b>3.4 Respecting different points of view, and diverse orientations</b></p> <p>Respect of different points of view, openness to diversity.</p>	<p>How do you ensure that every member of the team is allowed to participate?</p> <p>Tell me about a time when you had to work closely with someone from a different social background, race, culture, or belief-system to yours.</p> <p>What were the challenges? How did you deal with them?</p>
<p><b>3.5 Ability to cooperate with other teams</b></p> <p>Builds and maintains constructive and productive relations with other teams and their members</p>	<p>Give me an example of when you have identified an opportunity to enhance a service by collaborating with another team. How did you identify that this was an opportunity? What was your role in developing effective partnership working?</p> <p>Give an example of when you have lead a team on a major project. How did you gain support for this activity beyond your immediate team?</p> <p>Describe a time when you have had to enlist the help of another department or group to complete a piece of work.</p>

Competency	Example competency-based interview questions
<p><b>4.0 COMMUNICATION</b></p> <p><i>The ability to communicate effectively both orally and in writing with managers, colleagues, clients and citizens, conveying information clearly, accurately and in a timely manner to relevant individual and groups.</i></p>	<p>Tell us about an occasion when your communication skills made a difference to a situation?</p> <p>What is the worst communication situation that you have experienced?</p> <p>Tell us about a situation when you failed to communicate appropriately.</p> <p>Tell me about a particularly difficult message that you had to communicate to an individual or group. What steps did you take to ensure the message was clear? How did you ensure the message was understood?</p>
<p><b>4.1 Tactfulness</b></p> <p>Has patience and uses good judgment in communication, keeping polite behaviour in all interactions.</p>	<p>Please describe a situation where you've been tactful.</p> <p>Can you please describe a situation where you've been diplomatic?</p> <p>Describe a situation when someone has irritated you. How did you respond?</p> <p>Tell me about a situation when someone was very slow to respond to a request of yours. How did you deal with it?</p>

Competency	Example competency-based interview questions
<p><b>4.2 Clear conveying of ideas, facts and instructions</b></p> <p>Conveys ideas, facts and instructions, – orally or in writing – with clarity, using language the audience will best understand.</p>	<p>Describe a situation where you had to explain something complex to a colleague or a client. Which problems did you encounter and how did you deal with them?</p> <p>What type of writing have you done? Give examples please. What makes you think that you are good at it?</p> <p>How do you feel writing a report differs from preparing an oral presentation?</p>
<p><b>4.3 Active listening</b></p> <p>Listens, understands and learns from what others say.</p>	<p>Give us an example where your listening skills proved crucial to an outcome.</p> <p>Tell us about a time when you were asked to summarise complex points.</p>
<p><b>4.4 Encouraging feedback from others</b></p> <p>Encourages information feedback from others and offers it to other parties</p>	<p>Describe a situation when you have sought feedback from your clients (internal or external). Why did you seek this feedback? How did you gather the information? How did you use it to improve services?</p> <p>Tell me about an occasion when you had to adapt to a major change Why was it important? How did you adapt? How did you use feedback to improve your work?</p>
<p><b>4.5 Adaptive communication style</b></p> <p>Changes the communication approach and style to meet the preferences and needs of the audience</p>	<p>Demonstrate how you vary your communication approach according to the audience that you are addressing.</p> <p>Describe a situation where you had a disagreement or an argument with a superior. How did you handle it?</p> <p>Describe an occasion when you needed to adopt a particular approach to get agreement from others.</p> <p>Have you ever had to modify your personal communication style to achieve results with a difficult individual or group? Tell me how you did this.</p>
<p><b>4.6 Effective participation at meetings</b></p> <p>Conducts and/or participates in meetings and group discussions efficiently and with structure.</p>	<p>Tell me about an important meeting you have led or participated in. How did you prepare? What did you do during the meeting?</p> <p>Tell me about the most difficult meeting you have led/participated in. Why was it difficult? How did you deal with it?</p>



Competency	Example competency-based interview questions
<p><b>5.0 PERSONAL EFFECTIVENESS AND RESULTS ORIENTATION</b></p> <p><i>Performing consistently at a high level. Achieving goals and continuously improving the quality of service to citizens, clients and other civil service functions and institutions.</i></p>	<p>Tell me about a time when you have had to meet challenging client needs.</p> <p>Give me an example of where you found it necessary to change a process to meet client needs.</p> <p>What has been your biggest work achievement this year? How did you make it happen?</p> <p>Tell me about a time when you were able to improve a service to a client or another department.</p>
<p><b>5.1 Focusing on results and desired outcomes</b></p> <p>Focuses on results and desired outcomes and how best to achieve them. Produces good quality outputs with little oversight, on time.</p>	<p>When did you depart from the established policy to achieve results and the expected outcome.</p> <p>Describe a project or situation where you took a project to completion despite important opposition</p> <p>Describe an occasion when you have had to deliver a complex project on time and to budget. What were the objectives? What key stages did you work through? How did you get people on board? What were the difficulties you had to overcome?</p> <p>What obstacles do you encounter and how do you overcome them to achieve your objectives?</p> <p>What do you do to deliver your unit's goals?</p> <p>Tell me of a challenging goal you have set yourself.</p> <p>How do you organize your day-to-day workload? What tools or methods do you use? How does this take account of interruptions and changes to your plans?</p> <p>Give an example of when you have set a deadline and were unable to achieve it. What issues did you anticipate? How did you plan for these? What was the result? What if anything would you do differently next time?</p> <p>Tell me about a time in which you were required to produce something to a high standard, within a fixed period of time.</p> <p>Give me an example of where you found it necessary to change a process to meet client needs.</p> <p>Tell me about a time when you didn't meet an objective/deadline.</p>

<b>Competency</b>	<b>Example competency-based interview questions</b>
<p><b>5.2 Building and maintaining client and citizen satisfaction</b> Builds and maintains client and citizen satisfaction with the services offered by meeting or exceeding their expectations.</p>	<p>Describe a time when you exceeded a client's expectations. How did you know you had exceeded? What did your actions achieve?</p> <p>Describe a situation where you had to deal with a dissatisfied client. How did the client respond to the actions you took? What did you do to ensure that the situation did not occur again with other clients?</p> <p>Give us an example of when you have initiated the development of working relationships with external partners to improve the quality of service.</p> <p>Describe a key client relationship you have built.</p> <p>Describe a time when you were really satisfied with the service you had given to a client.</p> <p>Tell me of an occasion when a client has commented on service you provided.</p>
<p><b>5.3 Paying attention to detail</b> Pays attention to detail and produces accurate results</p>	<p>Describe a time when you have made a mistake and the subsequent actions that you took.</p> <p>Tell me about a piece of work you produced where accuracy was essential.</p> <p>Give me an example of the ways you check the accuracy of your work.</p> <p>Tell me of a time when you have felt it necessary to consult with others for more detail</p>
<p><b>5.4 Efficient management of time and resources</b> Improves productivity by managing time, priorities and resources to achieve goals and secure value for money</p>	<p>Give an example of when you have set a deadline and were unable to achieve it. What issues did you anticipate? How did you plan for these? What was the result?</p> <p>How do you currently ensure that you manage your resources effectively?</p> <p>How do you consider costs to the organisation? What environmental factors do you take into account?</p> <p>What factors do you need to take into account when planning your budgets?</p> <p>How do you plan your organisation's expenditure?</p> <p>How do you ensure you keep to your budget?</p> <p>Is there anything you can do to improve your financial forecasting?</p>

Competency	Example competency-based interview questions
	<p>Explain how you have introduced changes to product/processes/services in your team/ department.</p> <p>Tell me about a time when you had to consider existing/ conflicting workloads, when planning a task/event/project.</p> <p>Tell me of a time when you have had to re-prioritise in response to changing requirements/strategic needs.</p> <p>In your current job, how do you manage your time and workload to achieve your objectives?</p>
<p><b>5.5 Effective decision making</b> Makes timely, informed decisions that take into account the facts, goals, constraints and risks.</p>	<p>What big decision did you make recently. How did you go about it?</p> <p>What is the decision that you have put off the longest? Why?</p> <p>When is the last time that you have refused to make a decision? Tell me about it.</p> <p>Tell us about a situation where you made a decision too quickly and got it wrong. What made you take that decision?</p> <p>Which constraints are imposed on you in your current job and how do you deal with these?</p> <p>Tell me about a time when you took responsibility for making a key decision • What was the decision? How did you defend your decision?</p> <p>Tell me of a time when you have had to manage a risk.</p> <p>Tell me of a time when you have felt it appropriate to call on others before making a decision.</p> <p>Tell me of a time when you have had to justify a decision you have made.</p>
<p><b>5.6 Analytical thinking</b> Applies analytical thinking by breaking a situation into smaller pieces, tracing the implications of a situation in a step-by-step way. Organises the parts of a problem in a systematic way, making comparisons of different aspects and causal relationships.</p>	<p>Give me an example when you have collected and analysed complex data to inform your decision-making? What approach did you take to analysing the data? What were the key issues you identified? How confident were you with the decisions made?</p> <p>What management data or information do you collect and monitor to inform your future plans and/or policies. How do you use the data?</p>

Competency	Example competency-based interview questions
	<p>Describe an occasion when you have had to deliver a complex project on time and to budget. What were the objectives? What key stages did you work through? How did you get people on board? What were the difficulties you had to overcome?</p> <p>Tell me how you have handled a large task.</p> <p>Give an example of a time when you had to gather and interpret information for a particular purpose.</p> <p>Tell me about a time when you had to analyse some information and how you came to your conclusions.</p>
<p><b>5.7 Ability to work under pressure</b> Keeps composure in stressful or adverse situations</p>	<p>Describe a situation where you had to deal with an angry client</p> <p>Describe a situation where you had a disagreement or an argument with a superior. How did you handle it?</p> <p>Describe a time when pressures threatened your ability to work effectively.</p> <p>Tell me about an occasion when you felt under pressure.</p> <p>Tell me of a time when interruptions from others have affected your work.</p> <p>Describe when a colleague let you down. How did you respond?</p>

## 5.2.2 Additional Competencies for Managers

Competency	Example competency-based interview questions
<p><b>6.0 LEADERSHIP</b> <i>Motivating people to high performance in achieving the team's and organisation's goals.</i></p>	<p>Tell me how you manage your top team.</p> <p>Tell us about a situation where you had to get a team to improve its performance. What were the problems and how did you address them?</p> <p>Tell me about a time when you were less successful as a leader than you would have wanted to be.</p> <p>Give an example of when you have led a team on a major project. How did you gain support for this activity beyond your immediate team? How did you ensure your people were engaged and motivated to perform? How did you measure success?</p>

Competency	Example competency-based interview questions
<p><b>6.1 Translating strategic goals to everyday work</b></p> <p>Links vision, values, goals and strategies to everyday work</p>	<p>Describe how you have communicated the vision/ goals of the organisation to your team.</p> <p>Give me an example of how you have managed the concerns of your team during times of uncertainty/change.</p> <p>Tell me how your unit's strategy fits with organisational goals and values.</p>
<p><b>6.2 Creating positive work environment</b></p> <p>Creates a positive work environment where staff are motivated to do their best</p>	<p>Give me an example of how you have used your leadership skills to manage and improve team performance. How did you get team buy in? How did you handle any difficult situations that arose amongst the team?</p> <p>Describe a change where you had to drive a team through change. How did you achieve this?</p>
<p><b>6.3 Goal setting</b></p> <p>Sets clear, meaningful challenging but attainable group goals and expectations</p>	<p>Tell us about a situation where you faced reluctance from your team to accept the direction that you were setting.</p> <p>Give an example of when you have lead a team on a major project. How did you gain support for this activity beyond your immediate team? How did you ensure your people were engaged and motivated to perform? How did you measure success?</p> <p>Describe how you have established the priorities and activities of a team</p> <p>Describe a time when you set goals for an individual or team. What goals were achieved and how did you go about it? Looking back, what would you have done differently?</p> <p>Tell me how you ensure the quality of your and your unit's work.</p> <p>How do you set objectives for you team?</p>
<p><b>6.4 Effective delegation</b></p> <p>Manages staff by delegating and entrusting certain tasks and assisting them to succeed in their performance.</p>	<p>Give me an example of how you have used your delegation skills to manage and improve team performance.</p>
<p><b>6.5 Staff motivation</b></p> <p>Regularly provides both positive and critical feedback to team members to improve motivation and performance</p>	<p>Tell us about a situation where you had to get a team to improve its performance. What were the problems and how did you address them?</p>

Competency	Example competency-based interview questions
	<p>Give me an example of when you have had to deal with poor performance. How did you approach the problem? What were the political/personal sensitivities you had to deal with? What were the results? With hindsight, would you have approached this any differently?</p> <p>Have you ever discovered you staff/team were not performing to established standards? What did you do about it?</p> <p>How have you motivated slow or difficult team members?</p> <p>Tell me about a time when you have had to deliver feedback to a colleague / subordinate.</p>
<p><b>6.6 Leading by example</b> Is an excellent role model – leads by example</p>	<p>Describe a situation where you needed to inspire a team. What challenges did you meet and how did you achieve your objectives?</p> <p>Describe a situation when you motivated those around you with your own example, to achieve team goals.</p>

Competency	Example competency-based interview questions
<p><b>7.0 PLANNING AND ORGANISING</b> <i>The ability to plan, organise, coordinate and monitor activities and work tasks for self and team members</i></p>	<p>Tell me about a time when you have had to plan a project/task/event that involved other people in the implementation.</p>
<p><b>7.1 Effective planning</b> Plans the best use of available resources</p>	<p>Tell me about a time in which you were required to produce something to a high standard, within a fixed period of time.</p> <p>Tell me about a time when you have had to plan a project/task/ event.</p>
<p><b>7.2 Team planning</b> Agrees objectives with individuals that support team plans and service goals</p>	<p>How do you set objectives for your team members? Give me an example where this did not work well. What was the cause? What did you do about it.</p>
<p><b>7.3 Holding members to account for their work results</b> Holds team members to account for achieving the results that have been agreed</p>	<p>Give me an example of when you have had to deal with poor performance.</p> <p>How did you approach the problem? What were the political/personal sensitivities you had to deal with? What were the results?</p>

Competency	Example competency-based interview questions
	<p>With hindsight, would you have approached this any differently?</p> <p>Please give me an example of how you monitor and manage employees' performance. What have you done when performance efficiency has not been satisfactory?</p>
<p><b>7.4 Risk management</b> Evaluates risk and puts realistic plans in place to manage it</p>	<p>Tell me about a time when you have had to plan a project/task/ event and how did you estimate risk?</p> <p>Tell me about a time when you've had to manage a risk.</p> <p>What' is the biggest risk you have taken at work in the last 2 years? How did it go? How did you manage the risk?</p>
<p><b>7.5 Ensuring meeting of deadlines</b> Takes early action to deal with issues that affect deadlines to ensure delivery on time</p>	<p>Tell me about a time in which you were required to produce something to a high standard, within a fixed period of time.</p> <p>Tell me about a time when you have had to plan a project/task/ event in a given timeframe.</p> <p>Tell me about a time when you had to consider existing/ conflicting workloads, when planning a task/event/project.</p> <p>Tell me about a time when you didn't meet an objective/deadline.</p>

Competency	Example competency-based interview questions
<p><b>8.0 DEVELOPING PEOPLE</b> <i>Developing people to improve their performance and fulfill their potential</i></p>	<p>What strategies to you operate to identify and nurture talent in your organisation?</p> <p>How do you ensure staff with potential are identified and developed?</p> <p>How has this benefited your organisation?</p> <p>Tell me how you manage the development of others.</p>
<p><b>8.1 Identification of team members' training needs</b> Identifies training needs in team members and takes action to meet them by formal or informal learning and development methods</p>	<p>Tell me how you manage the development of others.</p> <p>Have you ever discovered your staff/team were not performing to your standards? What did you do about it? When?</p>

	Please give us an example about how you identified employees' training needs. What measures did you take to educate and develop your people?
<b>8.2 Talent management</b> Identifies talent and potential in staff members and creates development plans to realise it	What strategies to you operate to identify and nurture talent in your organisation? How do you ensure staff with potential are identified and developed? How has this benefited your organisation? Tell me how you manage the development of others.
<b>8.3 Coaching</b> Personally coaches team members to improve their performance	Have you ever experienced a situation when your staff did not perform to your expectations? What did you do about it? Tell me of a time when you have had to work with someone less experienced than yourself. Give me an example of how you coached someone to improve their performance.

### 5.2.3 Additional Competency for Top Managers

Competency	Example competency-based interview questions
<b>9.0 STRATEGIC DIRECTION</b> <i>Setting the strategic direction of the organisation in response to the needs of Ministers and citizens, and ensuring its delivery.</i>	Give me an example of when you have had to gain support from stakeholders to implement a strategic decision that had potential to be controversial. How did you handle any objections? How did you get others on board? What were the political/personal sensitivities you had to deal with? What were the results?
<b>9.1 Strategic planning</b> Develops strategic plans to ensure the organisation's future success	What ideas have you developed and implemented that have impacted on the long term strategic development of your organisation? What were the challenges? What was the impact on your organisational strategies? How did you evaluate the effectiveness of these strategies in the long term? Describe an occasion when you have had to develop strategies to implement major organisational change. What were you aiming to achieve? What was your approach to planning? How did you consult and involve relevant people?



	<p>What were the results? If you were doing it again, what would you do differently?</p> <p>Tell me how you have gone about planning for the future direction of your organisation.</p>
<p><b>9.2 Monitoring of strategic plans</b></p> <p>Monitors plans to achieve strategic objectives</p>	<p>Tell me how you have gone about planning for the future direction of your organisation/function. How did you monitor its implementation?</p> <p>Describe a strategic change you have recently implemented. How did you monitor its implementation and keep it on track?</p>
<p><b>9.3 Strategic resource management</b></p> <p>Secures the resources needed to deliver strategic objectives</p>	<p>How do you currently ensure that you manage your resources effectively?</p> <p>How do you consider costs to the organisation? What environmental factors do you take into account?</p> <p>Describe a strategic change you have recently implemented.</p>
<p><b>9.4 Taking responsibility for meeting strategic objectives</b></p> <p>Takes responsibility for ensuring the strategic objectives are met</p>	<p>Describe a strategic change you have recently implemented. Did it achieve its objectives? How did you ensure this?</p>
<p><b>9.5 Building an effective senior management team</b></p> <p>Builds an effective senior management team that pulls the organisation together.</p>	<p>Tell us about a situation where you faced reluctance from your senior team to accept the direction that you were setting.</p> <p>Give me an example of how you improve the effectiveness of your senior team in leading the organisation.</p>

## 6. TRAINING EXERCISES

### 6.1. TRAINING EXERCISE FOR JOB ANALYSIS – PREPARATION OF JOB DESCRIPTION

Divide the participants of the training into groups of 5–6 people each. Give each group one flip chart paper. You can prepare the flip chart paper earlier by drafting the names of the main elements of job description (purpose, description of jobs, contacts etc). Each group should analyse the job of one of the group members. The other group member should conduct an interview with the participant whose job is analysed while another group member will

draft the job description on the flip chart paper. The other participants in the group will give their comments and actively participate in drafting the job description. At the end of the exercise each group will present their prepared job description to other training participants.

## 6.2. TRAINING EXERCISE FOR IDENTIFICATION OF COMPETENCES ON THE BASIS OF A JOB DESCRIPTION

If you haven't done this already in the previous exercise, divide the participants into groups of around 5–6 persons. Each group is to sit around a table to role-play the work of a selection panel. The group should choose one group members to be an interviewee – a candidate to interview.

Provide each group with a job description for either a managerial or non-managerial position (preferably a job description prepared by the group in the previous exercise). Provide each group with the following instructions:

*Your role is to serve as an interview panel and you are meeting to prepare for a competency– based interview for the job you have just analysed.*

*Elect a panel chairperson to coordinate your discussions and make preparations according to the list we have just discussed. The chairperson will also chair the actual interview at a later stage.*

*As a group, you should:*

- *Select 3–4 priority competences for the provided job description*
- *Decide on the questions that will be asked*
- *Decide who will ask each question and in what order.*
- *Decide how notes will be taken.*

### **Additional information to be given to trainees before the exercise:**

Take some time to familiarise yourself with the priority competencies to be assessed during the interview. The definitions and positive behavioural indicators are available in the Competency Framework. *ALL competency-based questions should be determined before you start interviewing and every candidate should be asked the same questions.*

## 6.3. TRAINING EXERCISE FOR CONDUCTING COMPETENCY-BASED INTERVIEWS

### 6.3.1 Conducting the interview (role play)

*Each group has already chosen one of its members to be a candidate to interview. The panel, under the coordination of its Chairperson should present their pre-determined competency-based questions to the candidate.*

*The candidate should answer from **his/her own real experiences**.*

*The panel should take the opportunity to probe the candidate until they are satisfied they have sufficient information on each question.*

### 6.3.2 Additional information to be given to trainees before the exercise:

Typically, competency-based questions will frequently ask candidates for examples of how they have dealt with a particular situation in the past. The rationale behind asking for such examples is that past behaviour is a strong predictor of future behaviour in similar situations. Hypothetical questions (such as “What would you do if ...”) should be avoided as they gather information that is a less valid predictor of future behaviour.

Very often a candidate’s answer to a question will give you some information but not enough to make an assessment of the competency you are assessing. What is needed then are probing questions to follow up the initial question.

Interviews should follow a clear structure; however, the questions should not be followed slavishly as this will interrupt the flow of the interview. It is good practice to explain to the candidate how the interview will be structured, and that you will be asking for specific examples of when they have demonstrated the competencies required for the role. Ask them to bear in mind that you’ll be interested in:

- Examples from their work life
- Recent examples preferably – the last 2–3 years
- What they individually did or said, not the team as a whole (it is fine if they need time to think of an example)

The questions and probes should be structured as follows:

- Situation – What is the example?
- Task – Ask them to describe their detailed task

- Action – What did they do?
- Result – What was the outcome? How did it go/what would they do differently?

As the panel asks their questions you should make notes, using an interview assessment form. You are looking for evidence that the criteria have been met in the responses to the questions and in the examples that candidates give. Be aware that in many instances, applicants answering a question on one competency will provide insight into their proficiency in others as well.

Asking each candidate the same competency-based behavioral questions will ensure a fair evaluation of the applicants on the same set of competencies. Panel members should have the definitions of the competencies in front of them during the interview.

### 6.3.3 Additional guidelines for members of selection committees (including the Chairperson)

All panel members should make notes on candidates' answers during interviews to aid the subsequent collective evaluation. Notes should be based on what the interviewee actually interview questions will be framed around. Notes should be an accurate record of what the said or did in the interview, not on the interviewer's personal inferences. It is important to separate observation from evaluation. Ask questions clearly and clarify issues that need clarification. Follow up with probing questions where necessary. Probing should be tailored to the responses received from the candidate, it cannot be scripted in advance.

Allow for silence on tough questions that seek specific detail to allow candidates to consider the question and think through it before answering. Put the candidates at ease, let them know they have time before you expect an answer.

Seek contrary evidence in your interviews. If the interview is painting a picture of negative past behavior on the job, seek to find evidence of good behavior or performance to get a balanced view of the candidate. The same is true when a candidate seems perfect, perhaps too perfect.

Assess each candidate against the criteria in the job specification and competency descriptions, rather than against each other. If there is a difference in opinion within the panel, reassess the candidates by going back through the job specification and how a candidate scored on each one of the criteria again, if needed. The final decision should be agreed by all members of the panel.

The Chair of the panel is expected to fully participate in the asking of questions. In addition, s/he will control the proceedings, including time-keeping of the interviews, as required.

**Actions during the interview:**

- Welcome the candidate and introduce panel members.
- Explain the overall process to the candidate and that they can expect panel members to take notes.
- Ask an opening question designed to relax the candidate and help them to overcome nervousness, if required.
- Monitor the process and intervene if any panel member asks inappropriate question.
- Ensure that all questions are competency-based, avoiding hypothetical questions.
- Ensure that the candidates have an accurate picture of both the job itself and of the terms and conditions relating to it, and provide an opportunity at the end of the interview for candidates to ask any questions and offer any additional information.
- Bring the interview to a close by thanking the candidate for their time. Explain the decision-making process and how and when the candidate will be informed of the outcome.

## 6.4 TRAINING EXERCISE FOR ASSESSING THE CANDIDATE AFTER THE INTERVIEW

*This session should be coordinated by the panel Chairperson*

**Step 1**

*Each panel member should use the scoring form to assess the candidate, based on their own interview notes. This should be done in silence and with no consultation with others.*

**Step 2**

*Each panel member in turn shares their scores and assessments. The panel Chairperson should record these on a matrix on the flipchart. An example matrix is attached.*

**Step 3**

*The panel will collectively discuss the scoring results and decide by consensus whether to consider the candidate qualified for the position or not. Panel members are allowed to question and challenge each other and*

*to seek justification for particular scores. Judgments should be based on facts and evidence that came from the interview.*

### 6.4.1 Additional information to be given to trainees before the exercise:

#### **Actions during the decision-making process:**

- Keep accurate notes of the decision-making process, including clear reasons for deeming someone unsuitable.
- Ensure that the assessment is carried out in a fair and transparent manner and that recruitment and selection procedures and policy have been followed correctly to avoid any claims of unfair treatment.
- The Chairperson should invite all panel members to give feedback and share their scores on the candidates, finishing with the chair's own feedback.
- Provide the results obtained from any other tests, or invite the HR representative to do so.
- Lead the panel in reaching a consensus on whether each candidate meets the basic requirements of a given position, for example, through an overall score.

#### **Assessing candidates and deciding a rank order**

As discussed above, immediately after each interview the panel members should discuss and compare their notes made during the interview and decide whether the basic requirements for a position have been met by that particular candidate. Based on this they should complete the interview score sheet. Each candidate deserves to be scored carefully, using the same criteria for each applicant. In assessing the overall qualifications level of each candidate, the panel members should ask themselves questions such as:

- How relevant were the personal examples described by the candidate?
- Did the examples demonstrate that the candidate possessed personal qualities and qualifications for the kind of job s/he had applied for?
- Did the applicant's personal qualities and qualifications meet the expectations of the institution concerned?
- For middle and top-management level positions: did the candidate through the examples given demonstrate good leadership abilities, as well as personal characteristics that are required of a good leader?

An example of a final assessment form is found below. Once the final assessment form for each candidate has been completed, time has come to decide how the candidates should be ranked. Such a rank order should clearly distinguish between candidates who are considered qualified for the position, and those who are not. The internal ranking of qualified candidates should be based on a careful evaluation of the experience, skills and competencies of each candidate and how they compare to one another. Each member of the panel will have his/her evidence to bring to the discussion and it is to be expected that panel members may have different views on how the candidates should be ranked. Discussions and judgments should be based on the final assessment form for each candidate, supplemented by the evidence of facts gathered during the selection process.

In many cases, the individual ranking between qualified candidates turns out to be rather straight forward, in other cases it may be difficult to distinguish between two or several candidates. In that case, each of the candidates' strong and, if applicable, weak points should be contrasted with what is most important for doing a good job in the position concerned.

A scoring matrix may be used to aggregate all the scores agreed by the panel for all candidates to assist in the decision-making process on who should be ranked as number one, number two, etc. The purpose of this evaluation process is to appoint the best candidate for the job, i.e. the one who most closely matches the specifications and requirements derived from the job description. If none of the candidates meet the requirements in an acceptable way, it would be normal to announce the vacant position once more, in order to attract new candidates.

### **Assessment form for the interview of a candidate**

The assessment form for each candidate should initially be filled in by each member for the panel individually. The **FINAL** assessment form for a candidate is agreed by all members of the panel, through a focussed discussion of each competence/qualification that the position requires. The rank order of the candidates is based on the final assessment forms, supplemented by additional evidence if required.

Name and surname of the candidate:	Work post:
Institution:	Date:

I Assessment of competencies:

Competencies/qualifications	Grades (1 – 5)
1.	
2.	
3.	
4.	
5.	
...	
Total number of points (1+2+3+4 + 5 +...)	

Comments (optional):

Key candidate's strengths:	Noticed weaknesses:

Signature of the competition commission member:

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# Conflict of Interest

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## 1. CONFLICT OF INTEREST AND INTEGRITY CHALLENGES IN THE WESTERN BALKANS

In order to pursue and protect the public interest, persons working in the public sector are under the obligation to make decisions that have an impact on citizens' rights and interests. It is necessary that public regulations and decisions that affect individuals be passed in an impartial and professional manner, thus contributing to the preservation and advancement of public interest while leaving personal or other extraneous interests aside.

Conflict of interest implies situations in which the private interest of public officials affects or could affect their impartiality in the performance of the delegated tasks of public interest. All public officials are individuals who have their own private interests. These private interests may be of such nature that they might affect the independent and objective performance of the official duties and activities in the public interest. That is how numerous situations may arise in which public sector employees are (potentially) in a conflict of interest, which distorts "the socially acceptable balance between the personal interests of the public sector employees and the public interest."<sup>1</sup> A conflict of interest may arise as a result of an attempt to avoid personal losses, but also to ensure personal gain by using professional or official capacities.<sup>2</sup> It should certainly not be disregarded that such controversial situations can simply be the result of a set of objective, external circumstances.

### 8 Categories of Conflict of Interest

- Acting with the aim of personal benefit
- Accepting benefits
- Trading in influence
- Using state property
- Using confidential information
- Additional employment
- Post-office employment
- Personal behaviour

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1 F. M. Popa, "Conflict of Interest and Integrity in Public Administration in CEE Countries. Comparative Analysis", *Journal of Public Administration, Finance and Law*, No. 4/2013, 58.

2 See the last Chapter for more detailed examples of conflicts of interest in practice.

Defining the public interest is not the prerogative of the public officials alone. An important factor in making this decision are the citizens, observing from outside and assessing whether the activities of public authorities are in line with the state values, moral standards, and legal principles. When the citizens are convinced that actions are appropriate and that decisions are adopted impartially and in compliance with law, they will have trust in public institutions and perceive public officials as persons of integrity. Maintaining public trust in the work of public institutions is a key task that can be achieved by promoting and preserving the personal integrity of public officials. That in turn promotes further development, institutional and social integrity.

However, the mere suspicion that public officials have acted in their private interest and not in the public interest will cause a loss of trust in the integrity of a public institution. In order to preserve the citizens' trust in institutional integrity, public officials must ensure that a **perceived conflict of interest** does not exist and that the institutional integrity has been well protected. Therefore, the mere existence of a **potential conflict of interest** requires a public official to eliminate the possibility of any such conflict, in order to prevent the perception of any wrongdoing. **In situations in which there is a real conflict of interest**, there is an obligation to take the necessary steps to resolve the conflict situation, and to ensure that the decision-making process is in line with the public interest. The following table shows some of the basic forms of conflict of interest.<sup>3</sup>

Any suspicion that the public sector employees act in their own personal interest, rather than the public interest, undermines the confidence in the integrity of the institutions. However, the mere existence of contradictory interests may not necessarily have negative effects. First of all, good governance principles have been developed, requiring disputable situations to be resolved in an adequate manner before decisions or further actions have been made. A failure to report a potential conflict of interest situation or a failure to take the necessary actions to resolve it, may damage the public interest and create an impression that it favours personal interests. Conflicts of interest are often equated with corruption which, by definition, implies the abuse of public position or power for personal gain.<sup>4</sup> However, it should be noted that sometimes a conflict of interest may be present without it leading to corruption, and vice versa. Only in cases when public interests have **indeed** been side-lined by private interests, one can talk about corruption. In other words, only the failure on the part of public official to act and resolve

3 F. M. Popa, "Conflict of Interest and Integrity in Public Administration in CEE Countries. Comparative Analysis", *Journal of Public Administration, Finance and Law*, No. 4/2013, p. 59. Also, L. Esadze, *Guidelines for the Prevention of Conflict of Interest*, Belgrade 2013, p. 8.

4 I. Amundsen, *Political Corruption: an Introduction to the Issues*, Chr. Michelsen Institute, Bergen 1999, available at <http://www.cmi.no/publications/1999/wp/wp1999-7.pdf>, 3.3.2017.

a potential conflict of interest, and not its very existence, creates a breeding ground for corruption and its prevalence.

It is exactly the domain of conflicts of interest that can be a powerful tool in establishing and maintaining the citizens' trust in public institutions. In that respect, the conflict of interest rules should not in themselves eliminate the possibility that public officials will have their personal interests, and they should rather contribute to maintaining the integrity of the public institutions, recognising that unsolved conflicts of interest may easily lead to abuse of power. Primarily, by not taking part in handling and deciding on the issues in which they themselves have a personal interest, as that could easily lead to abuse of power. A leading principle for public institutions should be impartiality. This principle, followed by effective mechanisms in order to eliminate personal interests, should be institutionalised. As a basic principle of good governance, it provides a sound foundation for building public trust in the integrity of public institutions.

It is clear that public sector employees have a crucial responsibility for maintaining the public trust in public institutions, since "individual responsibility is both a starting and an end point on the integrity route in public service."<sup>5</sup> The additional part of that responsibility, however, lies with the public authorities and institutions themselves: they must have clear rules and procedures in order to handle and prevent conflict of interest situations. Furthermore, they are under the obligation to inform the employees of the conflict of interest rules, and to sanction failure to comply with them. Otherwise, the sense of responsible personal behaviour will be lost, and all efforts to achieve the institutionalisation of integrity will remain unsuccessful. In addition, that creates fertile ground for unethical behaviour to become acceptable.

During the last decade, the Western Balkan countries have adopted numerous regulations on the handling of conflicts of interest. The importance of regulating this complex issue was recognised in the course of the European integration process. In addition, membership of the Council of Europe and the United Nations also required dedication to the regulation of conflicts of interest in the public sector. Many of the legal regulations adopted are either directly or indirectly connected to the handling of conflicts of interest, along with a number of rulebooks, instructions, codes of ethics, and the like. Since the legislation mostly includes provisions that are general and need to be specified further, numerous internal secondary acts on conflicts of interest have also been adopted. To ensure successful implementation of the adopted

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5 C. W. Lewis, S. C. Gilman, *The Ethics Challenge in Public Service*, Jossey-Bass, San Francisco 2005, pp. 16–17.

primary and secondary legislation, efforts have been made to strengthen the capacities of public institutions as the key stakeholders.

However, a number of reports (OECD/SIGMA, European Commission) clearly indicate the remaining shortcomings in the implementation of the conflicts of interest regulations. Therefore, this issue remains one of the major challenges in the overall anticorruption efforts. Some of the main obstacles for the successful implementation of the relevant regulations include a lack of political will and a lack of independence from direct political influence within the institutions and agencies responsible to handle conflict of interest issues. It is beyond dispute that a certain level of awareness about this problem exists; however, a conflict of interest is still perceived as an abstract issue and its consequences are not fully understood. Consequently, the primary and secondary legislation on handling and eliminating conflicts of interest is applied inconsistently and incompletely, while the persons competent to monitor potential public officials' conflicts of interest are often not appointed.

The problem of conflicts of interest becomes even more complex when one considers the ever-closer cooperation between the public sector, on the one hand, and the private sector on the other. Such cooperation may give rise to a number of new situations that may imply conflict of interest, a fact that is still not recognised in the relevant legislation.<sup>6</sup>

Regulations on the handling of conflicts of interest envisage various forms of sanctions for public officials for unethical behaviour. In addition to the procedures for the prevention of conflicts of interest, the agencies that are set up to implement these regulations are also under the obligation to inform the relevant authorities about any disciplinary, misdemeanour or criminal proceedings. However, such proceedings are not necessarily initiated.<sup>7</sup> When public officials see that the sanctions envisaged in the laws and other regulations are not implemented in practice, they may easily conclude that they are free to act in accordance with the unwritten rules and old practices, neglecting the norms and standards of new legislation. Moreover, the sense of being accountable for their own actions is not developed, compromising the efficiency of the prescribed rules and the success in their implementation.

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6 Some examples include public-private partnership, sponsorship, exchange of staff, the create of new jobs in the public sector that change the usual labour relation rules.

7 For more details on the number of criminal and misdemeanour proceedings (not)initiated in Western Balkan countries see J. Meyer-Sahling, "Civil Service Professionalisation in the Western Balkans", *SIGMA Papers* No. 48, OECD Publishing, Paris 2012. Also see European Commission Staff Working Document, Serbia 2016 Report, Accompanying the document "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions", 2016 Communication on EU Enlargement Policy, Brussels 2016.

All these shortcomings make the entire system and its integrity vulnerable, since they provide room for ignoring the rules and regulations on conflicts of interest and failing to report or handle a conflict of interest situations. As the final result, new legislation is not consistently implemented and the desired change of behaviours in the public sector is not achieved.

## 2. WHAT ARE THE INTERNATIONAL STANDARDS IN THE FIELD OF CONFLICT OF INTEREST?

### 2.1. LEGAL SOURCES OF INTERNATIONAL STANDARDS

Public officials often find themselves in the situations characterised by a discord between public and private interests. The successful resolution or prevention of conflict of interest requires the existence of and adherence to specific guidelines and standards. Such resolution contributes to competent and professional performance of public office and duties and the respect for the principles of impartiality and integrity.

Given that the need to resolve conflicts of interest is relevant in almost all countries in the world, a large number of international agreements have been adopted in this field. The main international legal acts governing this field are the following: “Twenty Guiding Principles for the Fight against Corruption of the Council of Europe”<sup>8</sup> especially the principles under ordinary numbers; The Council of Europe Recommendation of the Committee of Ministers to Member States on “Codes of Conduct for Public Officials”;<sup>9</sup> UN Convention Against Corruption,<sup>10</sup> OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;<sup>11</sup> United Nations Code of Conduct for Civil Servants,<sup>12</sup> as well as the Anti-Corruption Initiative of the South-East Europe Stability Pact.

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8 The Council of Europe Resolution on the “Twenty Guiding Principles for the Fight against Corruption”, No. 97/24. Even though conflicts of interest are not mentioned explicitly, it can be concluded that certain principles also apply to policies related to conflict of interest resolution. These are principles number 1, 3, 7, 9, 10 and 20.

9 The Council of Europe Recommendation of the Committee of Ministers to Member States on “Codes of Conduct for Public Officials”, No. 200/1.

10 UN Convention against Corruption, General Assembly Resolution, No. 55/61.

11 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21.11.1997.

12 United Nations Code of Conduct for Civil Servants, available at <http://icsc.un.org/resources/pdfs/general/standardsE.pdf>, 10.4.2017.

Some of these legal acts prescribe only the general obligation of the signatory states to establish measures for the prevention of conflicts of interest in accordance with their internal legislation,<sup>13</sup> while others include concrete recommendations on the appropriate behaviour of public officials. For instance, the Code of Conduct for Public Officials, adopted by the Council of Europe, provides recommendations on the appropriate conduct of public officials. Its addendum includes a Model Code, proposing how to treat situations that may result in a conflict of interest concerning public officials, such as accepting gifts, using public funds, etc.<sup>14</sup>

**Article 8 paragraph 5 of UN Convention Against Corruption**

Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

**Article 13 paragraph 3 of the Model Code**

Since the public official is usually the only person who knows whether he/she has a conflict of interest, the public official has a personal responsibility to:

- be alert to any actual or potential conflict of interest;
- take steps to avoid such conflict;
- disclose to his/her supervisor any such conflict as soon as he/she becomes aware of it;
- comply with any final decision to withdraw from the situation or to divest himself or herself of the advantage causing the conflict.

## 2.2. CONTENTS OF INTERNATIONAL STANDARDS

The international standards on resolving conflicts of interest include limitations, prohibitions and obligations that public officials must adhere to, as well as the rules for reporting conflicts of interest. Furthermore, the standards include the registry keeping rules, which facilitate the monitoring and prevention of

13 Article 7, paragraph 4 of UN Convention against Corruption. OECD's Recommendation on Guidelines on managing conflict of interest in the public sector proposes efficient measures for countering corruption that can be taken by member states. This primarily refers to criminalisation of bribing foreign public officials in the fields of banking, finance, accounting and the like.

14 Council of Ministers Recommendations suggests in a clear fashion that the recommended Model Code of Conduct for public officials should be a part of national legislation, and to be adjusted so as to meet the needs of the public administration of each member state.

conflicts of interest, contributing considerably to transparency. The national legal systems differ in terms of the scope of such limitations and obligations, as well as the quantity and contents of the information that needs to be disclosed.

**Identification and reporting of situations that may result in conflict of interest:** One of the main standards related to conflict of interest resolution is the obligation to report private interests that may potentially affect objective performance of duties. This shows readiness to avoid contentious situations, by being aware of (potential) threats to personal and institutional integrity. Real or potential conflict of interest can be reported when taking a certain position (in the form of a declaration of assets and income<sup>15</sup>) or during the performance of an office (in the form of a report on contentious or debatable situations). Filing such a report ensures transparency and helps identifying conflict of interest situations, to exclude a public official from performing public duties and from participating in the decision-making process.

Certain ambiguities still remain as to the scope of information that should be declared, for example, about the circle of those who should be obliged to file a report or be included in the report.<sup>16</sup> Another example is whether a declaration of assets should have an important role in controlling and preventing conflicts of interest of elected local officials and members of parliament. Given that controlling these reports requires is time intensive and costly, it is recommended not to require all civil servants to file them, and rather limit this obligation to those who hold positions and work in the sectors that are prone to conflicts of interest.<sup>17</sup> Instead, the assets and other financial interests of civil servants may be controlled on a random basis.

**Concurrent or additional employment and occupations:** Concurrent engagement outside of public office may result in a conflict of interest, and that is why the relevant authorities should have the power to decide on the compatibility of public office and additional employment. An assessment that such additional work may potentially cause a conflict of interest should lead to a denial of consent for additional employment to those performing public duties.<sup>18</sup> A precise definition of the conditions for allowing additional

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15 Declaration of assets of persons who hold public offices is not necessary if a report on assets already exists, but it may contribute to the control of officials and persons appointed on political grounds.

16 This resulted in the practice of having officials' family members also declare assets, which is assessed as problematic from the constitutional standpoint.

17 SIGMA, "Conflict-of-Interest Policies and Practice in Nine EU Member States: A Comparative Review", *SIGMA Paper*, No. 36, OECD publishing, 2007.

18 All OECD countries have limitations with regards to additional employment of politically appointed persons, including members of the government, civil servants and (judges), whilst these conditions are even more strict in Spain, France, Germany and Poland.

employment, and the public authority or institution that should decide on whether the conditions are met, is an important step in the establishment of a preventive system that would minimise conflicts of interest.

**Official decision-making and advising policy:** Other fields in which public officials must demonstrate that their impartiality and objectivity in the performance of their duties are negotiations, drafting and implementation of contracts, and decision-making on compensations and sanctions. This particularly relates to the need to prevent giving a privileged position or certain benefits to the natural or legal persons that are related to the public decision-maker, contrary to the legal procedures and solely on the basis of their personal relationship. One of the ways in which a conflict of interest in this field can be prevented is to prohibit the public officials from concluding contracts on behalf of the state if they are or may be perceived as related to the interested persons.<sup>19</sup>

**Gifts and privileges:** Gifts, privileges and other benefits acquired by persons who perform public office do not by definition constitute a conflict of interest, as long as they may not be seen as potentially influencing the public official concerned. On the other hand, public officials must not solicit any gifts or economic gain or privilege from the private sector that cooperates with the Government for the performance of the duties included in their job description. For example, when the public sector cooperates with the private sector, gifts and other advantages may be seen, by definition, as bribes, which obviously leads to corruption.

Conflicts of interest will not arise when gifts and other benefits are rare, of small value, or a part of regular protocol or courtesy as they cannot endanger or compromise personal or institutional integrity. However, there is a fine line. That is why the public officials who make decisions that might directly benefit the persons or companies that provide gifts and other benefits need to be particularly careful.

However, accepting any other gifts, regardless of whether they were given as a token of true gratitude or a remuneration for a service rendered, may cause suspicion about the independence and impartiality of public officials. It is therefore necessary to define and prescribe which gifts may be accepted and under what conditions. With the exception for token gifts (for example, a pen or plaque with a logo), most countries prescribe an obligation to keep relevant registers, which are available to the public in a transparent manner.

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<sup>19</sup> This also relates to situations including contracting with companies owned by their relatives or friends.



**Limiting the potential use of confidential information in the private sector after the termination of public office:** The fact that someone has held public office should not deny him/her the possibility of taking a new job. However, when seeking new employment, former public officers should be under the obligation to eliminate any potential conflict of interest between their new job and the responsibilities they had while they were in the public office. For example, for a certain period of time after their employment in a public authority, a former public official should not accept the appointment to the managing board, or employment in the companies with which he/she had frequent cooperation or a business relationship during a period of one year prior to the termination of office. Furthermore, former public officials should not represent persons before the organisations with which they had frequently officially cooperated during that period. The key reason behind such a time-limited quarantine is the potential risk of a public disclosure of the internal information linked to their former public work or public programmes and policy that are not otherwise available.

**Setting clear rules on what is expected from public officials in case of a conflict of interest:** a public official should accept his/her personal responsibility if it has been established that he/she has relevant private interests that may be or are in contradiction with his/her public duties. Options for resolving such conflict of interest are the following: deprivation or suspension of private interests; limiting access to certain information or stepping aside from decision-making in the area in which a conflict of interest exists or may arise; reassignment of duties and responsibilities; transferring the conflicting interest to a proxy; termination of employment or resignation of the public official from his/her current position.

**Efficient implementation of the conflicts of interest policies:** In addition to establishing the principles for regulating and resolving conflicts of interest, efficient conflict resolution requires adequate mechanisms that would enable the implementation of these principles in practice. For example, a procedure for reporting noncompliance with the conflict of interest rules to an independent body (whistle-blowers). Such mechanisms contribute largely to the prevention of the conflict of interest situations.<sup>20</sup> However, to accomplish this standard, it is necessary to establish bodies that would investigate potential conflict of interest situations, identify noncompliance with policy or regulations, and prescribe appropriate sanctions, which would be consistently implemented.

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20 Rules on these kinds of mechanisms must include, inter alia, protection from retaliation for whistleblowers, as well as eliminating the possibility of abuse of anonymous warnings or reports.

Sanctions for noncompliance with the conflict of interest policy or regulations in the public sector should be differentiated, depending on the gravity of the violation. They may range from a simple entry of the contentious interest in the relevant register, a formal warning, a disciplinary sanction, to filing corruption charges or abuse of position charges. Other measures that may effectively deter those who wish to ensure personal gain by such violations of regulations and abuse of delegated powers may also be developed.<sup>21</sup>

### 3. WHAT IS THE LEGAL FRAMEWORK FOR MANAGING CONFLICT OF INTEREST IN THE WESTERN BALKANS COUNTRIES?

#### 3.1. ALBANIA

##### Legal sources:

- **Law on Prevention of Conflicts of Interest in the Performing Public Office,**<sup>22</sup>
- **Law on the Declaration and Audit of Assets, Financial Obligations of the Elected Persons and Certain Public Officials,**<sup>23</sup>
- **Law on the Rules of Ethics in the Public Administration,**<sup>24</sup>
- **Law on Civil Servants**<sup>25</sup>

The main obligation of all persons employed in the public administration is to prevent or resolve as soon as possible any situation that constitutes a potential conflict of interest.<sup>26</sup> If he/she is not sure whether a conflict of interest exists at all, the public official is obliged to consult his/hers superior, who will take further necessary actions.<sup>27</sup>

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21 Examples of such measures include retroactive annulment of wrongfully made decisions, passed by a person who had conflicting interests, and recusal from future involvement in certain public tasks of persons who have acted in contradiction with conflict of interest rules.

22 Law on Prevention of Conflicts of Interest in Performing Public Office, *Official Gazette of the Republic of Albania*, No. 9367, dated 07 April 2005.

23 Law on the Declaration and Audit of Assets, Financial Obligations of the Elected Persons and Certain Public Officials, *Official Gazette of the Republic of Albania*, No. 9049, dated 10 April 2003.

24 Law on the Rules of Ethics in the Public Administration, *Official Gazette of the Republic of Albania*, No. 83/2003.

25 Law on Civil Servants, *Official Gazette of the Republic of Albania*, No. 152/2013.

26 Article 3, paragraph. dh of the Law on the Rules of Ethics in the Public Administration, Article 46 of the Law on Civil Servants.

27 Article 6 of the Law on Prevention of Conflict of Interests in Performing Public Office.

**Reporting private interests and registering conflicts of interests:** In the course of performing public office, public officials, as personnel defined by the Law on Prevention of Conflicts of Interest in Performing Public Office<sup>28</sup> (hereinafter public officials) are obligated to report any personal private interest that may cause a conflict of interest. In addition to self-reporting, interests can be reported also at the order of the superior.<sup>29</sup> The existence of public officials' personal interests can be identified based on the information obtained from other officials, public institutions, interested parties, third parties, the media, etc.<sup>30</sup> The public authorities maintain registers of interests that include the details about the public official, the manner and reasons for the emergence of a conflict of interest, sources of information, actions taken, and decisions adopted. A separate law also stipulates the obligation of **civil servants** to report their private interests to their superior.<sup>31</sup>

**Actions to manage conflicts of interest:** A public official who has timely established the existence of a conflict of interest has at his/her disposal several actions he/she can take: transferring the private interest to another person, exclusion from the decision-making procedures, withdrawing from private activities, office or engagements that are in conflict with his/her public office, or resigning from public office. The public official must notify his/her superior about his/her actions, who may also order specific actions to be taken to resolve the conflict of interest.<sup>32</sup> These would include: withholding certain information from the public official who is in a conflict of interest, excluding the public official from certain decision-making procedures, changing the public official's responsibilities, taking actions to avoid appointing the public official to a position in which he/she might come into conflicts of interest, etc.<sup>33</sup> Unless appropriate actions have been taken to address the conflict of interest, contracts concluded under such circumstances would be null and void and would have no legal effect.<sup>34</sup>

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28 Law on Prevention of Conflicts of Interest in Performing Public Office, *Official Gazette of the Republic of Albania*, No. 9367, dated 07 April 2005. The Law is applicable to the following personnel: elected personnel, members of the Government, directors of independent institutions, judges and prosecutors. The Law also covers all decision-making processes: legislative, administrative (local and central Government) and judicial (civil, penal and administrative).

29 Similar obligations are stipulated also for any person employed in the public administration in Article 4, paragraph 3 of the Law on the Rules of Ethics in the Public Administration.

30 Articles 8, 9 of the Law on Prevention of Conflict of Interests in Performing Public Office.

31 Article 47 of the Law on Civil Servants.

32 Article 37, paragraph 4 of the Law on Prevention of Conflict of Interests in Performing Public Office.

33 Articles 37 and 38 of the Law on Prevention of Conflict of Interests in Performing Public Office, Article 5, paragraph 1 of the Law on the Rules of Ethics in the Public Administration.

34 Article 40 of the Law on Prevention of Conflict of Interests in Performing Public Office.

**Concurrent additional employment and work:** The Law on the Rules of Ethics in the Public Administration stipulates a general prohibition for all persons employed in the public administration to engage in additional employment and work if that could jeopardize or impede in any way their duties within the public administration. The superior must be informed in advance of any additional employment.<sup>35</sup>

**Prohibition on contracting:** A public official cannot enter into a contract with public or commercial companies in which he/she has an interest. In addition, contracts are prohibited between a public institution and a natural or legal person or a company, if the public official has a key decision-making role in the evaluation of the bidders and the award conditions, and if at the same time he/she has an interest in a potential counterparty.<sup>36</sup>

**Prohibition to hold financial interests in companies:** A public official must not have shares or interests in companies that are exempt from paying taxes or that do business in a tax-free zone, if he/she is competent to decide on granting of the above privileges.<sup>37</sup> In addition, a public official who is a representative of a public institution holding interests in a company during the performance of public office must not receive gifts from that company, buy shares in that company or receive any other benefits from the clients of the company.<sup>38</sup>

**Gifts:** A public official must not receive or solicit gifts, services or any other privileges, except token or appropriate gifts, as a compensation for performing activities within the scope of his/her office.<sup>39</sup> A public official must refuse all gifts that have been gifted, and must return the gift to the gifter. In the event that this is not possible, he/she must hand the gift over to his/her superior. In addition, a public official must inform the superior about any offer that has been made, providing as much information as possible about the event (indicating who offered the gift, and his/her reasons for such conduct, etc.).<sup>40</sup>

**Asset declaration:** Asset declaration rules apply to office holders, defined by the Law on the Declaration and Audit of Assets, Financial Obligations of the

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35 Article 8, paragraphs 1, 2 of the Law on the Rules of Ethics in the Public Administration.

36 Article 21, paragraph 3 of the Law on Prevention of Conflict of Interests in Performing Public Office.

37 Article 22, paragraph 1 of the Law on Prevention of Conflict of Interests in Performing Public Office.

38 Article 22, paragraph 2 of the Law on Prevention of Conflict of Interests in Performing Public Office.

39 The same rule is stipulated for all employees in the public administration in Articles 10 and 11 of the Law on the Rules of Ethics in the Public Administration.

40 Article 23, paragraph 3 of the Law on Prevention of Conflict of Interests in Performing Public Office.

Elected Persons and Certain Public Officials.<sup>41</sup> Office holders and their family members and related persons are required to declare their assets and the origin of their assets.<sup>42</sup> Assets must be declared upon entering the office, and upon its termination, on a regular basis – annually or upon request by the Senior Inspector for Asset Declaration and Valuation and Conflict of Interest.<sup>43</sup>

## 3.2 BOSNIA AND HERZEGOVINA

### Legal sources:

- **Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina (BiH)**<sup>44</sup>
- **Law on Civil Service in Governmental Institutions of BiH**<sup>45</sup>
- **Law on Conflict of Interest in Governmental Institutions of the Federation of Bosnia and Herzegovina (FBiH)**<sup>46</sup>
- **Law on Civil Service in Governmental Institutions of the FBiH**<sup>47</sup>
- **Law on Prevention of Conflict of Interest in the Government of the Republic of Srpska (RS)**<sup>48</sup>
- **Law on Civil Servants of RS**<sup>49</sup>

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41 Article 3 of the Law on the Declaration and Audit of Assets, Financial Obligations of the Elected Persons and Certain Public Officials defines the personnel who are subject to the obligation to make a declaration and will be referred to in this section on Albania as office holders.

42 Article 1 of the Law on the Declaration and Audit of Assets, Financial Obligations of the Elected Persons and Certain Public Officials, Article 47 of the Law on Civil Servants.

43 Articles 6–9 of the Law on the Declaration and Audit of Assets, Financial Obligations of the Elected Persons and Certain Public Officials.

44 Law on Conflict of Interest in Governmental Institutions of BiH, *Official Gazette of BiH*, Nos. 16/02, 14/03, 12/04, 63/08, 18/12. The Law is applicable to the following personnel: elected officials (Members of Presidency BiH, delegates and members of the Parliamentary Assembly of BiH, secretaries of both Houses of Parliamentary Assembly of BiH, directors, deputy directors, assistant directors of State administration authorities, institutes, agencies and directorates appointed by the Council of Ministers of BiH or the Parliamentary Assembly of BiH, or the Presidency of BiH, executive office holders (Ministers and deputy ministers in the Council of Ministers), advisors (advisors to the elected officials and to the executive officeholders) in the institutions of government in exercising their duties – which will be referred further in this section **public officials**. Similar definitions are also contained in the legislation of FBiH and RS.

45 Law on Civil Service in Governmental Institutions of BiH, *Official Gazette of BiH*, Nos. 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09, 8/10, 40/12, 87/13, 41/16.

46 Law on Conflict of Interest in Governmental Institutions of the FBiH, *Official Gazette of the FBiH*, No.70/08.

47 Law on Civil Service in Governmental Institutions of the FBiH, *Official Gazette of the FBiH*, Nos. 29/03, 23/04, 39/04, 54/04, 67/05, 8/06, 4/12.

48 Law on Prevention of Conflict of Interest in the Government of the RS, *Official Gazette of the RS*, No. 73/08.

49 Law on Civil Servants, *Official Gazette of the RS*, Nos. 118/08, 117/11, 37/12, 57/16.

The regulations of all three levels of government (BiH, FBiH and RS) contain similar definitions of conflict of interest. In accordance with the above regulations, it will be considered that conflict of interest arises when the private interest of elected officials, executive officials or advisors affects, or may affect, the lawful, objective and impartial performance of public office.<sup>50</sup> Such negative effects on the performance of public office require placing public interest and citizens' interests above any private interest.<sup>51</sup> This is achieved by respecting legal regulations, professional ethics, avoiding personal relationships of dependency on persons that may affect the impartiality of public office.<sup>52</sup>

**Incompatible duties:** All three levels of government prescribe the incompatibility of a public office with different types of engagement of the public sector employees. The performance of public office is incompatible with membership in the management or supervisory boards, assembly or other management of public companies and the Privatization Agency, as well as with employment in private companies.

In addition to prohibiting elected officials, executive officials and advisors to perform concurrently the above incompatible duties during their term in public office, this prohibition is also for a certain period after their leaving public office. The duration of this period varies. Thus, at the level of the BiH and the FBiH, the prohibition is set to last for 6 months,<sup>53</sup> while in the RS it lasts 3 months after the termination of public office.<sup>54</sup>

**Additional restrictions** are specified in the regulations at all levels of government for the membership of elected officials, executive officials and advisors in assemblies, supervisory boards and management of **private companies** in which the authority in which those persons are employed has invested capital during a period of four years prior to these persons entering public office, as well as during their term in public office. In addition to this restriction, the law also stipulates that they are not allowed to be members of assemblies, the management or supervisory boards, or to be appointed directors, of companies that cooperate with the state authorities or local government authorities, during their term in public office. In addition, an

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50 Article 1, paragraph 4, subparagraph č of the Law on Conflict of Interest in Governmental Institutions of BiH; Article 2, paragraph 1 of the Law on Prevention of Conflict of Interest in the Government of the RS.

51 Article 2, paragraphs 5 and 7 of the Law on Conflict of Interest in Governmental Institutions of BiH.

52 Article 2 of the Law on Conflict of Interest in Governmental Institutions of the Federation of Bosnia and Herzegovina.

53 Articles 4, 5 of the Law on Conflict of Interest in Governmental Institutions of BiH, Article 5 of the Law on Conflict of Interest in Governmental Institutions of the FBiH.

54 Article 5, paragraph 1 of the Law on Conflict of Interest in the Government of the RS.

additional condition prescribed by the above regulations is that the value of the engagement must exceed the prescribed threshold. The prescribed amount varies at different levels of government. At the RS level, the law stipulates that the value of the engagement must exceed KM 30,000.<sup>55</sup> At the level of the FBiH and the BiH, this additional condition is defined in a slightly different way. Namely, it is envisaged that elected officials, executive officials and advisors cannot be members of the assembly, management and supervisory boards, nor have the status of an authorised person of any private company that concludes contracts whose value exceeds the amount of KM 5,000 with the bodies financed from the budget at any level of government.<sup>56</sup> Public officials are obliged to resign from any incompatible duty or job on the following day upon entering office.<sup>57</sup>

Elected officials, executive officials and advisors must refrain from voting and from taking official actions relating directly to any commercial company in which they have a financial interest. Otherwise, their vote or the decision would be null and void.<sup>58</sup>

Civil service regulations at all levels of government stipulate certain forms of incompatibility of the performance of civil service with some forms of additional activities. At the level of the FBiH and the BiH, it is stipulated that, for two years after their termination of service, a **civil servant** cannot be employed with the persons to whom he/she was a superior, or in a company that was controlled by him/her. In addition to the prohibition of employment with these persons or in these companies, during the same period after their termination, they are not allowed to receive any compensation from them.<sup>59</sup>

The RS Law on Civil Servants regulates the incompatibility of the civil servant status and the performance of an independent activity. In such events, a civil servant's employment is terminated.<sup>60</sup> In addition, the civil servants in the RS are prohibited from being members or founders of political parties, from being members of the management, supervisory or other bodies, and from acting as councillors, deputies or to hold any other executive office in the

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55 Article 6, paragraphs 1 and 2 of the Law on Prevention of Conflict of Interest in the Government of the RS.

56 Article 6, paragraph 2 of the Law on Conflict of Interest in Governmental Institutions of the FBiH, Article 6, paragraph 2 of the Law on Conflict of Interest in Governmental Institutions of BiH.

57 Article 10 of the Law on Prevention of Conflict of Interest in the Government of the RS.

58 Article 7 Law on Conflict of Interest in Governmental Institutions of BiH, Article 7 Law on Conflict of Interest in Governmental Institutions of the FBiH, Article 6, paragraph 2 of the Law on Prevention of Conflict of Interest in the Government of the RS.

59 Article 16, paragraph 1, sub-paragraph b of the Law on Civil Service in Governmental Institutions of BiH, Article 19, paragraph 1, sub-paragraph b of the Law on Civil Service in Governmental Institutions of the FBiH.

60 Article 22 of the Law on Civil Servants.



authorities at both the republic and at the local government levels.<sup>61</sup> Also, in order to prevent them from having personal gain, the civil servants in the RS are prohibited from participating in any decision-making that may affect the financial or other interests of the civil servant himself/herself or his/her closely related persons.<sup>62</sup>

At the level of the FBiH and the BiH, with regard to the political engagement of civil servants, certain restrictions apply – from the moment when the candidacy of a civil servant for public office is confirmed or when he/she is appointed to a position in any legislative or executive body at any level of government, it is considered that the civil servant is absent from the civil service. Within one month after loosing in the elections or termination of public office or termination of mandate, a former civil servant may return to the civil service.<sup>63</sup>

**Prohibition of taking action in the event of conflict of interest:** At all three levels of government (BiH, FBiH, RS), prohibition of taking action has been stipulated for the public sector employees in cases where there is a real or possible conflict of interest. If elected officials, executive-officials or advisers find themselves in a position to vote or to take official actions on any matter in relation to any private company in which they have a financial interest, **they must refrain from voting and cede the official actions to another competent body.**<sup>64</sup> Otherwise, their decision or vote will be considered null and void.

**Personal services contracts:** Elected officials, executive officials and advisers are not allowed, during their term in public office, to enter into a personal services contract with any public company or with any private company that does business with the authorities at any level of government in the BiH, FBiH and RS.<sup>65</sup>

**Gifts:** The prohibition for public sector employees to receive gifts is defined in the same way at all levels of government. These persons may not receive gifts or other services to perform their public function, they may not receive any additional fees on top of their salary for the activities that are in the

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61 Article 23, paragraph 1, Article 24, paragraph 1 of the Law on Civil Servants.

62 Article 23, paragraph 5 of the Law on Civil Servants.

63 Article 19, paragraph 1 of the Law on Civil Service in Governmental Institutions of the FBiH, Article 16, paragraph 1, sub-paragraphs c, d of the Law on Civil Service in Governmental Institutions of BiH.

64 Article 7 of the Law on Conflict of Interest in Governmental Institutions of BiH, Article 7 of the Law on Conflict of Interest in Governmental Institutions of the FBiH, Article 6, paragraph 2 of the the Law on the Prevention of Conflict of Interest in the Government of the RS.

65 Article 8 of the Law on Conflict of Interest in Governmental Institutions of the FBiH, Article 7 of the the Law on the Prevention of Conflict of Interest in the Government of the RS, Article 7 of the Law on Conflict of Interest in Governmental Institutions of BiH.



scope of their public function. Gifts up to a certain value can be kept and do not have to be reported. However, any gifts in the form of securities or cash cannot be kept under any circumstances.

The regulations at the level of the BiH, FBiH and the RS differ from one another in terms of the value of the gift that may be kept. Elected officials, executive officials and advisors in the governmental institutions of the BiH and the FBiH are allowed to receive gifts as a compensation for the performance of public office if the value of such gifts does not exceed 200 KM.<sup>66</sup> All gifts exceeding that value must be handed over to the authority on whose behalf the elected officials perform the executive office,<sup>67</sup> or to the bodies that appointed or elected them and on whose behalf they perform their public office.<sup>68</sup> Also, if there are any doubts about the value of a gift, a person performs a public office may request the bill from the gifter. The prohibition to receive gifts applies not only to persons who perform public office, but also to all persons who receive gifts on their behalf.<sup>69</sup>

At the level of the BiH, it is envisaged that institutions are obliged to submit data on received gifts to the Commission for Decision on Conflict of Interest, which maintains the central registry of all gifts received by elected officials, executive officials and advisors during the performance of their public office. The elected officials, executive officials and advisors in the RS may keep a gift whose value does not exceed KM 300. If its value of the gift exceeds that limit, or if it is in the form of money or cheques, irrespective of the value, they are obligated to report it to the Republic Commission for the Establishment of Conflict of Interest and hand it over to the authorities that appointed or elected them and on whose behalf they perform their public office.<sup>70</sup> The prohibition for civil servants to receive or offer gifts for personal gain applies also to the civil servants in the RS, as well as to the civil servants in the BiH and FBiH.<sup>71</sup>

**Concurrent additional employment and work:** During the performance of public office, elected officials, executive officials and advisors must not

66 Article 11, paragraph 2 of the Law on Conflict of Interest in Governmental Institutions of the FBiH.

67 Article 11 of the Law on Conflict of Interest in Governmental Institutions of BiH.

68 Article 11, paragraph 4 of the Law on Conflict of Interest in Governmental Institutions of the FBiH.

69 Article 10, paragraph 8 of the Law on Conflict of Interest in Governmental Institutions of BiH.

70 Article 11 of the Law on Prevention of Conflict of Interest in the Government of the RS.

71 Article 23, paragraphs 2, 3 of the Law on Civil Servants, Article 17, paragraph 3, sub-paragraph b of the Law on Civil Service in Governmental Institutions of the FBiH, Article 14, paragraph 3, sub-paragraphs b of the Law on Civil Service in Governmental Institutions of BiH.

act as representatives of and represent any foundation or association that is financed from the public budget in the amount exceeding KM 10,000 annually (at the level of the FBiH and the BiH),<sup>72</sup> or exceeding KM 100,000 (at the level of the RS). If the foundation or association is not financed from a public budget, these restrictions do not apply.

**As far as civil servants are concerned, restrictions are imposed at all levels of government in terms of carrying out additional activities.**

At the level of the BiH and the FBiH, it is stipulated that a civil servant must not perform additional work if he/she receives remuneration for such work, unless that has been approved by the Minister or the manager of the institution in which he/she is employed.<sup>73</sup> In the Republic of Srpska, the Government adopts a separate Decree specifying the conditions and circumstances in which civil servants are allowed to have additional work and adopts a decision on each individual civil servant's request for approval of additional work.<sup>74</sup>

**Asset declarations:** Persons who perform public office at the level of the BiH and the FBiH are obliged to submit a declaration to the BiH Central Election Commission, and to disclose their personal financial situation.<sup>75</sup> This obligation of persons performing public office exists also in the territory of the Republic of Srpska, where these persons report on their personal financial status and circumstances to the Republic Commission for the Identification of Conflicts of Interest.<sup>76</sup>

**Civil servants** in the BiH and the FBiH governmental institutions are also obliged to disclose all information relating to their personal assets upon entry into service. In addition, the above information must be provided also for the civil servant's close family members.<sup>77</sup> At the level of the RS, this obligation of civil servants has not been stipulated.

**Competence for the implementation of laws on conflict of interest:** To ensure the implementation the Law on Conflict of Interest, a Commission

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72 Article 11 of the Law on Conflict of Interest in Governmental Institutions of BiH, Article 12 of the Law on Conflict of Interest in Governmental Institutions of the FBiH, Article 8 of the the Law on the Prevention of Conflict of Interest in the Government of the RS.

73 Article 16, paragraph 1, sub-paragraph a of the Law on Civil Service in Governmental Institutions of BiH, Article 19, paragraph 1, sub-paragraph a of the Law on Civil Service in Governmental Institutions of the FBiH.

74 Article 24, paragraph 2, 3 of the Law on Civil Servants.

75 Article 12 of the Law on Conflict of Interest in Governmental Institutions of BiH, Article 13 of the Law on Conflict of Interest in Governmental Institutions of the FBiH.

76 Article 12 of the Law on Conflict of Interest in Governmental Institutions of BiH, Article 13 of the Law on Conflict of Interest in Governmental Institutions of the FBiH.

77 Article 16, paragraph 2 of the Law on Civil Service in Governmental Institutions of BiH, Article 19, paragraph 2 of the Law on Civil Service in Governmental Institutions of the FBiH.

for Deciding on Conflicts of Interest has been established at the level of Bosnia and Herzegovina, while in the Republic of Srpska, this function is performed by the Republic Commission for the Identification of Conflicts of Interest. At the level of the Federation, the Central Election Commission is in charge of determining whether a particular situation is a conflict of interest in accordance with the Law on Conflict of Interest in Governmental Institutions of the FBiH.

### 3.3. KOSOVO\*

#### Legal sources:

- **Law on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of all Public Officials;**<sup>78</sup>
- **Law on Prevention of Conflict of Interest in Discharge of Public Functions**<sup>79</sup>
- **Law on the Civil Service.**<sup>80</sup>

The above laws stipulate the obligations of public officials and civil servants to subordinate their private interests to the public interest, as well as a number of actions that they must take to prevent and resolve conflicts of interest to preserve their personal integrity and the integrity of the institution in which they perform public office, or public service.

A separate article prohibits a series of acts by senior public officials that may give rise to a conflict of interest, which boils down to: soliciting or receiving compensation in connection with the performance of public office or voting in a certain way, using confidential information obtained during the performance of public office or using influence for personal gains.<sup>81</sup>

**Consulting and reporting obligation:** In the event that a senior public official<sup>82</sup> has any doubts that he/she is in a situation of a conflict of interest, he/she should consult his/her immediate supervisor or his/her managing

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78 The Law No. 04/L-228 on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of all Public Officials and the Law on Prevention of Conflict of Interest in Discharge of Public Functions are applicable to restricted number of officials, which will be referred to further in this section as **public officials**.

79 Law on Prevention of Conflict of Interest in Discharge of Public Functions, Law No. 04/L-051.

80 Law on the Civil Service, Law No. 03/L-149.

81 Article 9 of the Law on Prevention of Conflict of Interest in Discharge of Public Functions.

82 A detailed definition of the term "senior public officials" is contained in Article 4 of the Law on Prevention of Conflict of Interest in Discharge of Public Functions.

body.<sup>83</sup> Upon consideration of the official's submission, his/her superior or managing body may propose appropriate actions to resolve the conflict of interest or may contact the Anti-Corruption Agency.

In every particular case when he/she identifies his/her private interest in the decision-making procedure in a specific matter, a senior public official **must declare the existence of the interest** to his/her supervisor or the managing body.<sup>84</sup> The obligation to notify the superior or the managing body exists also when a senior public official estimates that there is an attempt to influence his/her will or a pressure to vote or decide in a certain way. In addition to reporting attempts to influence his/her will, a senior public official is obligated to try to determine the source of such influences, and to try to provide witnesses of such events, in order to eliminate any suspicion that he/she has succumbed to such influences and has decided or acted contrary to the legal principles.

**Concurrent additional employment and work:** In the course of the performance of public office, a senior public official may perform office in a political party, as well as duties in the area of sport, science, and culture activities.<sup>85</sup> In addition, he/she may be a member of the management board of a non-governmental organisation in the fields of sport, culture or any other humanitarian activity, without the right to receive remuneration.<sup>86</sup> If a senior public official who is at the same time a member of the management board of an NGO had a possibility to influence the decision on the allocation of funds from the state budget, that NGO would not be eligible to receive budget funds.

**Transfer of management rights in companies:** In the course of the performance of public office, a senior public official is obligated to transfer his/her management rights in a company to another natural or legal person.<sup>87</sup> For his/her part, a senior public official must not give the person to whom he/she has transferred the management rights any information or any other instructions, while the person to whom the management rights have been transferred must notify the senior public official of all business relations of the company with public companies, companies with more than 5% of public equity or any other public institution.

**Incompatibility with public office:** A senior public official cannot be appointed member of the management board or the supervisory board of

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83 Article 8 of the Law on Prevention of Conflict of Interest in Discharge of Public Functions.

84 Article 13 of the Law on Prevention of Conflict of Interest in Discharge of Public Functions.

85 Article 10 of the Law on Prevention of Conflict of Interest in Discharge of Public Functions.

86 Article 11 of the Law on Prevention of Conflict of Interest in Discharge of Public Functions.

87 Article 14, paragraph 2 of the Law on Prevention of Conflict of Interest in Discharge of Public Functions.

a company, while this restriction does not apply to public companies, non-profit organisations or organisations in the field of science, sport, culture, or education.<sup>88</sup> A senior public official is not allowed to engage in private activities such as advocacy, notary activity, consulting, legal representation, or acting on behalf of for-profit or non-profit organisations.<sup>89</sup>

**Post-public office restrictions:** For a period of one year upon leaving public office, a senior public official is not allowed to enter into employment in a public or private company, to be appointed to a managerial position in a public or private company, or to control their operations if he/she used to be responsible for controlling their operations during a period of the two years prior to the termination of public office.

**Gifts:** A senior public official is not allowed to receive gifts or any other privileges for himself/herself or for his/her family members as a remuneration for actions performed in the course of his/her official duties, with the exception of appropriate and token gifts. A senior public official is not allowed to receive any gift in the form of money, irrespective of its value.<sup>90</sup>

If he/she was unable to refuse a gift, and if the gift was given to him/her without prior notice, a senior public official is obligated to notify his/her superior. All gifts that have been received must be registered in a special register, maintained by an official authorised to maintain the register of gifts for the public authority.<sup>91</sup> The register of gifts is submitted regularly to the Anti-Corruption Agency for scrutiny. The possibility has also been stipulated for the Anti-Corruption Agency to allow a gift to be kept, if that would not pose an unauthorised influence on the performance of public office.

**Civil servants** are not allowed to solicit or receive gifts, favours, or any other privileges as a remuneration for actions performed in the course of their official duties for themselves, their spouses, or family members.<sup>92</sup> They may receive only token gifts of no real market value or token gifts if they obtain an appropriate approval from the competent authorities. In addition to that, civil servants are not allowed to offer gifts to other equal, higher or lower-ranked civil servants for personal gains.

**Asset and income declarations:** A separate law regulates the obligation of senior public officials and their family members (parents, spouses, underage

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88 Article 15, paragraphs 1, 2, 3 of the Law on Prevention of Conflict of Interest in Discharge of Public Functions.

89 Article 16, paragraph 2 of the Law on Prevention of Conflict of Interest in Discharge of Public Functions.

90 Article 11 of the Law on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of all Public Officials.

91 Article 12 of the Law on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of all Public Officials.

92 Article 53 of the Law on the Civil Service.

children) to declare their assets and income.<sup>93</sup> They are obligated to declare assets and income upon entry to public office, annually, upon leaving public office, and upon request by the Anti-Corruption Agency.<sup>94</sup>

### 3.4. MACEDONIA

#### Legal sources:

- **Law on Prevention of Conflicts of Interest**<sup>95</sup>
- **Law o Prevention of Corruption**<sup>96</sup>

The Law on Prevention of Conflicts of Interest stipulates that public officials (as personnel defined by the Law on Prevention of Conflict of Interest)<sup>97</sup> and **civil servants** must not be guided by private, family, or religious interests, and must not succumb to the pressures and promises by their superiors.<sup>98</sup> To that end, a separate article lists the actions that public officials and civil servants must not take, as they can give rise to a conflict of interest.<sup>99</sup> Some of the prohibited actions are soliciting gifts, remuneration, or counter favours for performing public office and civil service activities, abuse of power, promising employment, imposing unlawful influence on the decision-making in a public authority to ensure personal or closely related person's interest.

**Conduct in case of conflict of interest:** If a public official or a **civil servant** suspects that there is a conflict of interest in a particular case, he/she is obliged to contact the State Commission for the Prevention of Corruption. In

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93 Articles 5, 13 of the Law on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of all Public Officials for all public officials determine the exact contents of the information that is to be declared.

94 Articles 6–10 of the Law on Declaration, Origin and Control of Property of Senior Public Officials and on Declaration, Origin and Control of Gifts of all Public Officials.

95 Law on Prevention of Conflicts of Interest, *Official Gazette of Republic of Macedonia*, No. 70, adopted on 5 June 2007.

96 Law o Prevention of Corruption, *Official Gazette of Republic of Macedonia*, Nos. 28/2002, 46/2004, 126/2006, 10/2008, 161/2008, 145/2010.

97 The Law on Prevention of Conflicts of Interest is applicable to the following personnel: the President of the Republic of Macedonia, appointed Ambassadors and envoys of the Republic of Macedonia abroad and nominated persons by the President of the Republic of Macedonia; elected or appointed functionary in the Assembly of the Republic of Macedonia, the Government of the Republic of Macedonia, the authorities of the state administration, courts and other authorities and organisations performing certain expert, administrative and other duties within the framework of rights and obligations of the Republic of Macedonia, the municipalities and the City of Skopje, as well as other persons discharging public authorisations.

98 Article 5 of the Law on Prevention of Conflicts of Interest. Similar obligation is stipulated also in Article 2, paragraph 2 of the Law on Prevention of Corruption.

99 Article 6 of the Law on Prevention of Conflicts of Interest.

addition, he/she must take the necessary actions to prevent the influence of the private interest on his/her actions.

If a public official or a civil servant finds that there are circumstances that clearly indicate a conflict of interest, he/she must request to be exempted from or must cease to perform certain activities.<sup>100</sup> He/she may also be excluded against his/her will from carrying out certain activities, in accordance with a decision by the superior or upon request of the person having an interest in that particular matter.

In case of a discussion within the public authority in which a public official or a civil servant performs his/her public office or public service about matters in which he/she has a private interest, the public official or the civil servant must declare his/her personal interest before the beginning of the discussion.<sup>101</sup>

**Transfer of interest in companies:** If a public official or a civil servant, when entering public office or civil service, has an interest in a company, he/she must transfer the management rights to another natural or legal person.<sup>102</sup>

**Contractual relations:** An elected or appointed public official, as well as any other civil servant in a public company or institution, cannot enter into contracts or any other business relations with any legal person founded by him/her or a member of his/her family or with a legal person in which a member of his/her family is a responsible person. If such business relationships have been established before this person has entered public office or civil service, the public official or the civil servant is obliged to exclude himself/herself from the decision-making process.<sup>103</sup>

**Performance of other activities:** A public official or a civil servant who, when entering public office or civil service, is engaged in specific activities must delegate such activities during his/her term in public office, i.e. serving in civil service, to another person that he/she chooses.<sup>104</sup>

**Performance of other offices:** A person who has been elected or appointed cannot perform any office, duty or activity that is not in accordance with his/her public office. In addition, he/she cannot perform any other profit-making activity that is incompatible with the public office. A public official cannot concurrently hold the position of a responsible person or member of the

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100 Article 12 of the Law on Prevention of Conflicts of Interest.

101 Article 13 of the Law on Prevention of Conflicts of Interest.

102 Article 9 of the Law on Prevention of Conflicts of Interest.

103 Articles 22, 23, 24 of the Law on Prevention of Corruption.

104 Article 10 of the Law on Prevention of Conflicts of Interest.

managing body of a public company, public institution, or other legal person with a specific percentage of state equity.<sup>105</sup>

**Deciding on recruitment:** A public official or a civil servant who decides on recruitment, or who is member of the body responsible to decide on that matter, is obliged to notify his/her manager of all recruitment procedures that may give rise to a conflict of interest. After the superior has established the nature of the relationship between the candidate for employment and the public official, or the civil servant, the superior must take all actions necessary to prevent such conflict of interest.<sup>106</sup>

**Gifts:** The law expressly prohibits public officials to receive gifts whose value exceeds EUR 100, while gifts in the form of money, securities, gold and other valuables must not be received regardless of their value.<sup>107</sup> If a gift could not be returned, public officials must report the acceptance of the gift to the competent authority, indicating the witness and providing other evidence.<sup>108</sup> Also, public officials are obliged to submit a written report of the receipt of the gift to the appointing authority within 48 hours.

With respect to **civil servants**, the Law on Civil Servants contains only one provision on the prohibition of receiving gifts. Any action that is contrary to this provision is considered a disciplinary violation.<sup>109</sup>

**Post-office restrictions:** For a period of one year after the termination of office, or civil service, a former public official, or a former civil servant, is not allowed to perform audit in any legal person, in which he/she used to perform auditing or control activities during a period of one year before the termination of office. Also, during the same period, a former public official, or a former civil servant is not allowed to enter into contractual or any other business relations with the public authority in which he/she was previously employed. For a period of two years after the termination of public office, or civil service, a public official, or a civil servant, is not allowed to represent or act on behalf of a legal or a natural person before the public authority in which he/she was previously employed if he/she participated in the decision-making in that specific case.<sup>110</sup>

All persons employed in the public sector who, during a period of three years after the termination of service or office, wish to establish a company or to start

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105 Article 21 of the Law on Prevention of Corruption.

106 Article 11 of the Law on Prevention of Conflicts of Interest; Article 29 of the Law on Prevention of Corruption.

107 Article 15 of the Law on Prevention of Conflicts of Interest; Article 30 of the Law on Prevention of Corruption.

108 Article 16 of the Law on Prevention of Conflicts of Interest.

109 Article 68 of the Law on Civil Servants.

110 Article 17 of the Law on Prevention of Conflicts of Interest.



an activity to generate profit in the area in which they performed their office or service must notify the State Commission for the Prevention of Corruption.<sup>111</sup> In addition, during the same period after the termination of office or service, public sector employees cannot acquire interests in a private company which they supervised during their term in public office or civil service.<sup>112</sup>

**Membership in companies' management or supervisory boards:** A public official or a civil servant who is a member of the managing body of a company, during his/her term in public office or civil service, must transfer his/her rights in the company to another person who will perform them on his/her behalf. In addition, he/she cannot be appointed member of a company's supervisory board.

The above restrictions do not apply to the membership of a public official or a civil servant in the managing or supervisory board of non-profit organisations, citizen associations, or other legal persons that perform their activities in the field of sports, science or culture. It should be noted that in these circumstances they do not have the right to receive remuneration.

A public official during his/her term in office, or a civil servant during the performance of public office, and for a period of three years after their termination, cannot acquire an interest in a company in which he/she or the public authority in which he/she was employed exercises or exercised supervision over the operations.<sup>113</sup> If they do acquire an interest in such a company, they must notify the State Commission for the Prevention of Corruption.

**Abuse of information:** A public official or a civil servant who is concurrently a member of a citizen association must not abuse any information that he/she may obtain in the course of performing office, or civil service, and must not secure any gain for himself/herself or his/her closely related persons in the course of performing activities in such association.<sup>114</sup>

**Asset declaration:** The Law on Prevention of Corruption stipulates the obligations of public officials and civil servants to file an asset declaration upon entering office, or upon entering the civil service. Upon termination of office, or civil service, he/she must file an asset declaration. In case of any change in their assets status, a public official or a civil servant must report it to the State Commission for the Prevention of Corruption.<sup>115</sup>

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111 Article 27 of the Law on Prevention of Corruption.

112 Article 28, paragraph 1 of the Law on Prevention of Corruption.

113 Article 19 of the Law on Prevention of Conflicts of Interest.

114 Article 20 of the Law on Prevention of Conflicts of Interest, Article 31 of the Law on Prevention of Corruption.

115 Articles 33–36 of the Law on Prevention of Corruption.

## 3.5. MONTENEGRO

### Legal sources:

- **Law on Prevention of Corruption**<sup>116</sup>
- **Law on Civil Servants and State Employees**<sup>117</sup>

The Law on Prevention of Corruption governs the issue of conflicts of interest in the course of performing public office. The Law is applicable to a special group of public officials,<sup>118</sup> and specifies the rules for how to manage it and prevent it. The civil servants' rights and obligations where it relates to conflicts of interest are governed by the Law on Civil Servants and State Employees.

The main obligation of any public official and any civil servant is to subordinate his/her private interests to the public interest, as well as to avoid conflicts of interest.<sup>119</sup> In addition, **civil servants** are obligated to act in a manner that would not jeopardize the citizens' trust in them as public servants, the reputation of the authority for which they work, the impartiality of their work, and to eliminate any possibility for the creation and development of corruption.<sup>120</sup>

Should a public official have any doubt about the existence of a conflict of interest, or that it influences the performance of public office, he/she is obligated to take actions to resolve the (potential) conflict of interest situation and to inform the Agency of the situation, so that the Agency may issue an opinion about it.<sup>121</sup>

Aware of the importance and danger of potential conflicts of interest, the legislator has foreseen the obligation of civil servants to report such situations.<sup>122</sup> In that respect, **a civil servant** must inform his/her immediate superior about:

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116 Law on Prevention of Corruption, *The Official Gazette of of the Republic of Montenegro*, No. 53/2014. The Law on Prevention of Corruption is applicable to the following personnel: persons elected, appointed or assigned to a post in a state authority, state administration body, judicial authority, local self-government body, local government body, independent body, regulatory body, public institution, public company, or other business or legal person exercising public authority, as well as persons whose election, appointment or assignment to a post is subject to consent by an authority – which will be referred to further in this section as **public officials**.

117 Law on Civil Servants and State Employees, *The Official Gazette of of the Republic of Montenegro*, Nos. 39/11, 50/11, 66/12, 34/14, 53/14, 16/16.

118 The definition of the term "a public official" is specified in Article 3 of the Law on Prevention of Corruption.

119 Article 7 of the Law on Prevention of Corruption; Articles 8, 69 of the Law on Civil Servants and State Employees.

120 Article 67 of the Law on Civil Servants and State Employees.

121 Article 28 of the Law on Prevention of Corruption.

122 Article 70 of the Law on Civil Servants and State Employees.

- any private interest in connection with the activities of the public authority in which he/she performs public service,
- any financial interests or any other interests he/she holds in companies for which the public authority in which he/she is employed has administrative duties according to its competencies,
- any natural or legal persons with which he/she has had contractual or business relations during a period of two years prior to becoming employed in a public authority, in case the public authority in which he/she is employed has administrative duties in relation to these natural or legal persons according to its competencies.

**Participation in discussions:** A public official who, in a public authority, needs to participate in discussions or to decide on a matter in which he/she or his/her related persons have a private interest, is obligated to inform the other participants in the discussion or the decision-making process. Such information is to be submitted to the authority in which he/she performs public office, which will in turn request the opinion of the Agency on the existence of a conflict of interest. If, in the opinion of the Agency, a conflict of interest does exist, the public official cannot participate in that discussion or decision-making process.

**Performance of other public duties:** A public official may, without limitations, be involved in sport, science, education, culture or art activities.<sup>123</sup> The only obligation is to report to the Agency any income he/she may obtain from such activities.

**A civil servant** may engage in additional work outside working hours or provide services to a natural or legal person if he/she has obtained the approval of the head of the public authority, and provided that the public authority does not supervise these activities and work, if such additional work does not give rise to a conflict of interest or poses a hindrance for the proper performance of his/her civil servant duties. For performing work in the area of science, sport, or humanitarian activity, as well as for publishing professional papers and giving lectures at seminars, it is sufficient to notify the head of the public authority in advance.<sup>124</sup>

**Management rights in companies:** Upon entry into public office, a public official is obligated to transfer to another natural or legal person his/her prior management rights or duties in a company or an institution. If a public official is a member of the management body of such a legal person, he/she is

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123 Article 9 of the Law on Prevention of Corruption.

124 Article 74 of the Law on Civil Servants and State Employees.

obligated to resign from that body.<sup>125</sup> **A civil servant** is also not allowed to establish a company or engage in entrepreneurial activities.

**Membership in companies' management bodies:** A public official cannot be appointed director, legal representative, member of the management body or the supervisory body, or to be a member of the management of a private company. Upon entry into public office, a public official is obligated to resign from all such offices and duties. In addition, he/she is not allowed to perform such offices or duties in public companies, public institutions, or other legal persons.<sup>126</sup> If during the term in public office, he/she accepts to perform an additional duty or office, the public official must resign from his/her public office.

**A civil servant** cannot be appointed chairperson or member of the management body or the supervisory body of a company. Otherwise, a civil servant may perform such duties in public companies, public institutions, or legal persons owned by the state or the municipality, sports and science associations.

**Service and business cooperation contracts:** A public official cannot enter into service contracts with a public company or with a public authority or a company that is in contractual relationship with the authority in which he/she is employed or works, and if the value of such contracts exceeds EUR 1,000 annually. In addition, the public authority in which the public official is employed or works cannot enter into a contract with a legal person in which the public official or persons related to him/her has a private interest.<sup>127</sup>

**Post-office restrictions:** Public officials are subject to a set of restrictions relating to any future employment and activities for a period of two years after leaving public office.<sup>128</sup>

During the specified period, a former public official cannot represent or act as a legal representative or attorney of a legal person, entrepreneur, or an international organisation that has a contractual relationship with the authority for which he/she used to work/perform a public office. Also, during the said period, he/she must not enter into employment with a legal person, entrepreneur or an international organisation that would benefit from any decision made by the authority in which the public official used to perform public office.

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125 Article 10, paragraph 2 of the Law on Prevention of Corruption.

126 In accordance with Article 12, paragraph 3 of the Law on Prevention of Corruption, a public official may be appointed chairperson, member of the management body or supervisory of science, education, culture, humanitarian, and sport institutions.

127 Article 14, paragraphs 1, 2, 3 of the Law on Prevention of Corruption.

128 Article 15 of the Law on Prevention of Corruption.

Also, upon the termination of public office, a former public official must not represent a legal or natural person in relation to a case in which the public official was responsible to decide during his/her public function. In addition, he/she is prohibited to enter into any contractual or business relationships with the authority in which he/she performed public office. The same restriction applies also to **civil servants**.<sup>129</sup>

Another prohibition that is stipulated is the prohibition for a public official to use the knowledge and information obtained during the performance of public office for personal or another person's gain, or in a way that may cause damage to others.<sup>130</sup> The same restriction applies also to **civil servants**. With that respect, it should be noted that a former public official is prohibited from performing audit and management activities in any legal person in which he/she used to perform supervisory or controlling activities, during a period of one year prior to leaving office. A similar prohibition on post-service employment applies to any **civil servant** in the capacity of a director, manager or consultant in a commercial company over which the public authority in which the civil servant used to be employed performed auditing or control activities.<sup>131</sup>

**Receiving gifts and entering into sponsorship contracts:** In principle, any public official, his/her spouse or partner and his/her children, are prohibited from receiving gifts, with the exception of token gifts and appropriate gifts whose value does not exceed EUR 50. It is expressly prohibited to receive gifts in the form of money, securities and precious materials, irrespective of their value.<sup>132</sup>

Any public official is obligated not only to refuse the gift that has been offered, but also to compile a report about any gift offer that has been made. In the event that he/she was unable to refuse a gift, the public official must not keep the gift but hand it over to the authority in which he/she performs public office, where it will be registered in the register of received gifts. Any gift whose value exceeds the value specified for the appropriate gifts becomes the state or municipal property.

On the other side, a public official must not conclude, in his/her own name or in the name of the authority in which he/she performs public office, a sponsorship contract or receive donations that affect or could affect the legality, impartiality or objectivity of the work of the public authority to which he/she is affiliated. That is why a public authority is obligated to submit to

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129 Article 77 of the Law on Civil Servants and State Employees.

130 This restriction does not apply to any information that is otherwise available to public.

131 Article 77 of the Law on Civil Servants and State Employees.

132 Article 16 of the Law on Prevention of Corruption.

the Agency a report on all received donations and sponsorships, so that the Agency can evaluate whether they may have influenced the legality, impartiality or objectivity of the work of the authority in which the public official performs public office.

Similarly, **civil servants** are not allowed to receive gifts in the form of money, securities or precious materials, irrespective of their value. If a gift that is offered is appropriate, and its value does not exceed EUR 50, a civil servant may receive it, with the obligation to report it to the public authority in which he/she works. If a civil servant was unable to refuse a gift that he/she is not allowed to receive, he/she must hand it over to the public authority in which he/she works.<sup>133</sup>

**Asset and income declarations:** A public official is obligated to submit to the Agency a declaration of his/her income and assets, including income and assets of his/her spouse or partner, and children, if they live in the same household:<sup>134</sup>

- upon entering office
- annually, during the term in office
- in the event of any major changes (an increase in assets over EUR 5,000)
- upon request of the Agency
- upon leaving office, and subsequently, annually, for the following two years.

**Sanctions for violation of the provisions of the Law:** The Agency conducts a procedure to establish violations of the provisions on the prevention of conflicts of interest, restrictions relating to the performance of public functions, gifts, donations, sponsorships, etc., *ex officio* or upon request by the authority in which the public official used to perform or currently performs public office. It may also take place upon request from the authority competent for the nomination, election or appointment of the public official, or upon request from another public authority, natural or a legal person.<sup>135</sup>

If it is established, in a final and enforceable decision, that the law relating to the prevention of conflicts of interest during the performance of public office has occurred been violated, that is considered negligent performance of public office. The Agency is obliged to inform the authority in which the public

133 Articles 72, 73 of the Law on Civil Servants and State Employees.

134 The contents of the declaration have been specified in detail in Article 24 of the Law on Prevention of Corruption.

135 Articles 31–41 of the Law on Prevention of Corruption.

official performed his/her office, and the authority competent for election and the appointment of a public official in order to initiate the procedure for his/her dismissal, suspension or pronouncement of a disciplinary sanction.<sup>136</sup>

### 3.6. SERBIA

#### Legal sources:

- **Law on the Anti-Corruption Agency**<sup>137</sup>
- **Law on Civil Servants**.<sup>138</sup>

The Law on Anti-Corruption Agency stipulates the rules for resolving public officials' conflicts of interest. The Law defines a special category of personnel which are considered to be public officials.<sup>139</sup> The Law on Civil Servants stipulates special rules that apply to civil servants.

The first provisions of the Law on Anti-Corruption Agency on resolving conflicts of interest specify the obligation of a public official, during the performance of public office, not to subordinate the public interest to his/her private interest, to maintain the trust of citizens through conscientious and responsible performance of public office, and to not use public office for personal gains. The Law also stipulates the general obligation of any public official to refrain from entering into any relationship that could affect his/her impartiality, and when such relations cannot be avoided, a public official is obliged to take every action necessary to protect the public interest.<sup>140</sup>

To that end, a public official is obliged, upon entering office, **to notify the Agency and the immediate superior of any suspicion of a potential conflict of interest or to report any existing conflict of interest**.<sup>141</sup> If it has been established that the conflict of interest indeed exists, the Agency will notify the authority in which the public official performs public

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136 Article 42 of the Law on Prevention of Corruption.

137 Law on the Anti-Corruption Agency, *Official Gazette of the Republic of Serbia*, Nos. 97/2008, 53/2010, 66/2011, 67/2013, 11/2013.

138 Law on Civil Servants, *Official Gazette of the Republic of Serbia*, Nos. 79/2005, 81/2005, 83/2005, 64/2007, 67/2007, 116/2008, 104/2009, 99/2014.

139 The Law on the Anti-Corruption Agency is applicable on the following personnel: every person elected, appointed or nominated to the bodies of the Republic of Serbia, autonomous province, local self-government unit, bodies of public enterprises and companies, institutions and other organisations whose founder, and/or member is the Republic of Serbia, autonomous province, local self-government unit and other person elected by the National Assembly which will be referred to further in the text as **public officials**.

140 Article 27 of the Law on the Anti-Corruption Agency.

141 Article 32 of the Law on the Anti-Corruption Agency.

office about it, including a proposal for actions to eliminate the conflicts of interest. **The obligation to notify** the Agency exists if a public official finds in the course of the performance of public office that he/she is exposed to unauthorised influence.<sup>142</sup>

**Prohibition to hold multiple public offices:** A public official is not allowed to hold multiple public offices, unless he/she has obtained approval from the Agency for it. The above approval is not required for a public official who has been elected directly by the citizens for the performance of other offices to which he/she has also been elected directly by the citizens.<sup>143</sup>

**Concurrent additional employment and work:**<sup>144</sup> A public official is not allowed to perform other duties or activities that require full-time engagement during the term in public office. At the same time, the Law on Civil Servants stipulates in principle that a civil servant may perform additional work, subject to the consent by his/her manager.<sup>145</sup>

Public officials and all **civil servants** who engage in scientific research, cultural and artistic, or sport activities, provided that that does not jeopardize the performance of public office, or the civil service, do not need any approval from their superior. Otherwise, a public official is obliged to cease to perform any additional work, and a civil servant may be prohibited by the manager to continue to perform such work.

Public officials, as well as **civil servants**, have a possibility to submit to the Agency a request for a consent for additional work. With the request, a public official must submit a positive opinion from his/her appointing authority, while **a civil servant** must submit his/her immediate superior's consent.

If a public official, upon entering public office, is already engaged in another job or activity, he/she is obliged to notify the Agency about it, and the Agency will decide whether this creates a conflict of interest, and whether the public official should cease to perform such job or activity.

**Establishing companies:** In addition to the prohibition of additional employment and work, public officials are also prohibited to establish companies during their term in office.<sup>146</sup> In addition, a public official is not allowed to manage or represent private equity in a company, institution or any other private legal person. Upon taking office, a public official must transfer his/her management rights in a company to an unrelated person who will

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142 Article 37 of the Law on the Anti-Corruption Agency.

143 Article 28 of the Law on the Anti-Corruption Agency.

144 Articles 30, 31 of the Law on the Anti-Corruption Agency.

145 Article 26, paragraph 1 of the Law on Civil Servants.

146 Articles 33, 34 of the Law on the Anti-Corruption Agency.



perform them until the termination of the public office.<sup>147</sup> By transferring the management rights to an unrelated person, that person becomes a related person, and the public official must not give that person any directions or any information, or influence in any way the performance of business activities in the company.

If a legal person in which a public official **owns more than 20% of the stake or shares** participates in a procedure that may end with the award of a contract with public authorities or legal persons with more than 20% of public equity, he/she must notify the Agency about it.<sup>148</sup> The rules on the prohibition of establishing companies and engaging in independent activities that apply to public officials apply also to **civil servants** accordingly.<sup>149</sup>

With respect to affiliation in a legal person, **a civil servant** cannot be appointed director, deputy or assistant director of a legal person, and may be appointed member of the managing body only if he/she has been nominated by the Government or a public authority.<sup>150</sup>

**Post-public office restrictions:** Upon leaving public office, for the following two years, the public official is not allowed to enter into employment or business cooperation that is connected with the public office he/she used to hold, unless he/she has obtained consent of the Agency.<sup>151</sup>

**Gifts:** The general rule is that a public official, as well as any person related to him/her, may not receive **gifts related to** the performance of public office, and is obliged to refuse them.<sup>152</sup> A public official may receive only token and appropriate gifts, which must not be in the form of money or securities.<sup>153</sup> Token gifts must be handed over to the competent authority in charge of public assets management, unless the value of such gift is less than 5% of the average monthly wage in the Republic of Serbia. With respect to appropriate gifts, a public official must not keep them if their value exceeds 5% of the average monthly wage.

If a public official was not able to not refuse a gift, the gift must be handed over to the competent authority in charge of public assets management, and the Agency and the superior must be notified about it. A public official is obliged to notify the public authority, organisation or public service in which he/she is employed about all gifts that he/she has received, and a separate

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147 Article 35, paragraphs 1, 2 of the Law on the Anti-Corruption Agency.

148 Article 36 of the Law on the Anti-Corruption Agency.

149 Article 28, paragraph 2; Article 31 of the Law on Civil Servants.

150 Article 29 of the Law on Civil Servants.

151 Article 38 of the Law on the Anti-Corruption Agency.

152 Articles 39, 42 of the Law on the Anti-Corruption Agency.

153 Article 39 of the Law on the Anti-Corruption Agency.

register of such gifts must be maintained.<sup>154</sup> The Law on Civil Servants stipulates the same rules for receiving gifts by **civil servants**.<sup>155</sup>

**Asset declaration:** A public official<sup>156</sup> is obliged to submit a declaration of his/her assets and income, including the assets and income of his/her spouse, partner, and underage children, if they live in the same family household, and the contents of such declarations are regulated in detail by the Law on Anti-Corruption Agency.<sup>157</sup> The obligation to declare assets and income applies also to any significant change of the previously declared information that has occurred during the term in public office.

The Agency maintains the Assets Register including the information from the declarations (income level, ownership of immovable assets, vehicles, savings deposits, apartment tenures), based on which public officials' asset declarations are cross-checked with their assets status. The Law also stipulates the Agency's cooperation with financial organisations and companies, if that is necessary to obtain information. If, in the course of the monitoring of the assets status, the Agency establishes any inconsistency between the actual status and the information in the declaration, the Agency is authorised to establish the causes of such discrepancies, to notify the authority in which the public official performs office, and to order the public official to submit the information necessary to assess the actual value of his/her assets.

## 4. WHAT ARE THE KEY ISSUES RELATING TO THE IMPLEMENTATION OF LEGAL PROVISIONS ON CONFLICTS OF INTEREST, AND HOW TO OVERCOME THEM?

In all the countries analysed in this book, numerous regulations dealing with conflict of interest and strengthening the integrity in the public sector have been adopted. They focus on raising awareness about the potential problem of conflict of interest and its consequences, and establishing the basic mechanisms for their prevention and resolution. The above legislation covers

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154 Article 39, paragraphs 2, 3, of the Law on the Anti-Corruption Agency.

155 Article 25 of the Law on Civil Servants.

156 A public official who is a councilor or a member of the management or supervisory board of a public company, institution or organization founded of the municipality or city, or the Republic, is not obligated to declare assets.

157 Article 43 of the Law on the Anti-Corruption Agency.

public officials only, and explicitly prescribe their obligations in cases of conflict of interest. However, a field that requires a more detailed regulation is civil servants who have a conflict of interest. In general, the legislation on civil servants includes a limited number of articles dealing with conflicts of interest, and instead envisages that the rules governing public officials apply accordingly.<sup>158</sup>

However, even though mechanisms for detecting and preventing conflict of interest situations have been established, the practice has shown that they are not sufficiently efficient. Some of the key problems relating to only partial implementation include **imprecise provisions in the primary and secondary legislation, and the lack of knowledge of public officials (employees) in relation to the conflict of interest issues**. In addition to the already mentioned problems related to the lack of adequate legal norms, another problem is the fact that the measures envisaged in the existing norms have not been followed up. This primarily relates to a **failure to appoint a competent person to maintain the gift registers, as well as a competent person to monitor the existence of conflicts of interest with an obligation to resolve them**. Only with such mechanisms in place it will be possible to contribute significantly to the successful implementation of the conflict of interest regulations. In addition, the issue of additional employment has also been identified as a source of a significant number of conflicts of interest, which have not been adequately addressed.

Consequently, in order to determine the reasons behind unsuccessful implementation of the adopted regulations, it does not suffice to analyse the primary legislation alone. It is necessary to analyse the secondary legislation, primarily the codes of ethics, which are envisaged to provide more precise rules on the correct behaviour of public sector employees. The norms included in the codes of ethics are often very general, and sometimes simply copied from the legal provision, which does not aim at providing guidance for ethical issues and dilemmas of a more practical nature.<sup>159</sup> By reading largely legal texts, people employed in the public sector cannot be expected to know how to act in certain problem situations – for example, the so-called “grey zones”. Therefore, codes of ethics should be explicit and should provide specific guidelines on how to observe the ethical principles and standards. With codes of ethics formulated in that way, it would be

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158 J. Meyer-Sahling, “Civil Service Professionalisation in the Western Balkan”, *SIGMA Paper*, No.48, OECD Publishing, Paris 2012, p. 66.

159 For example, see Articles 7, 8, 9 of the Code of Behaviour of Civil Servants adopted by the Human Resource Management Service or the Code of Ethics of Members of Parliament of Montenegro which, in the part dedicated to the conflict of interest, prescribes the MP's obligations to comply with the regulations governing the prevention of conflicts between public and private interests but without regulating these obligations in more detail.

easier for public officials to recognise the situations in which there is or could be a conflict of interest. In addition, they should be motivated and aware that they are expected to contact immediately the competent authority in order to address and resolve the conflict of interest situation, and thus prevent any negative consequences. However, that does not always happen, possibly because some public officials find that failure to report conflicts of interest may result in personal gain or, at least, in avoiding a potential loss.<sup>160</sup>

In some countries, the problem with the inadequate codes of ethics goes even further – they are either not adopted at all, or they are adopted but they are not published. For example, in Montenegro, there is no code of ethics for members of the government, while in Albania there is no code of ethics for employees in local self-governments. Moreover, in Albania there are examples of codes of ethics that have been adopted, but have never been published, and only to a very narrow circle of people know that they exist.<sup>161</sup> Given that the core purpose of codes of ethics is to regulate certain aspects of the employees mutual relationships and their relationships with external parties, such codes must be published on the websites of the institutions in question, and they must be applied by the respective human resource services that may, as part of their work, be in charge of monitoring conflicts of interest. The contents of the codes should be communicated to both the public– sector employees and the public to raise awareness about the importance of addressing conflicts of interest, but also to create certain expectations as to how they should be handled under specific circumstances. Such approach towards codes of ethics serves as a clear indicator of the approach to the problem of conflicts of interest and the importance of educating the public about that problem.

It is safe to conclude that the primary legislation (laws and codes of ethics, as the follow-up of laws) in the Western Balkans generally has approached the regulation of conflicts of interest with insufficient dedication and detail. It is, therefore, necessary to make a closer look at the secondary legislation, that is, or the internal acts and regulations adopted by public authorities and institutions.

**Adopting internal acts:** The key reason behind the unsuccessful implementation of the existing rules that regulate conflicts of interests is the lack of awareness and information about the phenomenon itself – how to

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160 For example, in Croatia, ethical committees, which function as independent bodies, have been appointed; their objective is to contribute to the promotion of the codes of ethics and to their successful implementation. J. Meyer-Sahling, pp. 66–67. A. Dymishi, M. Hallunaj, p. 46.

161 A. Dymishi, M. Hallunaj, *Integrity Building of the Albanian Public Service, An Analyses of the Ethical Framework Governing the Conduct of Albanian Public Servants*, Institute for Democracy and Mediation, Tirana 2014, p. 49.

recognise the conflict of interest situations and how to act in such situations. It is certainly not possible to list all the situations in which a conflict of interest may arise, and that is exactly why public officials have to be trained and instructed on how to recognise such situations and how to handle them. They have to be clearly explained what conflicts of interest represent, and in which situations they may occur. In parallel, the relevant authorities must be under the obligation to adopt **internal acts that include adequate rules and procedures**.

Such acts should include guidance and mechanisms that, in a practical manner, provide what is needed to recognise and resolve real or potential conflict of interest situations. Clearly stated and explicit rules and procedures in internal acts would provide a basis for the implementation of the mechanisms ensuring the resolution of conflict of interest situations and maintaining the institution's integrity. That would ensure a clear system of accountability and professional duties of civil servants, which would allow them to have a clear understanding of what constitutes conflicts of interest, that they must report it, and a whole set of additional rules. When internal acts are being adopted, it is necessary to take into account the specificities of each institution and their competences. One cannot expect that the same conflict of interest rules can effectively regulate this issue at the local self-government level, in the police, or in schools. Given the diverse nature of private interests that may be involved in different institutional settings, the variations in potential situations in which conflicts of interest may occur are numerous.

Internal acts should explain, at a more general level, what a conflict of interest is, why it occurs, and why it needs to be addressed. The procedures for addressing actual and potential conflicts of interest should indicate to whom such conflicts of interest need to be reported, and further steps that need to be taken. The contents of internal acts could be summarised in the following four basic elements:

- Given that it is not possible to envisage every situation that may involve a conflict of interest, internal regulations need to provide a certain general norm that will help in identifying a (potential) conflict of interest. ***A definition of what constitutes a conflict of interest*** should be clearly spelt out, as that will assist public officials in identifying situations that are not explicitly envisaged, either in legal statutes, codes of ethics, or internal rulebooks. When drafting future internal acts in this field, a public body should use its core activity as a starting point and, based on that, identify situations in which conflicts of interest may most likely occur. It is clear that some situations, such as receiving gifts, certain kinds of decision-making

in which a public official has a personal interest, personal financial interests (like owning shares and stocks in companies that cooperate with state bodies), are easy to refer to. Clear rules on how to act in such situations can be prescribed. The subsequent internal rules and procedures should clearly set out what should be a public official's further actions when he/she has established – or suspects – that a conflict of interest exists, for example, in terms of how to report it and to whom.

- It should be considered whether the internal act, based on the nature of the institution's responsibilities, should **include relevant concrete examples of private interests that are likely to be in conflict with public interests and the institution's integrity**. In this way, civil servants will become more familiar with the notion of conflict of interest and which situations to avoid. The duty to report such situations should be included in employment contracts when taking office.<sup>162</sup>
- Each individual person is best informed of his/her own personal circumstances and is hence in the best position to recognise whether personal interests may become a source of a conflict of interest. This is why the public officials themselves have the primary obligation to **recognise and report conflict of interest situations**. That obligation should be specifically emphasised in their labour contracts. Of course, not all situations are clear and there may be reasonable doubt whether a (potential) conflict of interest situation exists or not. However, such situations should also be reported. Internal acts should also regulate when (suspicion of) a conflict of interest situation should be reported. The main rule is that such situations should be reported as early as possible to the person or unit with the competence to monitor conflicts of interest. This may be the immediately superior of a public official, the head of the human resources unit, or another person or unit envisaged by the act. That would ensure an outside and objective evaluation of the newly developed situation. Acting contrary to these rules would imply misconduct and an attempt to refuse to "exit" the conflict of interest, the results of which may have a negative effect on citizens' trust in the integrity of public sector in general as well as indicate poor conflict of interest management by public authorities.<sup>163</sup>
- The mere reporting of the existence of a conflict of interest situation obviously is not sufficient in itself. Internal acts should stipulate the obligations for the public body in question, which must provide **rules on further actions to be taken in cases of conflict of interest**, including in cases when there are no explicit rules in primary or in secondary legislation than apply. This primarily refers to time limits

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162 *Ibid*, 28

163 Department for Education, Campaign and Cooperation with Civil Society, *Training Manual on Integrity*, Anti-Corruption Agency, Belgrade 2013, p. 26.

within which the person to whom a report of a conflict of interest has been reported should act, the kinds of decision that need to be made, etc. If such rules do not exist, the competent person or unit in a public body must evaluate ***how serious the (potential) conflict of interest is and to what extent the public interest may become jeopardized.*** On the one hand, some conflict of interest situations may not be of a serious nature and there may be no need to take any action. In such situations a simple note on the existence of a (potential) but insignificant conflict is sufficient. On the other hand, a conclusion that a conflict of interest situation is serious should lead to the taking of an appropriate action. Measures to be taken include *assigning a certain competence to a different employee, transferring the employee who represents a conflict of interest to a different position, etc.*

If there are indications that a particular conflict of interest situation is unlikely to be frequent, then it would not necessarily be required to take any of the measures outlined above – it may suffice for the public official involved to abstain from taking part in a concrete disputable situation, for example, to withdraw from taking part in certain meetings or in a particular decision. The above proposal not to remove or substitute a person who is in a conflict of interest situation may sound strange and contrary to everything that has been said so far, but sometimes that is inevitable. That is true in very rare and special situations when all persons who are potential substitutes have a conflict of interest.

To prevent the handling of a particular issue from paralysis, it is necessary not to act on a potential conflict of interest will be necessary. Similar outcome may be necessary also when only a small number of people in the entire country possess the relevant knowledge and experience, and they are in high demand in both the private and the public sector. Conflicts of interest are inevitable, especially in small countries, such as the countries included in the analyses. In such situations transparency may be of particular importance, even when general guidelines of how to handle a potential conflict of interest situation may not be fully applied.

***Publication of and information on the internal act:*** In order for the primary and secondary legislation, and internal acts in particular, to be implemented successfully, it is necessary for employees in the public sector to be aware of them and understand what they are and when they apply. One necessary requirement is for such acts to be ***published*** in an appropriate manner. If the public officials are expected to act in accordance with their responsibilities, there is a need for them to be clearly informed of the institution's policy and rules regarding conflicts of interest. Given that questionable situations may occur in people's daily work, public officials should be ***regularly reminded***



of what is expected of them. To provide them with examples of what may be considered “best practice”, is a good approach. Only when they are informed about the rules, as well as past bad and good practice, they may be expected to understand what they are expected to do. Therefore, **continuous communication and cooperation with the public officials** is necessary. The opportunity to seek advice is also important. In fact, the possibility to seek advice, from someone within a public institution or state body, should not be a privilege of public officials but also be available for the general public. Such opportunities may prevent disputes and promote efficiency.

**Appointing advisers to help resolve conflict of interest situations:** The rules and regulations of the countries included in the analyses envisage the appointment of persons in charge of providing advice on conflicts of interest and how to resolve such situations. These advisers should have considerable responsibility for establishing and maintaining integrity of both public officials and institutions. Or, at least, that is how things should work in practice. When integrity plans were developed in the Republic of Serbia, shortcomings related to ethics and personal integrity were assessed as posing the highest risk to an institution’s integrity. Hardly any integrity plans fail to refer to these issues as problematic. The most commonly recognised integrity risks in the field of conflicts of interest include the **appointment of people who are in charge of advising the other employees on (potential) conflict of interest situations**. The most problematic issue is to what extent the persons appointed to monitor and advise on conflicts of interest are independent in performing their task. Frequently they are unable to obtain the necessary information, particularly from officials they have no authority over, oftentimes precisely those officials who appointed them. In those cases, it is clear why the independence of these designed advisers is questionable. An additional problem for the advisers includes that their activities to monitor whether a conflict of interest is present, usually is not regulated by separate rules or regulations and entails no compensation or incentives for doing a good job. Under such circumstances, they clearly have little motivation to act, and the success of their work relies solely on personal enthusiasm.<sup>164</sup>

These persons could considerably contribute to the prevention of conflicts of interest, and generally to the promotion of a focus on integrity. In fact, it might be useful to call them **integrity advisers**. Private interests of

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<sup>164</sup> In Albania, the Act on the Prevention of Conflict of Interest in Performance of Public Power (No. 9367, *Fletorja Zyrtare e Republikës së Shqipërisë* No. 31/2005) envisaged that these persons shall receive an additional 15% or more of their monthly salary, but this provision was set aside by subsequent amendments to the law (No. 9690, 5. March 2007).



employees in the public sector that might collide with the particular tasks and responsibilities of the institution could be reported to them during recruitment and later, during employment. Another task for these advisers would be to check whether the submitted conflict of interest declarations are sufficiently detailed to make adequate decisions on resolving a (potential) conflict of interest situation. When the public officials in question have ready access to integrity advisers, it would help create an environment in which it becomes easier to identify and discuss concrete difficulties in implementing all regulations linked to the institution's integrity.

In addition to monitoring conflicts of interest in an institution, integrity advisers could also occasionally **publish reports on steps taken in this area**, examples of problem areas that need particular attention, investigations initiated, etc. In particular, given the fact that conflicts of interest are often overlooked, integrity advisers tasked with monitoring may also be tasked with providing warnings to future partners of state bodies and other public agencies to avoid future conflict of interest situations that may result in suspension of decision-making or other procedures, or the annulment of, for example, a future public contract.

Another mechanism that internal rules and regulations may put in place is the **keeping of a register of assets and interests**. public officials would, with such a mechanism in place, occasionally report their personal assets and other specific interests that might come in conflict with the public interest. As noted above, appointed integrity advisers might be tasked with keeping such registers of personal interests. In that way, that would not be a register of conflicts of interest and would include only information that would serve as indicators, and they would be of great help to persons designated to monitor and identify conflicts of interest. In this way, public sector employees could also be informed in a timely manner and warned that conflicts of interest might occur due to the existence of certain interests and thus they could serve as a preventive measure. Having to report their personal interests would serve to raise the awareness of public sector employees about the problem relating to conflicts of interest. That would help them to avoid situations that might entail a potential conflict of interest.

In order to facilitate the execution of their duties, integrity advisers may use the following checklist in order to ensure that their institutions have established adequate mechanisms for preventing and managing the conflict of interest:

- Are the adequate rules and procedures in place to examine and approve additional employment?
- Are all employees informed about these rules and procedures?

- Are the rules and procedures sufficient in order to avoid possible conflicts of interest that may arise as a result of additional employment?
- Are the rules applied consistently?
- Are the approvals to work in areas that may be prone to involve conflicts of interest checked periodically, to ascertain whether they remain in line with the rules and regulations on conflict of interest?
- Have steps been made to assure that all employees who participate in the drafting, negotiation and execution of contracts, including the related decision-making, have reported their private interests that might potentially be in conflict these tasks and with the public interest?
- Should certain private interests exclude a public employee from participating in the drafting, negotiation and execution of certain kinds of contracts, or from decision-making in certain areas?
- Does the state body or public institution in question have the power to amend or cancel a contract or to annul a decision if it has been determined that there had been a (serious) conflict of interest?
- Will previous decisions also be re-examined to ascertain whether the determined conflict of interest may have affected their validity?
- Have the internal rules and regulations related to receiving gifts, and mechanism for monitoring reception of gifts, been adopted? And if so, are they sufficient and implemented?
- Have the internal rules and regulations on the conditions for additional employment of public employees outside their public institution been adopted? And if so, are they sufficient and implemented?

***Appointing people to monitor and register gifts and other benefits:*** Gifts and other benefits that are received and accepted by public officials may undermine their impartiality and independence and thus negatively affect integrity, even when no compensation in return is involved. The primary as well as secondary legislation regulating conflicts of interest should, therefore, also regulate to what extent public officials are allowed to receive gifts and other personal benefits. In many countries, public officials are not permitted to accept gifts; an exception may be token gifts of little value. At one point, giving gifts to public officials has become a ubiquitous and socially acceptable habit, which may also gradually lead to corruption. As a result of that, access to services from a state body become reserved only for those who provide certain gifts and other benefits to the public officials concerned. Such corruption also opens a considerable space for undue influence on professional and impartial performance of the delegated public duties, posing a direct threat to institutional integrity.

Public officials who find themselves in a situation in which they are offered a gift need to ask themselves the following questions: Have they somehow requested the gift? If they accept it, will they still be perceived as independent and impartial or will their personal integrity be compromised? Also, if they accept the gift, do they feel obliged to return a favour? And perhaps most importantly, whether he/she aware of his/her obligation and willing to hand over the gift and disclose where it comes from to the authorised person in the public institution in which he is employed? Would they be seriously compromised or even be perceived as corrupt if information about the gift becomes public knowledge? The latter is frequently the key to whether a gift should be accepted: does it tolerate transparency?

In many public institutions, internal rules and regulations prescribe that all gifts and other received benefits should be reported. It is important that all employees are aware of such rules – that gifts and other benefits, including who gave them, should be reported to the appropriate person or unit within the institution. In some cases, the rules may prescribe that all gifts that are received should be turned over to the institution and not be privately kept become property of the institution. That is true in case of gifts received during an official visit at which a public official has officially represented his/her institution.

However, even if public officials have decide to report the gift, the problem is that there is no appointed person in charge of registering gifts?

The lack of a transparent and universal mechanism aimed at recording gifts and other benefits associated with the work of public officials sends two important messages – the first one addressed to the general public and the second one to the public officials concerned. The general public get a message that their rights and interests cannot be ensured in a lawful way, and that in reality the procedures in public authorities depend on giving gifts. In addition, it may be seen as an opportunity to buy oneself an advantage in a manner that is not explicitly defined as unlawful. In this way, the integrity of both the public employees and the public sector more generally is undermined in the eyes of the citizens. The public officials on their side get a message that there is no control system in place to monitor receiving inappropriate gifts and conflict of interest, and that there is little danger of being sanctioned. They are actually being tempted to ask for or implicitly indicate that a gift or some other benefit may facilitate a certain kind of decision or public service. The lack of any positive examples of sanctioning encourages public employees to engage in questionable situations. For example, in Montenegro, there is not a single enforceable judgment regarding a conflict of interest against a member of the Government, and according to the available data, not a single misdemeanour proceeding has been initiated. In some countries there is no statistical data on disciplinary proceedings, since public institutions do not necessarily forward the relevant data.

**Concurrent or additional employment:** As a preventive policy measure with regards to conflicts of interest, all legislation normally envisages certain restrictions on public officials' additional employments in companies or institutions outside of the public sector. Unlike public officials, who are not allowed to have additional employment unless when approved by the relevant body at the public official's request, civil servants in the Western Balkans may, in principle, have additional employment with the employer's consent.

Questionable situations arise when civil servants request or negotiate additional employment in the private sector, while preserving his/her position as a civil servant. Moreover, under such circumstances, a civil servant may find himself/herself in the position to run a private business or provide services in his/her or someone else's private interest and against the public interest, in conflict with his/her public role and responsibilities. Public interests may be jeopardised, or the integrity of the public sector may be undermined if a civil servant has access to confidential internal information and uses it to pursue private interests. Such conflicts of interest may also arise when a civil servant or his/her family members are employed by private companies that are in a contractual relationship with the public institution in which the civil servant is employed. This certainly gives rise to a conflict between private and public interests, which needs to be regulated, and putting one's private interests before the public interests should be sanctioned.

The first step that public institutions should take with regard to regulating what will easily be a grey zone prone to conflicts of interest, is to define the circumstances under which additional employment of civil servants is possible, concurrent with their civil service, and when it is not acceptable and a reason for losing their employment. The main procedural requirement that must be met is the consent of the superior of a civil servant, given in the appropriate procedure. The procedure of giving consent must be must take place under the same conditions for all, so that civil servants would not be discouraged from disclosing additional employment. Consent to additional employment must be given on the basis of transparent rules that are valid for all employees. Unless the tasks and responsibilities of a public institution is of a nature that is incompatible with additional employment, the rules should not in themselves discourage civil servants and public officials from reporting additional employment. Failure to request consent for additional employment, however, should rise to disciplinary action or even dismissal in cases that involve a serious conflict of interest. Designated integrity advisers should be authorised to determine whether additional employment is acceptable or not.

One must not disregard that personal circumstances may change over time, and that the issued consents to additional employment must be subject to periodical revisions.

## 5. EXAMPLES OF BEST INTERNATIONAL PRACTICES IN THE AREA OF CONFLICT OF INTEREST

This section contains the best practices in the area of conflict of interest of OECD countries, that could be used as sources of inspiration for resolving conflict of interest situations in the Western Balkans.

### Box 1

#### Tailored approach to define conflict of interest

In **New Zealand**, the definition of conflicts of interest is tailored to targeted groups, such as public servants, ministers or board members of crown companies. Nevertheless, these definitions contain common features. For example, they all cover actual and perceived as well as direct and indirect conflicts. Apart from the general definition, secondary legislation also lists possible types of conflict of interest situations, together with concrete examples.

For **public servants**: "Conflicts of interest are defined as... any financial or other interest or undertaking that could directly or indirectly compromise the performance of their duties, or the standing of their department in its relationships with the public, clients, or Ministers. This would include any situation where actions taken in an official capacity could be seen to influence or be influenced by an individual's private interests (e.g. company directorships, shareholdings, offers of outside employment). ... A potential area of conflict exists for public servants who may have to deal directly with members of Parliament who have approached the department in a private capacity." (*Code of Conduct*)

In **Germany** a general definition of conflict of interest does not exist but the *Act on Federal Civil Servants* and the corresponding *Länder* statutes establish required modes of conduct for *civil servants* on how to serve exclusively in the public interest:

- The obligation of full dedication to the profession as a civil servant, and a corresponding duty to obtain permission for involvement in outside activities.
- An obligation to carry out official duties impartially.
- The necessity of restraint in political activities.
- An obligation of selflessness in carrying out of duties of public office.
- The duty to obtain permission for the acceptance of gifts connected with public office.

For **employees** working in the public service, the obligation to avoid conflict of interest situations usually is laid down in individual employment contracts and collective agreements, in addition to the general labor or public service employment legislation.

Source: *Managing Conflict of Interest in the Public Service*, OECD Guidelines

## Box 2 Additional employment in Sweden

**Sweden** has introduced new stricter laws for certain forms of extra-occupational activities. Before adopting the new regulations, a Committee was appointed by the State to do research on additional employment. Three major types of extra-occupational activities were reviewed in the inquiry, specifically:

- Activities which adversely affected public confidence in an organisation.
- Activities which adversely affected an official's performance.
- Activities which were basically in competition with government.

In the inquiry the following two main concerns emerged regarding the implementation of past regulations:

- The contrast between increased opportunities for state employees to take up extra-occupational activities in comparison with the lack of information or insufficient information provided as to whether these extra-occupational activities were permitted.
- Inconsistency of rules: Individual employees should be provided with coherent legal provisions that help their unambiguous application and interpretation in practice.
- The division of regulations between the Public Employment Statute and the collective agreements was considered as a potential source for differing interpretation.

The results of the inquiry caused the Government to provide unambiguous rules for the conflict of interest policy and particularly clarify the conditions under which extra-occupational activities can be accepted. In addition, the inquiry proposed that regulations should provide clear standards for areas where the risk to public confidence is particularly high. These areas principally include employment and positions in: justice administration, property administration, public procurement, exercise of public authority, supervision, leadership of public administration.

The existing regulations were amended both in scope and form:

- The extra-occupational activities that are considered to *adversely affect public confidence*, are now included in the legislation instead of collective agreements. Moreover, the secondary legislation enacts the rules for employees of municipalities and county councils regarding extra-occupational activities that adversely affect public confidence.
- The rules on extra-occupational activities that *adversely affect performance*, and those of a *competitive nature*, are included in collective agreements.

*Source: Managing Conflict of Interest in the Public Service, OECD Guidelines*

### Box 3 Deciding proportional sanctions

In **Canada**, at the federal level the measures and personal consequences are different for public office holders and public servants:

- For **public officials**, the Office of the Ethics Counsellor provides advice along with education about ethical conduct, in order to prevent conflicts and help to resolve ethical dilemmas. In case of complaints regarding alleged breaches to the Code, the Ethics Counsellor will inquire and determine whether a breach actually occurred and make recommendations. Breaches of the Criminal Code can lead to investigation and criminal prosecution.
- For **public servants**, disciplinary actions may include dismissal where the *Conflict of Interest and Post-Employment Code for the Public Service* has been seriously breached. In addition, criminal prosecution is possible in the case of a breach of the Criminal Code

In **France**, where both disciplinary and penal measures can be applied, the following forms of disciplinary sanction can be used in the public service:

- warning
- deletion from the promotion list, reduction in rank, temporary suspension from duty for a maximum of 15 days, transfer of duty.
- demotion, suspension from work from 3 months to 2 years.
- dismissal.

Source: *Managing Conflict of Interest in the Public Service*, OECD Guidelines

### Box 4 Providing information on the policy: Germany

The federal administration makes use of a variety of tools to provide information on the conflict of interest policy. Special training courses are organized for civil servants to:

- provide information on the principles and relevant legal regulations
- give instructions about the concrete measures for avoiding conflict of interest situations
- focus on principles and daily practices of cooperation and management, social competence and responsible behavior.

In addition, training courses for the executive service in the federal administration deal with such issues as self-image, social behavior, communication and management, competence in grassroots administration.

All ministries and subordinate authorities also distribute copies of the Federal Government Directive containing a *Behavioral Code against Corruption*, or make it available to their employees in electronic form.

Source: *Managing Conflict of Interest in the Public Service*, OECD

### Box 5

#### Holistic approach to develop an open administrative culture: Finland

A leading example of a holistic approach to develop an open administrative culture is to be found in Finland. The key elements of the Finnish approach include:

- measures for promoting awareness – particularly ensuring the clarity of norms, provision of information on the policy and knowledge of its practical application
- preventive mechanisms for safeguarding impartiality of civil servants – especially the hearing of parties, the presentation of grounds for a decision and its publicity, clear provisions for disqualification of civil servants in case of actual conflict of interest
- retroactive measures – legal protection through administrative self-correction, appeal and petition for review
- ensuring transparency of the activities of state administration – decision making is open and documents are public (with the exception of documents specifically defined as secret or confidential) provides critical conditions for close public scrutiny.

*Source: Managing Conflict of Interest in the Public Service, OECD*

## 6. TRAINING EXERCISES

The training exercises listed below describe situations in which there may be a conflict of interest. In each one of the first five exercises, three alternative actions are outlined. Decide which one you find most appropriate and how you would react as a public control unit asked to investigate these situations. The answers may then be shared with others, and if different answers have been chosen, the reasons could be discussed in greater detail.

In the remaining six exercises, several courses of action are indicated for each hypothetical situation, together with pro and con arguments and alternative ways of how to evaluate the case, dependent on circumstances. These exercises are well suited for group discussions.

### Training exercise No. 1

Tax inspector XY provides consultancy services to companies in his free time. After some time, he realised that this was an excellent source of extra income and registered an accounting/bookkeeping agency using the name of one of his family members. His field of work – direct contacts with tax debtors – indirectly ensured a constant income for “his” private agency, while no one could formally connect him to the agency since it was registered using



another person's name. As a tax inspector, XY has access to information on monthly and annual inspection plans and is, therefore, able to warn tax debtors who are his private clients on when inspection is planned, so that they can put their books in order and make sure to align their operations with the regulations. Those who do not want to voluntarily become clients of "his" private agency are frequently exposed to his frequent visits in his public capacity, as well as to controls and sanctions, and will as a result eventually start using "his" accounting services.

A. You think everything is in order and do nothing. This is one of the best inspectors in your team, who has performed the largest number of inspections and issued most misdemeanour orders and motions for initiating misdemeanour proceedings. You are lucky to have among your staff such true professionals who are capable of giving tax-related advice to the largest private companies.

B. You analyse possible complaints against the work of this inspector and order another tax inspector to check all the tax debtors that make use of the services of the private agency in question.

C. You verify whether the private activities of the tax inspector are in accordance with the law and the code of ethics of civil servants and ask him to forward to you a written approval from his direct superior for performing additional work, as well as a statement on non-existence of conflict of interest, before deciding to take further measures.

## **Training exercise No. 2**

Two police officers, X and Y, provide security services to local discotheques and nightclubs in their free time. Security is increased and police raids involving the discotheques and nightclubs are notably reduced. In the meantime, the business has developed so much that X and Y gradually include other colleagues from other organisational units who want to make extra money, since satisfied club owners demand that only members of the police provide these services.

A. Everyone is entitled to additional work. The pay in the local police is low. It is commendable that the police officers are looking for opportunities to create additional income.

B. This is an excellent opportunity to make the best of both worlds – guests of the clubs must feel safer knowing that armed members of the police force are present on the premises, while potential offenders get a clear message that these clubs are not places they should frequent.

C. You ask the police officers to provide you with a written approval from their direct superior for performing additional jobs, and you assess the potential conflict of interest having in mind the responsibilities of the police as an institution and the specific responsibilities of the organisational unit in which the police officers work.

### **Training exercise No. 3**

A tax inspector (Large Taxpayer Office), is a renowned lecturer in internal seminars and other training events organised by several large taxpayers (telecommunication, IT, pharmaceutical and oil companies). In these seminars, he regularly receives appropriate gifts (phones, fuel vouchers, tablets, laptops, etc.). He has also entered into service contracts for educating the employees and management of the private companies in question. Taxes and levies related to these contracts are regularly paid.

A. You think that the above is not a problem and do nothing.

B. The tax inspector is one of the best professionals in your team and he is entitled to additional employment. The gifts he receives are an appropriate gesture of gratitude.

C. You check the potential conflict of interest, given the institution's competences, and ask the tax inspector to forward to you a list of all the gifts he has received with their exact market values.

### **Training exercise No. 4**

DD, a publicly owned company, discreetly provides monetary support to sports clubs and organisations in which officials of that company are members of the management board. As a token of appreciation, they receive a certain quota of free tickets for sports events in which the athletes from these clubs participate for themselves, their family members, and a limited circle of employees.

A. Everything is fine, this is a good way of providing additional financing to sports organisations and to promote sports.

B. Maybe a public call should be announced for such donations and subsidies, so that all sports organisations and clubs that meet the criteria specified in the call may apply for support.

C. I think that this is a conflict of interest and receiving inappropriate gifts.

## Training exercise No. 5

Two civil servants working for a public authority have voluntarily left their positions as public employees. Civil servant X has retired but continues to provide consultancy services to the public authority for which he used to work, based on a consultancy services contract. Civil servant Y is now working as manager in a legal person that is monitored by the public authority in which he used to work.

A. The above situation is unproblematic and a good example of how acquired knowledge and experience in the public sector can be utilised in now jobs.

B. Maybe it would be advisable to check whether any provisions related to employment restrictions after the termination of a labour contract have been violated.

C. Civil servants, or public employees, are not allowed to perform the mentioned jobs before two years after the termination of their work contracts.<sup>165</sup>

## Training exercise No. 6

Civil servant X works in a public institution that offers funding to community organisations for a range of environmental projects. In her role, X carries out an initial assessment of applications and writes reports for the committee that will consider and make final decisions on funding. Civil servant X also monitors how the funding has been used.

X is also a member of a local association and the association has applied for funding to clean up a local stream and carry out a native shrub replanting program in the community. Normally, this application would be one that X would deal with.

In this situation there is a conflict of interest. Someone could reasonably allege that X will not be completely impartial in evaluating the received applications. The decision on funding may benefit in a significant way the local association and their finances.

Even though X is not one of the managers of the local association, she did not prepare the application, she has no personal financial interest in the matter, and believes she would be capable of considering all applications fairly and professionally, outsiders might perceive it as a clear-cut conflict of interest situation. The association is small, and X is very likely to know its

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<sup>165</sup> Examples taken from B. Dulovic, B. Dabanovic *et al.*, *Integrity or corruption? Questions and Answers*, IPA 2010 Twinning Project "Support to Implementation of the Anti-Corruption Strategy and Action Plan", Podgorica 2014.

leaders well and work closely with them. The situation would be different if the association was a large nationwide or international organisation, and the application was from a different branch of that organisation. A direct personal relationship, therefore, may be considered questionable.

A) X should tell her superior about her personal connection and interests in relation to this application. Her superior should consider the nature of her role in processing these sorts of applications, whether her position has a significant influence on decision-making, and whether it is practicable for someone else in the public institution to evaluate the particular application.

B) It may be more prudent of her superior to consider the possibility that all of the received applications for this particular round of funding should be evaluated by another civil servant. If the superior takes this view, it may also be preferable that the other person should not be someone for whom civil servant X has line management responsibility and for whose actions she is accountable. If the application from X's association is successful, X might also need to be excluded from controlling the use of that particular grant.

C) Another possibility is that the above steps are impracticable, because X is the only person in the institution who can do the work. In that case, some other option might have to be used, such as carrying out an additional review of her work.

D) Another option is that no actions should be taken because civil servant X's role is a low-level administrative one and all decisions to grant money are done by others. Also, another possible scenario is that X is the only person in the public institution that can do the work, and that because of that the rules cannot be applied. In this case, other actions must be taken (such as a review of civil servant X's work by other civil servants at the same level of the civil service hierarchy).

### **Training exercise No. 7**

Y is the principal of a secondary school in a small town. She takes a leading role in handling the recruitment of key staff. A vacancy has arisen for the position of finance manager and Y's husband has expressed an interest in applying for the position. Y obviously has a conflict of interest here. The school needs to employ staff on merit, and must avoid perceptions of preferential treatment in appointment decisions, and that one candidate has been favoured in comparison to others.

A) Y should inform the school's board about the situation. The board should ensure that this appointment process is handled entirely by others, and that Y has no involvement in the process. Because of Y's own position, the board

needs to take actions to ensure that the process is truly transparent, so that all those who think that they are eligible could apply, and be considered for the position, eliminating any suspicion that Y may have influenced the decision making in any way.

B) Decision making in the selection process for the vacancy is not the only type of conflict of interest that needs to be considered carefully by the school. Problems linked to impartiality and integrity are also likely to arise in an ongoing working relationship if any issues should arise directly affecting or involving Y, her husband, or other employees at the school. It often happens that two people who are closely related or married/ a couple work in the same organisation. Such a situation, in itself, is not problematic. Indeed, it would be unfair for someone's benefits to be taken away simply because he/ she is closely related to someone, especially in case of a large organisation where two people do not work closely together on a daily basis.

However, sometimes – and depending on the nature of their positions – appointing someone who is a close relative could become a source of future difficulties, even if the procedure has been duly followed. That is particularly true when, for example, a person is in a leader position with direct powers *vis-à-vis* other persons, including the spouse.

That can create the risk of the lack of independence, respect for rules and professionalism in decision-making.

Therefore, in a public entity, it is particularly unwise for relatives to hold two senior positions, in particular when one of them is in a managing position and the other one responsible for financial management.

In Y's husband's situation, the school's board must consider whether the board itself is able to resolve all potential conflicts of interest that may arise if Y's husband is employed. If Y's husband is appointed, their relationship would be such that the husband would have to submit reports to Y or that they would work closely together on managing the school's finances.

It can be difficult to decide the fairest course of action in a situation like this. Here, the school board might decide not to appoint Y's husband because it would be too complex to resolve and manage a conflict of interest in the school.

### **Training exercise No. 8**

X is a civil engineer and works for a state-owned enterprise (SOE) responsible for the national infrastructure network of gas pipes. The SOE is planning to build a major new mains pipeline to increase supply capacity from a refinery

to a large city. The pipeline has to cross a distance of 300 kilometres, and the SOE has come up with several different options for where to construct it, which it will now consider in more detail. The SOE has to acquire land along the route to be chosen. The project is opposed by many people who live along the routes to be considered and who fear that the pipeline will adversely affect the natural environment and destroy their land. X has worked on a number of issues directly linked to the project and has been appointed to the Route Options Working Group (ROWG) that will assess the different route options and make a recommendation to the board. X is also part-owner of a farm that lies directly in the path of one of the route options.

X has a conflict of interest here. He has a personal stake in the decision about which route to choose, because that could directly affect his land. Although the working group is not the final decision-maker in this matter, it does have a key role in analysing the route options. X's role will need to be considered carefully. It may be that X does not mind whether the pipeline ends up crossing his land – he may believe that he would be able to contribute to the ROWG to help it arrive at the best one should bear in mind the risk that X's personal interest will become publicly known, and that others might easily think that the decision has not been made in an impartial way.

The superiors might have to remove X from the working group and assign him to other tasks. It is recommended that X does not have access to confidential information about the decision before it is made public, in case he is considering selling his land.

Therefore, X's expertise may be considered as indispensable to the project, or he may have such a small part in the overall process. In that case, some other arrangement could be considered (for example, a relatively limited role or imposing extra supervision of X's involvement in the process).

### **Training exercise No. 9**

Y is a senior scientist working for a state research institute. The institute has developed a new product that has a significant revenue-earning potential, and Y has worked on the design and development of the product. However, the institute needs help in manufacturing and marketing the product on a large scale and plans to enter into a joint venture with a private company. The institute is considering appointing Y as one of its representatives on the governing body of the joint venture.

Coincidentally, Y is also a shareholder in the private company with which the institute wishes to close a contract. It has to be noted that Y had no role in the selection of the institute's contracting partner.

This situation creates a conflict of interest for Y. The fact that there may be no direct disadvantage to the institute (the joint venture partners expect to be working together for their mutual benefit) does not remove the (potential) conflict of interest. The existence of interest in both the institute and the private company could create confusion about her roles, and also about her primary loyalty. She could be accused of using her official position to ensure her own private interests.

A. Y should inform her manager. It will probably be necessary for Y not to be given any major role in managing the joint venture, as long as she keeps her private interest in the private company. The superior might also need to think carefully about what other work, if any, would be appropriate for Y to do on the project to establish the joint venture, in her capacity as an employee of the institute. This decision may not be clear-cut. Y might be the best person in the institute to carry out certain tasks, but the risk is that she could be regarded as spending a large part of her time as someone who uses the institute's resources for private gain.

B. The superior might judge that some involvement in the project is acceptable (or even necessary), but that it has to be limited. For example, Y's role could be changed so that she does not have any influence on decisions about how the joint venture and the project are run.

C. In addition, Y might be asked to give up one of her roles – that of employee in the institute or that of a shareholder in the private company.

D. If circumstances were to change to a point where the institute and the private company become competitors, Y's situation might become substantially more difficult. In that case, it may become necessary for Y's superior to insist either that she should relinquish her private interest in the private company or leave her job.

### **Training exercise No. 10**

X is a consultant who specialises in project management. His services have been hired by the Government to help it carry out a new building project. As part of this role, X has been asked to analyse the tenders for the construction contract and provide advice to the tender evaluation panel that needs to make a final decision. However, X has a lot of personal knowledge about one of the tenderers for the construction contract. X used that firm to build his own house last year, and he is currently using it to carry out structural alterations on several investment properties that he owns. Because of this, X knows the director of the company very well and has a high regard for their work.

A. This situation may represent a conflict of interest for X. X is expected to impartially and professionally assess each of the tenders, yet he could be regarded as being too close to one of them. Therefore, it is proposed that X should not take part in the evaluation of tenders and that he should be replaced by someone else. Depending on the circumstances, this may not require ending the cooperation between the Government and X. The dealings with the potential constructors are recent and significant. The risk is that it might instigate an outsider to allege that the selected firm had preferential treatment because of private relations.

B. These sorts of situations are not necessarily clear-cut they and do not necessarily mean that something is wrong and in contravention of the law. Particularly in small or specialised industries, people often have had some degree of previous personal contact with someone they now have to decide on. Sometimes previous connections may be judged to be too remote or insignificant, such as, for instance, that the construction company concerned carried out a small job for X several years ago.

C. The circumstances would have been different if the construction company was run by an acquaintance or a very good friend X had known for many years either in private situations or because X used to work for the construction company. In that case, one would have to consider when X worked in that company, for how long, and how long ago. Insufficient significant relation between the construction company and X would exist also if X knew the owner of the company in a casual way through membership of the same sports club.

D. This case demonstrates that public authorities need to have a good strategy whether and how to manage conflicts of interest situations that arise for someone who is not an employee but just a consultant. X's role is important and affects a key decision that the public authority has to make, and therefore may expose the authority to legal and political risks. A potential solution might be to require a consultant to agree to and abide by the relevant conflict of interest rules that exists for the employees. The authorised persons would have to ensure that that person understands the conflicts of interest management policy, and should monitor his/her work in the same way as for other employees.<sup>166</sup>

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166 Examples taken from *Managing Conflicts of Interest: Guidance for Public Entities*, Office of the Auditor General, Wellington 2007.



# Internal Financial Control

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## 1. INTERNAL FINANCIAL CONTROL AND INTEGRITY CHALLENGES IN THE WESTERN BALKANS

Integrity implies individual honesty, consistent adherence to moral values, institutional rectitude, compliant and consistent operations, as well as good governance, ethics and professionalism.<sup>1</sup> The notion of integrity can be associated with an individual, but can also be seen as institutional integrity. At the individual level, it implies personal ethics, honesty, persistence, consistency and observance of law.<sup>2</sup> Institutional integrity is closely linked to the integrity of the employees. Strengthening integrity in the public sector contributes to reducing the risk that public offices will be exercised contrary to the purpose for which public institutions have been established, which improves the public institutions' operations and increases the public trust in them.<sup>3</sup> Public internal financial control strengthens the public sector ethics and accountability.

Public internal financial control comprises: financial management and control, internal audit and harmonisation, and coordination of financial management and control and the internal audit performed by the competent organisational unit of the national ministries in charge of public finance. Financial management and control is a comprehensive internal controls system carried out through the policies, procedures and activities set up by an institution's management, designed to provide reasonable assurance that the institution's decisions and operations comply with the appropriate legal regulations, internal acts, procedures and contracts, ensuring complete, realistic and reliable financial and business records, a sound financial

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1 Anti-Corruption Agency, *Manual for Development of Integrity Plans*, Anti-Corruption Agency of the Republic of Serbia, Belgrade 2012, p. 4. Text available at: [http://www.acas.rs/wp-content/uploads/2010/07/Prirucnik\\_konacna\\_verzija.pdf](http://www.acas.rs/wp-content/uploads/2010/07/Prirucnik_konacna_verzija.pdf), 15.1.2017.

2 Bureau for Social Research, *Analysis of the Development of Integrity Plans in the Courts in Serbia*, Bureau for Social Research (BIRODI), <http://www.sudije.rs/files/file/JASBIRODI%20Analiza%20planova%20integriteta.pdf>, 15.1.2017.

3 *Ibid.*, p. 3.

management, as well as assets and data (information) safeguarding.<sup>4</sup> Internal audit is an independent and objective consultancy activity in order to increase the value of assets and improve the organisation's operations.<sup>5</sup> Its work includes assessing the risks that threaten the organisation's operations and minimising their adverse impacts on the implementation of the organisation's objectives, as well as improving the control systems that are in place. The control systems need to contribute that the organisation's operations comply with rules and regulations, and that they are conducted in an economic and efficient manner, to safeguard assets and minimise the possibility that they are misused, destroyed or damaged.<sup>6</sup>

Internal financial controls implemented in public sector institutions contributes not only to the strengthening of institutional and employees' personal integrity, but also the citizens' trust in these institutions. In addition, putting in place financial controls increases both the transparency of and accountability for the use of public funds by public institutions. That is why over the past decade the Western Balkan countries have invested considerable funds in public internal financial controls and public integrity building, which is also an EU accession conditionality.

Public sector employees should have a high degree of accountability for the use of public assets. This accountability is often identified with financial accountability, which requires a network of internal and external control mechanisms, including adequate accounting, financial reporting and internal and external audit.<sup>7</sup> Public internal financial control strengthens accountability and professionalism of both the management and other employees. As a result, citizen trust in public institutions will also increase.

Unlawful and unauthorised use of public funds is a weakness that is common to all the Western Balkan countries' integrity systems. Poor financial management is frequent and difficult to suppress. Public money is often perceived as funds whose use is not restricted, nor regulated by law, and which can therefore be managed at will. There is still a lack of

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4 Definition of financial management and control is included in Guidelines for Internal Control Standards for the Public Sector, INTOSAI GOV 9100, Intosai Professional Standards Committee. p. 6. The text can be found at: [http://www.issai.org/en\\_us/site-issai/issai-framework/intosai-gov.htm](http://www.issai.org/en_us/site-issai/issai-framework/intosai-gov.htm), 15.1.2017.

5 Definition of internal audit is included in International Standards for the Professional Practice of Internal Auditing (revised in 2016, applied as of January 2017). Standards are available at: <https://na.theiia.org/translations/PublicDocuments/IPPF-Standards-2017-Serbian.pdf>, 15.1.2017.

6 J. Suput, "Harmonisation of Internal Audit Regulations with International Standards", in: *Good Administration and Internal Audit* (ed. D. Suput), Belgrade 2012. p. 96.

7 A. Rabrenovic, *Financial accountability as a condition for EU membership*, Institute of Comparative Law, Belgrade 2009, p. 55.

awareness that public money comes from the taxpayers and that the all elected governments are accountable to the citizens for its use.

Misuse of public funds has a particularly adverse impact on the citizen trust in the public institutions. This is a particularly sensitive issue when it comes to public finance. Specifically, the objective of public institutions is not to gain profit, but to provide public goods. That is central for the functioning of any state. Public spending should not only serve the needs of the citizens, but also the state. Since the production of public goods incurs certain costs (public expenditures), it is necessary to provide funds (public income) to finance those costs.<sup>8</sup> A majority of public incomes are based on levies (taxes, fees, and contributions) paid for by the citizens. If the state funds are not used rationally, the citizens will largely resist paying them. Overspending of public funds and insufficient public income can create budgetary deficits, which will negatively affect the functioning of the state and its ability to fulfil its objectives in the longer term.

Despite the considerable efforts put into establish internal financial control systems in Western Balkan countries in recent years, the systems are still not fully for several reasons. One of the reasons is their civil law system and little tradition of risk assessment, internal control and audit instruments, which come primarily from the private sector and common law systems.<sup>9</sup> Furthermore, other problems that affect the relatively weak integrity systems in the Western Balkan countries is inefficient implementation of laws, limitations in terms of human resources, space and other capacities for their implementation. It seems also that professional ethics is insufficiently developed and needs to be strengthened.

To improve public expenditure control mechanisms, it is necessary to continue the current efforts to establish effective internal financial control systems and reinforce public sector employees' and managers' personal responsibility and accountability for the use of public funds. The above controls serve as a mechanism that reduces and prevents mistakes and irregularities at the institutional level. That enables the distribution of managerial accountability with institutions. Adequate internal financial controls enable a uniform distribution of accountability, that is, delegation of powers to the so-called middle management, which is also an opportunity to depoliticise decision-making at the institutional level.

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8 S. R. Stojanovic, *Fiscal Federalism*, Institute of Comparative Law, Center for Anti-war Action, Belgrade 2005, p. 25.

9 A. Rabrenovic *et al.*, "Historical Development of Mechanisms for Preventing Corruption in the South-East Europe" in: *Legal Mechanisms for Preventing Corruption in the South-East Europe with a Special Focus on the Defence Sector*, (ed. A. Rabrenovic), Institute of Comparative Law, Belgrade 2013, p. 23.

## 2. WHAT ARE THE INTERNAL FINANCIAL CONTROL STANDARDS FOR THE PUBLIC SECTOR?

International standards for internal financial controls are based on the common European and internationally accepted principles and best practices for public sector financial management and control. The area of internal financial controls is considered “soft acquis”, as it is not part of the common EU legal framework, bearing in mind that the EU legislation does not contain any legal provisions in that field and that they are within the exclusive competence of the Member States.<sup>10</sup>

The standards for internal financial controls are contained more directly in the standards adopted by international organisations: International Standards for Internal Auditing are contained in the Standards of the Institute of Internal Auditors (IIA),<sup>11</sup> and the International Organisations of Supreme Audit Institutions (INTOSAI).<sup>12</sup> The European Commission has confirmed that their application is considered best practice, stating that the most important standards in the field of public internal financial controls are contained in the INTOSAI Guidelines for Internal Controls Standards for the Public Sector, and in the IIA documents.<sup>13</sup>

Internal financial controls must comply with the INTOSAI, IIA standards, and the EU best practice, and that is why all the countries in the region have regulated internal audit in accordance with the above standards and refer to their application in the national legislation. In accordance with that, in all countries that are members of the Institute of Internal Auditors, certified internal auditors are obliged to abide by the Standards for Professional Practice of Internal Auditing, established by the Institute of Internal Auditors (IIA).<sup>14</sup>

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10 I. Rakic, “Internal and External Audit”, in: *Legal Mechanisms for Preventing Corruption in the South-East Europe with a Special Focus on the Defence Sector*, (ed. A. Rabrenovic), Belgrade 2013. p. 143.

11 International Standards for the Professional Practice of Internal Auditing. The revised standards have been applied since 1 January 2017. Available at: <https://na.theiia.org/standards-guidance/mandatory-guidance/Pages/Standards.aspx>, 4.6.2017.

12 Guidelines for Internal Controls Standards for the Public Sector-INTOSAI GOV 9100, Guidance for Reporting on the Effectiveness of Internal Controls: SAI Experiences in Implementing and Evaluating Internal Control- INTOSAI GOV 9110, Internal Control: Providing a Foundation for Accountability in Government-INTOSAI GOV 9120, Guidelines for Internal Control Standards for the Public Sector – Further Information on Entity Risk Management-INTOSAI GOV 9130. Available at: <http://www.intosai.org/issai-executive-summaries/intosai-guidance-for-good-governance-intosai-gov.html>, 4. 6. 2017.

13 ECCIA Position Paper on Internal Auditing in Europe, European Confederation of Institutes of Internal Auditing, Brussels 2005. As cited in I. Rakic, “Internal and External Audit”, p. 144.

14 *Ibid*, 146.

With respect to the standards for internal financial controls for the public sector, one must mention: Guidelines for Internal Control Standards for the Public Sector,<sup>15</sup> International Professional Practices Framework,<sup>16</sup> and the INTOSAI standards.<sup>17</sup>

**Guidelines for Internal Control Standards for the Public Sector** specify the standards for financial management and control in the public sector (FMC),<sup>18</sup> adopted by the International Organizations of Supreme Audit Institutions. They include the Internal Control Integrated Framework, defined by Committee of Sponsoring Organization on the Treadway Commission (COSO).<sup>19</sup> However, they do not specify the internal audit function, and they refer to the above financial management and control component instead.

Another framework relevant for the professional practice of internal audit is the International Professional Practices Framework, a conceptual framework established by the International Institute of Internal Auditors integrating:

- 1) Mandatory Guidelines,<sup>20</sup> which are essential for the professional practice of internal auditing, and
- 2) Strongly Recommended Guidelines<sup>21</sup> describing the practice for the effective application of Mandatory Guidelines.

**Mandatory Guidance include:**

- Definition of Internal Auditing;
- Code of Ethics, and
- International Standards for the Professional Practice of Internal Auditing, including Attribute Standards and Performance Standards.

**Strongly Recommended Guidance include:**

- Implementation Guidance
- General Assumptions, and
- Practice Guides.

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15 Guidelines for Internal Control Standards for the Public Sector (INTOSAI GO 9100).

16 International Professional Practices Framework.

17 In addition to the above, Internal Audit Independence in the Public Sector standards (INTOSAI 9140) and Coordination and Cooperation of Supreme Audit Institutions and Internal Auditors in Public Sector (INTOSAI 9150) standards are also relevant to the overall internal financial control system in the public sector.

18 Financial Management and Control.

19 The Committee of Sponsoring Organization on the Treadway Commission.

20 Mandatory Guidance.

21 Strongly Recommended Guidance.

In addition, **INTOSAI GOV 9140**<sup>22</sup> and **INTOSAI 9150**<sup>23</sup> standards are also relevant to the internal auditing practice in the public sector. The former refers also to the use of other sources that regulate internal audit independence: The Institute for Internal Auditors standards, ISSAI 1610 – Using the Work of Internal Auditors, adopted by the International Organization of Supreme Audit Institutions, and International Standards on Auditing 610 adopted by the International Auditing and Assurance Standards Board.<sup>24</sup>

**INTOSAI 9150** defines the coordination and cooperation of Supreme Audit Institutions and internal auditors in the public sector.

In accordance with the Guidelines for Internal Financial Control Standards for the Public Sector, internal audit is part of the public internal financial control system.<sup>25</sup> This system consists of three components:

- 1) financial management and control;
- 2) internal audit, and
- 3) their harmonisation and coordination.

The financial management and control standards imply an internal controls system that is implemented through the policies, procedures and activities introduced by and under the responsibility of a public funds user's management, and designed to manage risks and to provide a reasonable assurance that the organisation's mission will be achieved in an lawful, proper, economical, efficient and effective manner. These standards are based on the following internal control components:<sup>26</sup>

- 1) control environment;
- 2) risk assessment;
- 3) safeguarding activities;
- 4) information and communication, and
- 5) monitoring.

The Central Harmonisation Unit is the central organisation at the country level, responsible for the preparation and promotion of the financial

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22 Internal Audit Independence in the Public Sector, INTOSAI GOV 9140. Available at: <http://www.intosai.org/issai-executive-summaries/view/article/intosai-gov-9140-internal-audit-independence-in-the-public-sector.html>, 4.6.2017.

23 Coordination and Cooperation between SAIs and Internal Auditors in the Public Sector – INTOSAI GOV 9150. Available at: <http://www.intosai.org/issai-executive-summaries/view/article/intosai-gov-9150-coordination-and-cooperation-between-sais-and-internal-auditors-in-the-public-s.html>, 4.6.2017.

24 I. Rakic, "Internal and External Audit", p. 147.

25 Public Internal Financial Control.

26 This definition is contained in the Guidelines for Internal Control Standards for the Public Sector.

management and control and internal audit methodology in accordance with the internationally accepted standards and best practices.<sup>27</sup> It is usually organised as a unit within a ministry of finance.

The main principle underlying the overall public internal financial control system is the managerial accountability principle. According to this principle, the manager of a budget user organisation is accountable for the management and control of the operations of the organisation he/she manages. In addition, the manager is accountable for identifying and achieving the organisation's specified objectives, whose fulfilment would be ensured to a great extent by the internal financial control system.<sup>28</sup> This principle is reflected also in the national legislation relating to the public internal financial control system.

### 3. WHAT IS THE LEGAL FRAMEWORK FOR INTERNAL FINANCIAL CONTROL IN THE WESTERN BALKANS COUNTRIES?

In most Western Balkan countries, the public internal financial control system is established by primary legislation. Some countries regulate it under a single law, while others regulate it under two separate laws (one law regulating financial management and control, and a separate law regulating internal audit). In addition, the internal financial control system is subject also to secondary legislation adopted at the national level to facilitate the implementation of the general legal acts in this area. Unlike other Western Balkan countries, the Republic of Serbia regulates internal financial control under two separate regulations (bylaws) adopted by the Ministry of Finance.

#### 3.1. ALBANIA

Albania regulates the internal controls system under two separate regulations. Financial management and control is regulated by the Law on Financial Management and Control in Albania,<sup>29</sup> while internal audit is regulated by the Law on Internal Audit in the Public Sector.<sup>30</sup> The basis for the adoption

27 I. Rakic, "Internal and External Audit", p. 150.

28 V. R. de Koning, Public Internal Financial Control, 2007, <http://www.pifc.eu/translation/Pifc-Bosnian.pdf>, p. 51. As cited in I. Rakic, "Internal and External Audit", p. 150.

29 Law on Financial Management and Control in Albania, Law Nos. 296/2010 and 110/2015.

30 Law on Internal Auditing in the Public Sector, No. 114/2015.

of these regulations is the Law on the Management of Budgetary System in Albania.<sup>31</sup> In addition to the above acts, internal auditing practice and financial management and control are regulated also by the guidelines for their implementation in practice, adopted by the Ministry of Finance in line with the international standards, such as the Financial Management and Control Manual.<sup>32</sup>

**The Law on the Management of Budgetary System in Albania**, in Chapter 6, specifies the overall budget system supervision, auditing and inspection system. The provisions of this Chapter stipulate that the Minister of Finance is responsible to establish the public internal financial control system. In accordance with the Law on the Management of Budgetary System, the above system comprises financial management and control, independent and decentralised internal audit function, and the Central Harmonisation Unit within the Ministry of Finance. The latter is in charge of harmonisation, coordination, implementation and operations of the financial management and control and internal audit system. In accordance with the above provision, all public institutions are obliged to establish an adequate financial management, control and internal audit system.<sup>33</sup> In addition, separate provisions of the Law on the Management of Budgetary System specify the financial management and control system and the internal audit system.<sup>34</sup> However, these internal financial control components are regulated more specifically under separate laws.

**The Law on Financial Management and Control** specifies the financial management and control rules of the public sector in Albania, including procedures, administrative network, and implementation rules, as well as managerial accountability for budget planning, execution, control, accountability and reporting. In accordance with that, the above system needs to ensure the efficient, effective and economical use of public funds and compliance with the principles of transparency and legality to avoid losses or misuse of public funds.<sup>35</sup>

**The Law on Internal Auditing** specifies the public sector internal audit scope, activities, mission, principles, organisation, competencies and accountability.<sup>36</sup>

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31 Law on the Management of Budgetary System, No. 9936/2008.

32 The Manual is available at: [http://arkiva.financa.gov.al/minfin/pub/financial\\_management\\_and\\_control\\_manual\\_1643\\_1.pdf](http://arkiva.financa.gov.al/minfin/pub/financial_management_and_control_manual_1643_1.pdf), 4.6. 2017.

33 Article 66 of the Law on Management of the Budgetary System in Albania.

34 Article 67 specifies the financial management and control system, while Article 68 specifies the internal auditing system in the public sector.

35 Articles 1 and 2 of the Law on Financial Management and Control.

36 Article 1 of the Law on Internal Auditing in Albania.



## 3.2. BOSNIA AND HERZEGOVINA

At the state level of Bosnia and Herzegovina, the financial management and control system is not regulated by one, but by several legal acts. Public sector internal audit is regulated by the **Law on Internal Audit in the Bosnia and Herzegovina Governmental Institutions**.<sup>37</sup> In addition, internal audit is regulated by other regulations that are essential for its functioning. Decision on Adoption of the Professional Code of Ethics for Internal Auditors, the Internal Audit Charter, and the Internal Audit Manual including the Standards for Internal Auditing in the Bosnia and Herzegovina Governmental Institutions, adopted by the Ministry of Finance and Treasury of Bosnia and Herzegovina, is of particular importance.<sup>38</sup>

However, unlike the internal audit system, financial management and control system is not regulated under a separate regulation. The basis for its establishment is the **Law on Financing Bosnia and Herzegovina Governmental Institutions**.<sup>39</sup> In addition to the Bosnia and Herzegovina budget preparation, adoption, execution, accounting, reporting and supervision, the integrated treasury account for the Bosnia and Herzegovina governmental institutions, and public investments, this law regulates the principles underlying the system and the financial management and control harmonisation in the Bosnia and Herzegovina public institutions. Chapter IV of the Law on Financing Bosnia and Herzegovina Governmental Institutions stipulates: the purpose, objectives and scope of the financial management and control component, the establishment of the above system in the Bosnia and Herzegovina governmental institutions, responsibility for the establishment of financial management and control, devolution of powers, the role of the Central Harmonisation Unit, and the procedures of taking action in case of irregularities or fraud.<sup>40</sup>

The financial management and implementation rules are specified more specifically in the Manual on Financial Management and Control in the

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37 Law on Internal Audit in the Bosnia and Herzegovina Governmental Institutions, *Official Gazette of BiH*, Nos. 27/2008 and 32/2013.

38 Decision of the Ministry of Finance and Treasury of Bosnia and Herzegovina on Adoption of the Professional Code of Ethics for Internal Auditors, the Internal Audit Charter, and the Internal Audit Manual including the Standards for Internal Auditing in the Bosnia and Herzegovina Governmental Institutions number 01-1-02-1-203-1/11 dated 3 March 2011. The above documents are available at: [http://mft.gov.ba/bos/index.php?option=com\\_content&view=article&id=682&Itemid=186](http://mft.gov.ba/bos/index.php?option=com_content&view=article&id=682&Itemid=186), 4.6. 2017.

39 Law on Financing Bosnia and Herzegovina Governmental Institutions, *Official Gazette of BiH*, Nos. 61/2004, 49/2009, 42/2012, 87/2012 i 32/2013.

40 The above issues are regulated by Articles 33a to 33i of the Law on Financing Governmental Institutions of Bosnia and Herzegovina.

Bosnia and Herzegovina Governmental Institutions,<sup>41</sup> and by the Guidelines for the Implementation of the Risk Management Process in the Bosnia and Herzegovina Governmental Institutions.<sup>42</sup>

### 3.2.1. Bosnia and Herzegovina Entity-Level Internal Financial Control Regulations

In addition to state level, the public internal financial control system is regulated by separate regulations of two Bosnia and Herzegovina entities: the Federation of Bosnia and Herzegovina, and the Republic of Srpska.

#### 3.2.1.1. Bosnia and Herzegovina Federation Level Regulations

The internal financial control system at the level of the Federation of Bosnia and Herzegovina is regulated by two legal acts: the Law on Financial Management and Control in the Public Sector in the Federation of Bosnia and Herzegovina,<sup>43</sup> and the Law on Public Sector Auditing in the Federation of Bosnia and Herzegovina.<sup>44</sup>

**The Law on Financial Management and Control in the Public Sector in the Federation of Bosnia and Herzegovina** governs financial management and control and specifies the common framework principles and standards relating to the establishment, development and implementation of the above system. This regulation defines the responsibility for the establishment, development and implementation of the financial management and control system, as well as the competencies of the Central Harmonisation Unit within the Federal Ministry of Finance – and other public organisations – in terms of the implementation of the financial management and control system at the Federation level. Other Ministry of Finance acts relevant to the implementation of financial management and control include: Manual on Implementation of Financial Management and Control in the Public Sector in the Federation of Bosnia and Herzegovina,<sup>45</sup> and the Standards of Internal Control in the Public Sector in the Federation of Bosnia and Herzegovina.<sup>46</sup>

41 Decision on the Publishing of Manual on Financial Management and Control, number 03-1-02-1-4-306-1/14 dated 11 December 2014. The Manual is available at: [http://mft.gov.ba/bos/images/stories/chj/pravilnici/PRIRUCNIK-Konacna\\_verzija\\_bos\\_23\\_12\\_2014.pdf](http://mft.gov.ba/bos/images/stories/chj/pravilnici/PRIRUCNIK-Konacna_verzija_bos_23_12_2014.pdf), 4.6. 2017.

42 Decision on the Publishing of Guidelines for the Implementation of the Risk Management Process in the Bosnia and Herzegovina Governmental Institutions, *Official Gazette of BiH*, No. 29/2015.

43 Law on Financial Management and Control in the Public Sector in the FBiH, *Official Gazette of the FBiH*, No. 38/2016.

44 Law on Public Sector Auditing in the FBiH, *Official Gazette of the FBiH*, No. 47/2008.

45 Manual on Implementation of Financial Management and Control in the Public Sector in the Federation of Bosnia and Herzegovina, *Official Gazette of FBiH*, No. 6/2017.

46 Standards of Internal Control in the Public Sector in the FBiH, *Official Gazette of the FBiH*, No. 75/2016.

**The Law on Public Sector Auditing in the Federation of Bosnia and Herzegovina** governs: the competencies, principles, establishment, procedures and activities, reporting and other issues relevant to the internal audit practice in the public sector. In addition to the above, another act relevant to internal audit practice is the Manual on the Criteria for Establishment of Internal Audit Units in the Public Sector in the Federation of Bosnia and Herzegovina.<sup>47</sup>

### 3.2.1.2. Republic of Srpska

The Republic of Srpska regulates internal financial controls in a different way. In this Bosnia and Herzegovina entity, this issue is regulated by a single legal act. **The Law on the Internal Financial Control System in the Public Sector**<sup>48</sup> provides the legal basis for: financial management and control, internal auditing, methodology, standards, and other issues relevant to the establishment, development and implementation of the public internal financial control system. In accordance with the Law, the above system includes: financial management and control, internal audit, and the Central Harmonisation Unit for Financial Management and Control and Internal Audit, established within Ministry of Finance.

## 3.3. KOSOVO\*

The Kosovar internal controls system is regulated by two separate legal acts: **The Law on Internal Audit**<sup>49</sup> and **the Law on Public Financial Management and Accountability**.<sup>50</sup> The Law on Internal Audit stipulates the purpose for its adoption, and therefore the purpose for the internal audit. Accordingly, internal audit is established to improve budget efficiency and financial discipline, and to increase legality in the public expenditures recording, management and control.

In addition, implementation bylaws, such as the **2010 Manual on Public Sector Internal Financial Controls**,<sup>51</sup> have been adopted to facilitate the application of the general regulations in this field. This secondary legislation is also important for the internal controls operations. The Manual regulates the COSO framework and the accountability principle in exercising public powers. Another important bylaw is the Manual on Public Spending, which

47 Manual on the Criteria for Establishment of Internal Audit Units in the Public Sector in the FBiH, *Official Gazette of the FBiH*, Nos. 82/2013 and 74/2014.

48 Law on the Internal Financial Controls System in the Public Sector, *Official Gazette of RS*, No. 91/2016.

49 Law on Internal Audit No. 02/L.74.

50 Law on Public Financial Management and Accountability No. 03/L-048.

51 Treasury Financial Rule No.01 on Public Internal Financial Control.

regulates the use of public funds and internal controls, and the decentralised public funds management system for all budget institutions.<sup>52</sup>

### 3.4. MACEDONIA

In the Republic of Macedonia, the internal financial control system is regulated by the **Law on Public Internal Financial Controls**.<sup>53</sup> The Law regulates the public internal financial control system that includes financial management and control, internal auditing, and their harmonisation, and which is established in accordance with the international standards for internal controls and internal auditing. It regulates also the terms and conditions for the implementation of the examination procedure for certified internal auditors in the public sector. In addition to the above Law, the Ministry of Finance bylaws relevant to the internal financial control system include: the Manual on the Procedures for Granting Authorisations,<sup>54</sup> the Manual on Internal Audit Procedures and Practises and Internal Audit Reporting Procedures,<sup>55</sup> the Manual on Internal Audit Charter,<sup>56</sup> and the Code of Ethics for Internal Auditors.<sup>57</sup> In addition to the secondary legislation, the Internal Controls Standards for the Public Sector<sup>58</sup>, and the International Standards for the Professional Practice of Internal Auditing<sup>59</sup> are also relevant to the internal financial control system operations.

### 3.5. MONTENEGRO

Montenegro regulates the internal financial control system under the **Law on Internal Financial Control System in the Public Sector**.<sup>60</sup> In order to improve the internal auditing practice, the Ministry of Finance of Montenegro

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52 Financial Rule No. 01/2013/MF on Public Funds Expenditure covering expenditure and internal control and the decentralisation of expenditure management to budget organisations.

53 Law on Public Internal Financial Controls, *Official Gazette of the Republic of Macedonia*, Nos. 90/2009, 188/2013 and 192/2015.

54 Manual on the Procedures for Granting Authorisations, *Official Gazette of the Republic of Macedonia*, No. 147/2010 and 34/2011.

55 Manual on Internal Audit Procedures and Practises and Internal Audit Reporting Procedures, *Official Gazette of the Republic of Macedonia*, No. 136/2010.

56 Manual on Internal Audit Charter, *Official Gazette of the Republic of Macedonia*, No. 136/2010.

57 Code of Ethics for Internal Auditors, *Official Gazette of the Republic of Macedonia*, No. 136/2010.

58 Internal Controls Standards for the Public Sector, *Official Gazette of the Republic of Macedonia*, No. 147/2010.

59 International Standards for the Professional Practice of Internal Auditing, *Official Gazette*, No. 113/2014.

60 Law on the Internal Financial Controls System in the Public Sector, *Official Gazette of Montenegro*, Nos. 73/2008, 20/2011 and 30/2012.

has enacted several bylaws, of which two are of special importance: the Manual on Internal Audit Procedure and Practices,<sup>61</sup> the Manual on Financial Management and Controls Establishment and Implementation Procedures and Practises.<sup>62</sup> In addition to the above law and bylaws, the guidelines and instructions issued by the Central Harmonisation Unit within the Ministry of Finance also have a special importance for the public internal financial control operations.

**The Law on Internal Financial Control System in the Public Sector** specifies the public internal financial control system in Montenegro, which, in line with the international standards, includes provisions on financial management and control and internal auditing. The Law specifies: the methodology, standards, and other issues relevant to the establishment, development and implementation of the public internal financial control system. In accordance with the Law on Internal Financial Control System, and the Manual on Financial Management and Controls System Establishment and Implementation Procedures and Practises, in 2016, the Ministry of Finance issued the Instructions for the Preparation of Financial Management and Control Improvement Plan.<sup>63</sup> The reason for its adoption is reflected in the need to adopt a common approach in the public sector that would be based on the managerial responsibility to establish internal control, the existence of the prescribed documentation, and the implementation of and compliance with internal controls in each organisational unit in the organisation, as well as the responsibility of all public sector employees to comply with internal controls.

### 3.6. REPUBLIC OF SERBIA

The Republic of Serbia regulates the general elements of the public sector internal financial control system in the **Law on the Budget System**,<sup>64</sup> and further specifies it in the secondary legislation: the Manual on Common Criteria and Standards for Public Financial Management and Control System Establishing, Functioning and Reporting,<sup>65</sup> and the Manual on Common

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61 Manual on Internal Audit Procedure and Practices, *Official Gazette of Montenegro*, No. 32/2009.

62 Manual on Financial Management and Controls System Establishment and Implementation Procedures and Practises, *Official Gazette of Montenegro*, No. 37/2010.

63 The Instructions are available at: [www.mif.gov.me/ResourceManager/FileDownload.spx?rId=259817&rType=2](http://www.mif.gov.me/ResourceManager/FileDownload.spx?rId=259817&rType=2), 4.6.2017.

64 Law on the Budget System, *Official Gazette of the Republic of Serbia*, Nos. 54/2009, 73/2010, 101/2010, 101/2011, 93/2012, 62/2013, 63/2013, 108/2013, 142/2014, 68/2015-separate law, 103/2015 and 99/2016.

65 Manual on Common Criteria and Standards for Public Sector Financial Management and Controls System Establishing, Functioning and Reporting and Public Sector Controls, *Official Gazette of the Republic of Serbia*, Nos. 99/2011 and 106/2013.

Criteria for Organisation and Standards and Methodological Instructions for Internal Audit Practices and Reporting for the Public Sector.<sup>66</sup>

In accordance with the **Law on the Budget System**, internal financial controls in the public sector include rules on financial management and accountability for public funds users and internal audit of the public funds users. The law also harmonises and coordinates the financial management and control activities and the internal audit that is carried out by the Ministry of Finance's Central Harmonisation Unit.<sup>67</sup> The Law provides the legal basis for the establishment of financial management and control for all public funds users,<sup>68</sup> and internal audit of all public funds users.<sup>69</sup>

**The Manual on Common Criteria and Standards for Public Financial Management and Control System Establishing and Reporting** specifies the common criteria and standards for the establishment and operations of and reporting on the financial management and control system in the public funds users.

**The Manual on Common Criteria for Organization and Standards and Methodological Instructions for Internal Audit Practices and Reporting for the Public Sector** specifies the common criteria for the organisation of and the standards and methodological instructions for internal audit practices and internal audit reporting. In addition, it specifies further the internal audit activities in the public funds users.

## 4. KEY ISSUES FOR ENSURING FULL IMPLEMENTATION OF LEGAL PROVISIONS COMMON TO ALL WESTERN BALKAN COUNTRIES AND HOW TO OVERCOME THEM

As it is a new field in the Western Balkans, it appears that internal control still has not become fully operational, and that the concept is in the initial phase of development. Even though the regulations governing public internal financial control have been adopted a while ago, this field of work is either not established at all or is not fully operational in public institutions. That may

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66 Manual on Common Criteria for Organization and Standards and Methodological Instructions for Internal Audit Practices and Reporting for the Public Sector, *Official Gazette of the Republic of Serbia*, No. 99/2011, 106/2013.

67 Article 80 of the Law on the Budget System.

68 Article 81 of the Law on the Budget System.

69 Article 82 of the Law on the Budget System.

be due to a lack of awareness about its importance, but also to uncertainties regarding its practical application.

Both the components of the internal financial control system – financial management and control, and internal audit – should be developed simultaneously. One of the functions of internal audit is to verify the adequacy of the financial management and control systems that have been established. That is why the nonexistence of one component has an adverse effect on the other. If an adequate financial management and control system is not established in an institution, the functioning and competence of the internal audit unit established within that institution will be undermined. Similarly, if internal audit is not established within an institution, the adequacy of financial management and control system may be questioned.

Risk assessment is a precondition for establishing an efficient and reliable internal control system. This is why an institution has to appoint a person or a working group in charge of financial management first. After that, business processes and procedures need to be established to determine the risks to all business processes in the institution. Furthermore, control activities in the form of written policies and procedures should be established to minimise the risks threatening the business processes, along with other activities envisaged in the internal control standards, and other documents relating to the establishment of the financial management and control system.

Risk management is of critical importance for optimal use of public funds. This is why public institutions have to adopt risk management strategies. Risk identification, assessment, quantification and control to which public institutions are subjected should be developed and continuously adjusted to new circumstances in all organisational units. Therefore, the risk management strategy must be regularly reviewed to reflect the implementation of the risk management process, at least once in every three years, and in case of any major change in the control environment in the institution.<sup>70</sup>

In practice, problems include the lack of risk assessment and identification with regards to important business processes and activities, and the failure to develop the risk register or the risk management strategy or to carry out the assessment of the existing business process safeguards, which is a precondition for assessing risk management.<sup>71</sup> According to

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70 V. Janjic, J. Suput, *Financial Management and Control System in Public Prosecutors' Offices, Association of Public Prosecutors and Deputy Public Prosecutors of the Republic of Serbia*, Belgrade 2014, p. 114.

71 Report on the Audit of the Annual Report of the Ministry of Justice for 2015 (Final Report), SAI No. 40113/16-041-307/26, Podgorica, July 2016. Available at: [www.dri.co.me/1/doc/Report on the Audit of the Annual Financial Statement of the Ministry of Justice for 2015](http://www.dri.co.me/1/doc/Report%20on%20the%20Audit%20of%20the%20Annual%20Financial%20Statement%20of%20the%20Ministry%20of%20Justice%20for%202015)



the public financial management and control standards, internal control should be a dynamic process that continuously adjusts to the changes in the organisation. Therefore, an assessment should always start from the existing procedures and from a critical evaluation of the efficiency of internal controls, to improve them.

Risk management is one of the four main elements of internal control. It is a process of identifying and analysing risks for the purpose of pursuing the institutions' objectives.<sup>72</sup> Only once the risks are identified and analysed, it will be possible to define the risk mitigating activities, or to bring the risks to an acceptable level. When it comes to the public sector, one of the most frequent risks that may jeopardise the institution's operation is the risk of illegal use of public funds. Therefore, if this risk is identified in a business process, measures need to be implemented to eliminate it or to bring it down to an acceptable level. Such measures can include written procedures or internal rulebooks that identify both personal responsibility and accountability for the use of public funds.

While most problems in practice relate to a well-functioning financial management and control system, there still appear to be some uncertainties about the functioning of internal audit as well. In some cases, there is no functionally independent internal audit unit, which in itself weakens the function of financial management and control. It may also have an adverse effect on the execution of the budget at the institutional level.<sup>73</sup> In some cases the internal audit has not been established or it operates inadequately. That may be caused by the fact that the internal auditors are assigned tasks that are not within their competence (e.g. development and implementation of integrity plans).<sup>74</sup> Such practice affects the independence of their work

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and the Financial Audit Report of the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina for 2015, BiH Governmental Institutions Audit Office, no. 01/02/03-08-16, Sarajevo, May 2016, p. 6. Available at: [www.revizija.gov.ba/revizioni\\_izvjestaji/finansijskarevizija/lzvjestaji\\_2015/?id=4883](http://www.revizija.gov.ba/revizioni_izvjestaji/finansijskarevizija/lzvjestaji_2015/?id=4883), 17.1.2017.

72 INTOSAI GOV 9100-Guidelines for Internal Control Standards for the Public Sector- these standards were revised in 2016. Available at [http://www.issai.org/en\\_us/site-issai/issai-framework/intosai-gov.htm](http://www.issai.org/en_us/site-issai/issai-framework/intosai-gov.htm), 17.1.2017.

73 Report on Audit of Parts of Financial Statements on Regularity of Operations of the Ministry of Public Administration and Local Self-Government for 2015. No. 400-1598 / 2016-03 / 28, Belgrade, 16 November 2016, p. 20. and the Report on the Audit of Consolidated Financial Statements for the Final Account of the City of Sabac for 2015, no. 400-954/2016-04. Text available at: [www.dri.rs/revizije/poslednji-izvestaj:135.html](http://www.dri.rs/revizije/poslednji-izvestaj:135.html) and Financial Audit Report of the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina for 2015, BiH Governmental Institutions Audit Office, no. 01/02/03-08-16-1-521/16, Sarajevo, May 2016, p. 6. Text available at: [www.revizija.gov.ba/revizioni\\_izvjestaji/finansijskarevizija/lzvjestaji\\_2015/?id=4883](http://www.revizija.gov.ba/revizioni_izvjestaji/finansijskarevizija/lzvjestaji_2015/?id=4883), 17.1.2017.

74 Report on the Audit of the Annual Report of the Ministry of Foreign Affairs and European Integration for 2014 (Final Report), SAI No. 40113/16-041-126/23, Podgorica, April 2016. Text available at: [www.dri.co.me/1/doc/lzvjestaj](http://www.dri.co.me/1/doc/lzvjestaj), 17.1.2017.



and is not in accordance with Internal Standards for the Professional Practice of Internal Auditing.<sup>75</sup>

Standard 1100 for internal auditing prescribes that internal audit activities must be independent and that internal auditors must be objective in performing their work. Independence and objectivity is a must when it comes to both internal auditors and chief audit executives. According to Standard 1112, chief audit executive cannot be responsible for activities concerning risk management. In addition, according to Standard 1130A1, internal auditors must refrain from assessing specific operations for which they were previously responsible. Acting contrary to the mentioned standards is a violation of the internal audit independence and impartiality principle, which weakens the internal audit function.

In some cases, internal audit is confused with the role of budget inspection, which indicates that the role of internal audit is not properly understood.<sup>76</sup> Internal audit is not an inspectorate, it works for the institution's management to improve its existing financial management and control system, in order to optimise public expenditures and the execution of the institution's business processes.

Finally, a problem that occurs in practice in terms of the functioning of the financial management and control systems is a lack or inadequacy of the risk register. The following section includes examples of such registers and the instructions on how to develop them.

## 5. EXAMPLES OF BEST PRACTICES IN THE AREA OF INTERNAL FINANCIAL CONTROL

One of the best practices to ensure a creation of an adequate financial management and control system at the institutional level is to establish a risk register. Only once the risks are assessed, the risk mitigation measures can be proposed. The register should record all the risks for specific business processes that have been identified in a systematic review of the organisation. The register should include the following data:

- Business process objectives
- Identified risks (description)

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75 International Standards for Professional Practice of Internal Auditing, translation by the Institute of Internal Auditors of Serbia. Text available at: <https://na.theiia.org/translations/PublicDocuments/IIPPF-Standards-2017-Serbian.pdf>, 17.1.2017.

76 Financial Audit Report of the Ministry of Foreign Affairs of BiH for 2015, no: 01/02/03-07-16-1-639/16, Sarajevo, June 2016, pp. 7–8. Text available at: [www.revizija.gov.ba/revizioni\\_izvještaj/finansijska\\_revizija/izvještaji\\_2015/?id=4886](http://www.revizija.gov.ba/revizioni_izvještaj/finansijska_revizija/izvještaji_2015/?id=4886), 17.1.2017.

- Risk scoring (impact on business process and likelihood of occurrence)
- Risk prioritisation
- Defining the risk response (measures for mitigating the risk)
- Appointing a person responsible to implement the measure
- Setting the implementation time line
- Status (monitoring, oversight)

Risk identification and assessment, risk management, monitoring and reporting are described more specifically in the Risk Management Strategy.

### I RISK SCHEDULE

BUSINESS PROCESS OBJECTIVES		IDENTIFIED RISKS		Timeline (Date)	Responsible person	
No.	Description	No.	Description		Section	Name/ title
1		1				
2		2				
3		3				
4		4				

### II RISK SCORING

RISK		Date	Assessor 1		Assessor 2		Total		
	Description		Likelihood	Impact	Likelihood	Impact	Likelihood	Impact	Total risk assessment
1									
2									
3									
4									

### III – RISK PRIORITISATION

No.	Description	Total likelihood	Total impact	Score	Priority	Risk response	Risk mitigating measure	Entrusted to	Implementation timeline	Status
1										
2										
3										
4										

### IV – UNACCOUNTED RISK

Risk number	Risk description	Total likelihood	Total impact	Score	Comment/ information

Based on a systematic risk assessment it is possible to propose risk mitigating measures. One of the measures is to set up written procedures to be adopted at the institutional level, to bring the risks to achieving the institution's objectives to the acceptable level, specified in the risk management procedures. These procedures should be approved by the manager of the publicly funded entity, as he/she is responsible to establish, maintain and improve the financial management and control system.

The procedures are not a legal act but an internal document. That is why it is always a challenge to ensure that the employees abide by these procedures. One of the ways to achieve that is for the manager to prescribe, in an internal rulebook, that failure to abide by the written rules and procedures constitutes grounds for disciplinary liability of employees. There is no universal model

for the procedures. However, they should include the elements given in the example below.

## PROCEDURE EXAMPLE

State

Address:

Name of Institution

Phone number:

Number: (under which the document is recorded)

e-mail:

## PROCEDURE TITLE (E.G. PROCEDURE FOR CONTROLLING SALARY CALCULATION AND PAYMENT)

	<b>DEVELOPMENT</b>	<b>IMPLEMENTATION</b>	<b>APPROVAL</b>
<b>Job title</b>	Job title of the person who is developing the procedure	The organisational unit in which the risk mitigating procedure is implemented	Job title of person who approves the written procedure (the manager of the institution in which the procedure is adopted)
<b>Person</b>	Name and surname of the person developing the procedure		Name and surname of the person approving the procedure
<b>Signature</b>	Signature of the person developing the procedure		Signature of the person approving the procedure

To be delivered to:

- The manager(s) of the organisational unit(s) in which the procedure will be implemented, and
- The employees who will implement the procedure in the course of their work

In addition to the information indicated in the first page of the written procedure, the second page should include the following:

- Introductory remarks
- Scope of application, and
- Related regulations

Introductory remarks usually include information on the primary and secondary legislation governing the business process (e.g. public funds users' salary calculation and payment), in addition to explaining why the procedure has been adopted (e.g. to minimise the possibility of the misdemeanours specified in a relevant law, relating to salary calculation and payment for public funds users).

Scope of application is a part of the written procedures describing the business process or processes to which the procedure applies (e.g. the salary calculation process, the salary payment process, etc.).

The content of the written procedures is given in the table below. The first column describes phases or steps in the business process. The second column should include the description of a specific activity that is a component of the business process. The third column lists the documents relevant for the carrying out that specific activity. The fourth column designates the person responsible to implement a specific phase/step in the procedure, according to his/her job title. The last column includes the data on other organisational units or other authorities that must be contacted to carry out a specific phase in the business process. These columns are the integral parts of the procedure, while the number of rows depends on what the manager thinks is necessary to ensure that all the activities that constitute the business process are carried out in accordance with the rules and regulations, to improve the accountability of all the employees involved and minimise the risks (which are largely of internal nature) that may jeopardise the execution of the specific business process.

<b>Procedure phases/steps</b>	<b>Description</b>	<b>Documents</b>	<b>Responsible person</b>	<b>Links to other authorities and organisations</b>

The table can be followed by some notes: e.g. that a specific regulation is expected to be adopted which may have an impact on the procedure at hand, and that the procedure would have to be harmonised with that regulation in the future. Just as the manager is responsible for the adoption of written procedures, he/she is also responsible for their revision. However, amendments to the written procedure may also be proposed by employees who take part in a business process in the institution. The reason for that may be a change in the primary or secondary legislation, but also the need to improve the control of the business process. In case of amendments to the

written procedure, all employees involved in the execution of such processes need to be informed of the new (revised) contents of the written procedures.

### EXAMPLE 1

An example of good practice in the establishment of internal control systems includes: the appointment of a person or group within the institution to be in charge of, establishing, implementing and developing financial management and control; the set-up of internal rules and procedures necessary for the establishment and implementation of the internal management and control system; the adoption of the integrity plan; the development of the risk register and the risk mitigation strategy; the development of internal rules and regulations that clearly set out duties and responsibilities at the level of the institution; the introduction of dual signature system; proper cataloguing of all business transactions, and the establishment of an adequate internal control system by the finance department manager.

When it comes to good practice regarding the functioning of internal audit, it implies the development of a strategic internal audit plan that defines its activities, objectives, and mandatory adherence to the Code of Ethics for Internal Auditors.<sup>77</sup>

### EXAMPLE 2

Good practice for internal financial control in public institutions implies also the development of an Action Plan for the adoption of internal rules and procedures for the establishment, implementation, and development of the financial management and control system. The adoption of separate internal rules and procedures for public procurement through direct negotiation process, the appointment of officials in charge of the establishment and development of financial management and control, the establishment of business books that contain a set of internal rules and procedures that the employees need to respect in order to minimise risks and to comply with law when performing financial transactions and controlling supporting documents should also be addressed. These procedures relate primarily to the process of drafting and adopting budgets, procedures for recording of invoices and their payment, cashier operations, free access to information, and the use of land and mobile phones, representation costs, salary calculation methods, public procurements, the financial report preparation

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77 Audit Report of the Annual Financial Report of the Ministry of Science for 2015, Final Report no. 40113/16-021-87/20, Podgorica, July 2016. Text of the report available at: <http://www.dri.co.me/1/doc/Izvje%C5%A1taj%20o%20reviziji%20Godi%C5%A1njeg%20finansijskog%20izvje%C5%A1taja%20Ministarstva%20nauka%20za%202015.%20godina.pdf>, 21.3.2017.

procedure, treatment of outstanding commitments, and the procedure for the approval of business trips.

In addition, good practice could mean also the adoption of an internal act (instructions) on the terms and condition for using fuel and vehicles in public ownership, the adoption of the rulebook on the signature, the establishment of internal procedures for small-value procurements, and the mandatory adoption of a risk management strategy that should inform the written rules and procedures. When it comes to internal audit, one of the indicators of good practice can be whether all internal audit recommendations are implemented within the specific timelines.<sup>78</sup>

## 6. TRAINING EXERCISES

1. Conduct a risk assessment at the institutional level based on real parameters. Based on the risk assessment, give proposals for the establishment the internal control mechanism that would reduce these risks to an acceptable level. Present the identified risks at the institutional level orally, and give the proposals for mitigating them (rulebooks, written procedures).
2. Draft an example of written procedures that would reduce the identified risks to an acceptable level.
3. List the main drawbacks of the existing control mechanisms at the level of the institution, and give proposals for overcoming them. Present and explain the proposals (orally).

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78 Audit Report of the Annual Financial Report of the Environmental Protection Agency for 2015, Final Report no. 40113/16-024-55/19, Podgorica, July 2015. The text of the report available at: <http://www.dri.co.me/1/doc/lzvje%C5%A1taj%20o%20reviziji%20Godi%C5%A1njeg%20finansijskog%20izvje%C5%A1taja%20Agencije%20za%20za%C5%A1titu%20%C5%BEivotne%20sredine%20za%202015.%20godinu.pdf>, 21.3.2017.





# Public Procurement

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## 1. PUBLIC PROCUREMENT AND INTEGRITY CHALLENGES IN THE WESTERN BALKANS

Public procurement is the government activity most vulnerable to corruption.<sup>1</sup> The 2014 EU Anti-Corruption Report<sup>2</sup> highlights the significant risks of corruption in the context of public procurement, due to deficient control mechanisms and insufficient risk management in the EU Member States. As a major interface between the public and the private sectors, public procurement provides multiple opportunities for both public and private actors to divert public funds for private gain.

Public procurement is also a major economic activity of the government, and government agencies, where corruption has a potentially high impact on tax payers' money. In the European Union, public procurement equalled approximately EUR 1.9 trillion in 2014.<sup>3</sup> In OECD countries, existing statistics suggest that public procurement accounts for 12% of GDP and 29% of government expenditure.<sup>4</sup> In addition to the volume of transactions and the financial interests at stake, corruption risks are exacerbated by the complexity of the process, the close interaction between public officials and businesses, and the multitude of stakeholders.

Significant corruption risks arise from conflict of interest in decision-making, which may distort the allocation of resources through public procurement. Moreover, bid-rigging and cartelism may further undermine the procurement process.<sup>5</sup> Lack of transparency and accountability have been recognized as a major threat to integrity in public procurement.<sup>6</sup>

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1 OECD, *Preventing Corruption in Public Procurement*, OECD publishing, 2016.

2 Report from the Commission to the Council and the European Parliament: EU Anti-Corruption Report (COM(2014) 38 Final) Brussels, 3 February 2014, available at: [http://ec.europa.eu/dgs/homeaffairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr\\_2014\\_en.pdf](http://ec.europa.eu/dgs/homeaffairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf).

3 Public Procurement Indicators 2014, DG GROW G4 – Innovative and E-Procurement, February 2016.

4 Available at: <http://www.oecd.org/gov/ethics/public-procurement.htm>.

5 OECD, *Preventing Corruption in Public Procurement*, p. 6.

6 OECD, Global Forum on Governance, *Fighting Corruption and Promoting Integrity in Public Procurement*, OECD Publishing, 2004, Paris. Corruption thrives on secrecy.

Integrity can be defined as the use of funds, resources, assets, and authority, according to the intended official purposes, impartiality and accountability, in line with public interest. A “negative” approach to define integrity is also useful to determine an effective strategy for preventing “integrity violations” in the field of public procurement. Integrity violations include:<sup>7</sup> corruption including bribery, “kickbacks” nepotism, cronyism and clientelism; fraud of resources, for example through product substitution in the delivery, which results in lower quality materials; conflict of interest in the public service and in post-public employment; collusion; abuse and manipulation of information; discriminatory treatment in the public procurement process; and the waste and abuse of organisational resources.

Good public procurement is increasingly recognized as a central instrument to ensure efficient and corruption-free management of public resources. In this context, the role of procurement officials has changed dramatically in recent years to cope with the need to ensure integrity in public procurement. Countries have devoted efforts to ensure that:

- Public procurement procedures are transparent and promote fair and equal treatment;
- Public resources linked to public procurement are used in accordance with intended purposes;
- Procurement officials’ behaviour and professionalism are in line with legal requirements and the public purposes of their organisation;
- Systems are in place to challenge public procurement decisions, ensure accountability and promote public scrutiny.

In the whole Western Balkan region, surveys of public opinion show that public procurement continues to be perceived as a significant source of corruption.<sup>8</sup> All countries have challenges in realistic planning of procurement and monitoring of contract awards and contract implementation. Countries in the region are facing the problem of small numbers of bidders. For example, in Macedonia in one quarter of all public biddings there was only one bidder. The use of negotiated procurement procedures is still significantly high. It is important to notice that in the defence and security sector special provisions apply, and

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Transparency and accountability have been recognised as key conditions for promoting integrity and preventing corruption in public procurement. However, they must be balanced with other good governance imperatives, such as ensuring an efficient management of public resources – “administrative efficiency” – or providing guarantees for fair competition. In order to ensure overall value for money, the challenge for decision makers is to define an appropriate degree of transparency and accountability to reduce risks to integrity in public procurement while pursuing other aims of public procurement.

7 Based on L. Huberts, J. H. J. van den Heuvel (eds.), *Integrity at the Public-Private Interface*, Shaker Publishing B. V., Maastricht 1999.

8 EU Country reports: Montenegro 2016 Report, Serbia 2016 Report, Albania 2016 Report, Bosnia and Herzegovina 2016 Report, Kosovo\* 2016 Report, Macedonia 2016 Report.

the sector is excluded from the general rules on public procurement.<sup>9</sup> This is especially important having in mind the values of such procurements.

A key challenge across countries has been to define an adequate level of transparency to ensure integrity and a fair and equal treatment of providers in public procurement. Although public procurement institutions in the region do engage in publishing data, they are not always aligned with the relevant transparency standards. The format used to publish procurement and contract data are not user friendly. Government portals usually lack appropriate search engines, are not easily navigable by common citizens, and might produce different results on automated and manual searches.<sup>10</sup>

Transparency is a necessary but not a sufficient condition for integrity in procurement. Building professionalism among procurement officials with a common set of professional and ethical standards is essential. Procurement officials in the region largely lack ethical guidance clarifying restrictions and prohibitions to prevent conflict-of-interest situations and, more generally, corruption.<sup>11</sup>

Integrity risks may be identified in all stages of public procurement: pre-bidding, bidding and post-bidding.

In the pre-bidding, the most common risks include:

- The lack of an adequate needs assessment, insufficient planning and budgeting of public procurement;
- Requirements that are not adequately or objectively defined;
- An inadequate or irregular choice of the procedure (in the whole region the open procedure should be promoted – see graph); and
- A timeframe for the preparation of the bid that is insufficient or not consistently applied across bidders.

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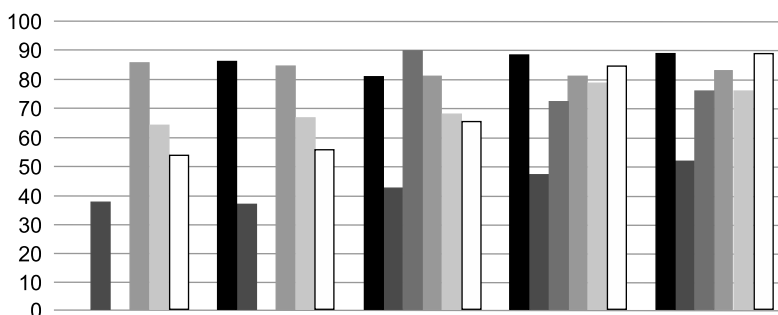
9 At the EU level the “Defence” Directive 2009/81/EU was adopted on July 15, 2009. The Directive is applied to all contracts concluded by the contracting authorities in the field of defence and security:

- For the supply of *military equipment* including any parts, components and/or subassemblies thereof as well as works, supplies and services directly related to the equipment for any and all elements of its life cycle;
- For the supply of *sensitive equipment*, including any parts, components and/or subassemblies thereof as well as works, supplies and services directly related to the equipment for any and all elements of its life cycle;
- *works and services for specifically military purposes or sensitive works and sensitive service.*

10 *Civil Monitoring of Public Procurement Workshop: Evaluation Report*, Tirana 2016, p. 201, available at: <http://ais.al/new/wp-content/uploads/Civil-Monitoring-of-Public-Procurement-Workshop-Report.pdf>.

11 Some countries introduced obligatory training of all stakeholders on conflicts of interest. For example, Bosnia and Herzegovina envisaged this obligation in the anti-corruption strategy, to anticipate risks in public procurement.

Graph 1 Percentage of the Public Procurement Value implemented in the Open Procedure<sup>12</sup>



	2011	2012	2013	2014	2015
Albania	0	86	81	88.6	89
BIH	37.3	37.13	42.02	47.48	51.67
Kosovo	0	0	90	73	76
Montenegro	86.12	85.1	81.23	81.61	83.19
Macedonia	64	67	68	78.74	76.24
Serbia	54	56	66	85	89

In the bidding phase, countries are facing the following risks:

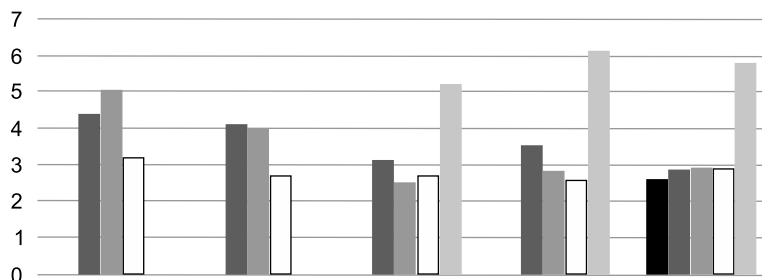
- Inconsistent access to information to bidders in the invitation to bid;
- Lack of competition or in some cases collusive bidding resulting in inadequate prices;
- Conflict of interest situations that lead to bias and corruption in the evaluation and in the approval process;
- Lack of access to records on the procedure in the award that discourages unsuccessful bidders to challenge a questionable procurement decision.

In the post-bidding phase, the most frequent risks to the integrity of the public procurement process include:

- The insufficient monitoring of the contractor;
- The non-transparent choice of or lack of accountability of subcontractors and partners;
- Lack of supervision of public officials.

<sup>12</sup> Graph is prepared based on data presented in countries EU Progress reports for 2011, 2012, 2013, 2014 and 2015.

Graph 2 Average number of bids per tender<sup>13</sup>



	2011	2012	2013	2014	2015
BIH	0	0	0	0	2.57
Montenegro	4.34	4.09	3.1	3.52	2.84
Macedonia	5	4	2.5	2.79	2.91
Serbia	3.2	2.7	2.7	2.6	2.9
Kosovo	0	0	5.2	6.1	5.8

## 2. WHAT ARE THE KEY INTERNATIONAL STANDARDS IN THE AREA OF PUBLIC PROCUREMENT?

There are several international instruments<sup>14</sup> that may be relied on by governments as guidance with respect to the conduct of public procurement. These Instruments have contributed to the development of internationally accepted principles of public procurement. They demonstrate that public procurement is an effective tool and vital part of public sector policy and systems, and an administrative function that can contribute to the higher objective we may call “good governance”. However, the various instruments have different objectives – whether to build confidence, promote international trade, establish a common market, prevent corruption, or other purposes with a socio-economic objective. In this respect, despite harmonization at the level of “principles,” there are no universally accepted international standards of public procurement.

The main international instruments are the World Bank Procurement and Consultant Guidelines, the WTO Government Procurement Agreement,

<sup>13</sup> Graph is prepared based on data presented in countries EU Progress reports for 2011, 2012, 2013, 2014 and 2015.

<sup>14</sup> These “instruments” can be classified into “binding” and “non-binding” international instruments. For avoidance of doubt, the term “Agreement” will be used to refer to a legally binding international instrument.

the EU Procurement Directives, the United Nations Convention against Corruption (“UNCAC”), and the 2008 OECD Recommendation on Enhancing Integrity in Public Procurement.

OECD Recommendations on Enhancing Integrity in Public Procurement is a pioneer policy instrument with an aim to prevent waste, fraud and corruption. It covers the whole procurement cycle, from needs assessment to contract management and complements international legal instruments (developed by World Bank, EC, UN, etc.).

The EU Directives set out the procedures which all authorities in the public sector, such as central and local governments, police, universities, etc. must follow when conducting procurement above a defined threshold. This legal framework is designed to ensure that contracts are awarded transparently, without discrimination, on grounds of nationality, and that all potential bidders are treated equally. The new rules adopted in 2014 simplify public procurement procedures and make them more flexible. This will benefit public purchasers and businesses, particularly small and medium enterprises(SMEs).<sup>15</sup>

Although the instruments mentioned have different objectives (i.e., coordination of procurement rules, promoting international or regional trade, preventing corruption), each instrument articulates all or some of these principles. These principles are to be reflected in the member state’s public procurement legal framework depending on each member state’s administrative and legal system. Application of these principles to the institutional and legal framework may be constrained by the objective which the procurement system is intended to achieve in more specific cases.

There are multiple stakeholders in a procurement system, and the principles apply to all aspects of the procurement system – the establishment of key institutions; legally binding standards and procedural rules; administrative decision-makers and limits on the freedom of discretion for the said decision-makers; the means for bid protest/complaint/challenge; the arrangements for procurement operations at the procuring entity level; budgeting and procurement planning; rules of participation (e.g., eligibility and qualifications of bidders); the identification of procurement methods and the conditions for their use; a requirement for standard bidding documents and standard conditions of contract including on disputes; internal and external controls; and provisions relating to fraud and corruption, records and publication requirements.

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15 Directive 2014/24/EU on public procurement; Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors; Directive 2014/23/EU on the award of concession contracts.

- **Competition**

Competition ensures that the procuring entities are able to purchase the goods, works and services that best meet their needs, from the market, with the allocated funds for the specific purpose, in order to perform their public mandate. From the procurement function point of view, competition means having a range of features such as open competitive methods, procurement planning, use of standards and technical specifications that promote competition, and wide dissemination of bidding opportunities. From the bidder's point of view, this means another array of features such as public and accessible information on the procurement rules, information on bidding opportunities, transparent procurement procedures, confidentiality of business and proprietary information, access to procurement markets, non-discriminatory rules of participation (discussed separately below), equal opportunity to bid, the right to challenge and review a procurement decision, enforceable contracts, and a business environment that enables private sector competition.

- **Equal treatment and non-discrimination**

Non-discrimination is a principle closely related to competition, which in the EU context derives from the EC Treaty and prohibits discrimination within the common market on the basis of nationality. With regard to the EU Directives, this principle of equal treatment means that the same situations are treated in the same way, and that different situations may not be treated in the same way. With respect to the Government Procurement Agreement(GPA), the principle of equal treatment means that among its members, bidders should have an equal opportunity to bid (also expressed in the World Bank Guidelines), and that throughout the procurement process, all bidders should be treated in the same way. Although UNCAC does not mention "non-discrimination," which, as a principle, has its roots in trade agreements rather than anti-corruption agreements, the same principle may still be met through the establishment of rules based on verifiable "objective criteria" in procurement decision-making.

Equal treatment is a concept that generally requires identical situations to be treated in the same way or different situations not to be treated in the same way, and it requires the identical treatment of identical people or companies. It provides for an objective assessment of tender prices and tender qualities and ignores any considerations that are not relevant to the discovery of the economically efficient tender.

- **Transparency**

Transparency has only recently emerged as a principle in its own right although it is probably better to think of it as a tool to be used to achieve

other objectives. For example, publication and accessibility of the relevant legislation provides clarity and certainty for all stakeholders and enables contracting authorities and economic operators to be aware of the rules of the game. The Directives apply requirements of advertising that guarantee transparency in the “marketing” process of tenders, i.e., guaranteeing the widest possible competition. Publicising in advance the technical specifications and the selection and award criteria permits stakeholders to check that these are fair and non-discriminatory. Recording and reporting requirements ensure that the actions of the contracting authorities may be verified where appropriate.

Transparency in the institutions affecting public procurement is directly regulated by the UNCAC. UNCAC addresses a member state’s anticorruption framework, which includes institutions, procedures, and conduct of public officials as well as the private sector. UNCAC has the broadest scope to influence public sector institutions and systems, including on public procurement, from the perspective of anti-corruption.

- **Economy and efficiency**

Economy and efficiency as principles for public procurement relate to how the procurement function contributes to the best allocation of resources by a public agency in the performance of its mandate. It refers not only to the methods and procedural rules that affect the procurement of a single contract, but also includes: the broader administrative control mechanisms that affect the management of the procurement function, the competence of public officers responsible for procurement, the efficiency of markets and whether they enable the public agency to purchase from the most competitive source, the ability to procure the best quality of goods, works and services on terms and conditions that reflect a satisfactory handling of risks, and the need for a robust contract and asset management.

The above elements are often used to describe the technical efficiency of the procedure itself, i.e., whether the planning has been appropriate and carried out on time; whether the various responsibilities have been engaged the way they should; whether sufficient time has been given to economic operators to prepare suitable tenders; whether the procurement is made in a timely manner. At a policy level, the two principles may be used to analyse the allocative efficiency of transactions and of the system as a whole and help to determine whether there is room to optimise the system further.

- **Value-for-money**

Value-for-money overlaps with the concepts of economy and efficiency so that the procurement procedure is carried out with the least waste (in terms



of cost and time) and with as much benefit as possible. It comes into its own, however, when dealing with the setting of requirements and evaluation.

The basic premise is that the government should only buy what is actually needed. While it is for the contracting authority to decide what to buy, the point is that the specifications must match the real needs of the contracting authority.

The principle of value-for-money also recognises that goods and services are not homogenous, i.e., that they differ in quality, durability, longevity, availability, and other terms of sale. The point of seeking value-for-money is that contracting authorities should purchase the optimum combination of features that satisfy their needs. Therefore, the different qualities, intrinsic costs, longevity, durability, etc. of the various products on offer will be measured against their cost. It may be preferable to pay more for a product that has low maintenance costs than a cheaper product with a higher maintenance cost.

In this sense, “value-for-money” broadly equates, in EU terms, the award criteria that represent the best price-quality ratio or cost, using a cost effectiveness approach which falls within the criterion of the “most economically advantageous tender” as redefined in the 2014 Directive. These criteria open for factors other than only price to be taken into account during the evaluation.

- **Integrity**

Proper procurement legislation will also serve to reduce the opportunities for corrupt practices. It does this by imposing accountability and transparency requirements so that the activities of procurement officers can be checked and verified, thereby reducing the possibility that such officers will serve extraneous objectives, for example, their own self-interest. The procurement officers must clearly set out in a public manner the requirements that that will serve as the basis for the procurement, as well as the selection and award criteria to be applied. Once all decisions and criteria are recorded, they may later be verified either by the government (internal or external audit) or by economic operators who feel ill-treated.

Some national laws make integrity an explicit objective, and they often include in the procurement legislation additional clauses of a practical nature seeking to enforce a just process, e.g., proper conflicts of interest provisions or compulsory application of a broad integrity framework (“integrity pacts”). Together with consequential provisions addressing the actions to be taken where corrupt practices have been determined to exist, such integrity guards provide confidence in the procurement process.

### 3. WHAT IS THE GENERAL LEGAL FRAMEWORK IN THE AREA OF PUBLIC PROCUREMENT IN THE COUNTRIES OF THE WESTERN BALKANS?

Public procurement legislation in the region was introduced during the last twenty years in all countries and was amended several times in order to achieve the most efficient, cost-effective, transparent and fair use of public funds, public resources and any other funds and resources of contracting authorities.

The international community played a crucial role in the process of introduction and modification of the public procurement legislation. It repeatedly urged the alignment of the legislation with the *acquis communautaire*. The most important inputs were reports prepared by the European Commission, SIGMA/OECD and the World Bank. These institutions are the main players who provided technical assistance and supported the development of a modern public procurement system in the Western Balkan countries.

#### 3.1. ALBANIA

Public procurement in Albania is governed by Law No. 9643 dated 20 November 2006.<sup>16</sup> The legislative framework covers classic public procurement (PP), the utilities sector and concessions. Since its adoption in 2006, the Public Procurement Law (PPL) has been modified several times, including in 2014, although some of the provisions of the EU Directives were not transposed.<sup>17</sup> The main gaps in the legislative framework include the non-implementation of the Defence and Security Directive and several provisions of the Remedies Directive.

The Law has been supplemented by secondary legislation dealing with the public procurement rules, electronic procurement, etc.<sup>18</sup> The Law on public procurement defines the Public Procurement Agency (PPA) as the central body responsible for public procurement. The PPA operates as a regulatory authority

16 Amended by the Law No. 9800, dated 10 September 2007, No. 10170 dated 22 October 2009, No.10 309, dated 22 July 2010, No. 22/2012 and No. 131/2012.

17 Available at: <https://www.app.gov.al/ep/Legislation.aspx>.

18 On 29 December 2014, the Council of Ministers Decision No. 914 on Public Procurement Rules was adopted, followed by the package of six Instructions developed by the PPA. The package is now implemented and also includes instructions aimed at encouraging the use of modern procurement techniques, such as framework agreements for central purchasing and joint procurement.

and manages the national procurement system. Until April 2010, it was also responsible for the administrative review of complaints, a function that has now been transferred to the new Public Procurement Commission (PPC).

Starting from 2009, the procedures of public procurement in Albania are performed electronically through an electronic system of procurements. The e-procurement system is obligatory, including for low-value procurement. All notices and tender documentation are available on the web portal, and contractors are obliged to submit bids electronically.

Transparency in the procedures of procurement and equal treatment of requests and obligations are the core of public procurement procedures. The law defines the organisation of public procurement with separate roles for the different institutions: the Agency of Public Procurement as policy maker; Public Procurement Commission as quasi-judicial body, and the contracting authority and economic operators.

## Planning of public procurement

The contracting authorities are obliged to prepare annual public procurement plans addressing, among other factors, the object and the estimated value of the procurement. Such information is published on the website of the PPA.<sup>19</sup> The plans are accompanied by realisation reports for each year of implementation.

The procurement plan foresees the goods or services or works to be procured, the timelines and the estimated sums, and includes the type of the procurement. Small value procurement<sup>20</sup> was originally not required to be published. From January 2013, these procurements are electronically published as well. The final decision regarding the type of public procurement procedure that is going to be applied is made by the contracting authority.<sup>21</sup>

## Initiation of public procurement

Contracting authorities are not allowed to commence the public procurement procedure without the approval of the respective branch of the Treasury Office.<sup>22</sup>

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19 Section 2 of the Council of Ministers Decision No. 914 on Public Procurement Rules, 29 December 2014.

20 The limit for such kind of procurement is ALL 400.000, cc. EUR 2.900.

21 According to Article 29 of the Law on Public Procurement, types of procedures are: open procedures; restricted procedures; negotiated procedures, with or without prior publication of a contract notice; request for proposals; architectural design; consultancy services.

22 Annual Report 2014, PPA.

In compliance with the Law on Public Procurement, there is an obligation to establish tendering committees and the procedure cannot be run if there is no such committee in place. The committee is established before the start of the procurement process. For small value procurements, the head of the institution appoints a committee at the beginning of the year for all such procurements.

The tendering committee is nominated by contracting authority and is composed of at least 3 persons, who should be specialists of the field. In case of complex contracts or contracts requiring special technical or legal knowledge, the contracting authority may include external specialists as member of the tendering committee. The chairman of the tendering committee must be appointed among senior officials in the contracting authority and is fully responsible to organise its activities, immediately after its establishment.

The public procurement rules, in Chapter V, point 1, prescribe that all employees, participating in procurement process, shall sign a declaration stating that they are not in a situation of conflict of interest under the conflict of interest law. This procedure is handled in accordance with the provisions of Conflict of Interest law.

In accordance with the transparency principle, all decisions enacted during public procurement procedure must be published as prescribed by the Law on Public Procurement. It is the obligation of the Tender Committee to compile a written report on the technical evaluation of the bids. Based on this report, the procuring entity then decides on the most advantageous bid, and this is communicated to all the other bidders and participants in the procurement procedure. All the documents and decisions of the contracting authority for awarding the contract to one of the bidders are published in the PPA website – public procurement portal.

The tendering committee is the responsible body to evaluate all the bidders and draft the evaluation report. The committee submits the evaluation report to the head of the institution, which approves the results. It is the head of the institution who signs the contract with the winner.

The Albanian procurement system is a decentralised one. The minister does not require prior authorisation from the Council of Ministers, or the parliament, for procurement.

## Implementation of awarded contract

Contract management instruments remain outside the scope of the Law on Public Procurement. The sound execution of a contract and the potential lessons for future procurement activities depend on the awareness and capacity of the Contracting Authority officers.

The State Audit Institution also audits public procurement. The external audit is focused on compliance with the procedures contained in the Law on public procurement.<sup>23</sup>

## 3.2. BOSNIA AND HERZEGOVINA

The Law on Public Procurement is largely in alignment with the EU acquis<sup>24</sup> and aims to ensure the transparency and integrity of public procurement. Non-competitive procedures are permitted only in exceptional cases.

The Law requires defence procurement to be regulated by special provisions. Such provisions were adopted at the end of February 2015. For non-priority services, a special procedure is also envisaged.<sup>25</sup>

The e-procurement system ensures that notices to be published and reports on procurement procedures are gathered by the Public Procurement Agency (PPA). Legislation (new and previous), opinions interpreting the provisions of law, periodic reports on monitoring and annual reports are all published.

### Planning of public procurement

Contracting authorities are obliged to prepare and publish annual public procurement plans,<sup>26</sup> including the object and value of the procurement. Contracting authorities are obliged to report each procedure, regardless of value and type, to the PPA, in addition to publishing them on their own websites.<sup>27</sup> Based on the reports received, the PPA prepares semi-annual and annual reports, and carries out monitoring.

### Initiation of public procurement

Members of the tendering committee are appointed by the minister or head of public institution concerned, who specifies their duties and tasks. At least one member has to be an expert on the substance of the procurement. Every committee member has to sign a statement of impartiality and is not

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23 In 2014, 31 reports were adopted on compliance and 8 on performance.

24 SIGMA, *Baseline Measurement Report: The Principles of Public Procurement, Bosnia and Herzegovina*, OECD Publishing, Paris, 2015. Report available at <http://www.sigmaweb.org/publications/Baseline-Measurement-2015-BiH.pdf>.

25 Rulebook on the Contract Award Procedure for Contracts Referred in to Part B of the Annex II of the Law on Public Procurement, Article 8.

26 Law on Public Procurement, Article 17.2.

27 Law on Public Procurement, Article 75.

permitted to accept any contract with the winner of the tender during the six months ensuing from the award. The tendering committee makes an award proposal to the minister. The minister does not need approval by the Council of Ministers or by the parliament in any case.

The Law on Public Procurement obliges the contracting bodies to publish contract award notices no later than 30 days from the day of the conclusion of the contract, or from a framework agreement having been signed,<sup>28</sup> as prescribed by the public procurement directives.<sup>29</sup> If the contract in question is subject to special conditions or concluded on the basis of a framework agreement, it will be published annually and no later than 30 days from the end of the calendar year.

The obligation to publish low-value contracts (competitive request),<sup>30</sup> or petty purchases (direct agreement)<sup>31</sup> contracts, is only applicable if the contracting body is running an open, restricted or negotiated procedure (with or without publication of notice, a design contest, or competitive dialogue).<sup>32</sup>

Public procurement contract award notices are published on the public procurement portal, and their abstracts in the Official Gazette of Bosnia and Herzegovina, as the Law stipulates that notices should be prepared and sent for publication electronically, in the manner and within the timeframe laid down in a statutory instrument enacted by the PPA.<sup>33</sup>

## Implementation of awarded contract

The publication of any contractual changes that might occur during the contract execution is mandatory.<sup>34</sup> The audit institutions at the State and Entity levels perform financial and, to a lesser extent, performance audits of their respective budget users. Their reports also cover public procurement, typically including both general and specific recommendations in this field.

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28 Law on Public Procurement, Article 74.

29 S. Pejakovic, *Towards a More Transparent Public Procurement System in Bosnia and Herzegovina via Publishing of Contracts: a Legal Framework Analysis*, Analitika, Sarajevo 2016.

30 The estimated value of goods and services procured being below the threshold of BAM 50.000.00, and the estimated value of works being below the threshold of BAM 80.000.00 (Law on Public Procurement, Article 87, Paragraph 2).

31 The estimated value of which amounting to or below the threshold of BAM 6.000.00 (Law on Public Procurement, Article 87, Paragraph 3).

32 Law on Public Procurement, Article 87, Paragraph 4, as relates Article 74, Paragraph 1.

33 Law on Public Procurement, Article 36, Paragraph 2.

34 Law on Public Procurement, Article 75.2.

### 3.3. KOSOVO\*

The Law on Public Procurement No. 04/L-042<sup>35</sup> currently in force covers utilities and general procurement, but without applying all available instruments envisaged by the EU Utilities Directive.<sup>36</sup>

The Law on Public Procurement was amended in March 2016, better aligning it with the EU Directives on classical procurement and, to some extent, on utilities. In line with the Stabilisation and Association Agreement, the amendments made in 2016 eliminate preferential treatment of domestic bidders and include provisions for defence and sensitive security procurement.

#### Planning of public procurement

The Law on Public Procurement includes an obligation that each contracting authority shall prepare a **preliminary procurement forecast** that identifies in reasonable detail all supplies, services and works that the contracting authority intends to procure over the course of that fiscal year. This forecast should be made no less than sixty days prior to the beginning of each fiscal year and should specify:

- a. In the case of anticipated supply contracts, the estimated total procurement by value and by product classification of the products that the contracting authority intends to procure over the next fiscal year;
- b. In the case of anticipated service contracts, the estimated aggregate value by category of each service that the contracting authority intends to procure over the next fiscal year;
- c. In the case of works contracts, the essential characteristics of each individual works contract that the contracting authority intends to award over the next fiscal year.

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35 *Official Gazette of Republic of Kosovo\**, No.18/19 September 2011 – In line with the Directive 2004/17/EC of the European Parliament of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004) and of the Council and Directive 2004/18/EC of the European Parliament and the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004).

36 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, *Official Journal of the European Union L 134*, 30 April 2004, p.1, e.g. under PPL utilities may not apply a negotiated procedure with prior publication of notice.

Within fifteen days after the proclamation of the appropriations legislation for a fiscal year, each contracting authority shall prepare a **final procurement forecast** that identifies in reasonable detail all supplies, services and works that the contracting authority intends to procure over the course of that fiscal year.

If any new procurement activity has not been included in the contracting authority's final procurement forecast, as communicated to the Central Procurement Agency (CPA), the contracting authority shall provide a copy of the relevant Statement of Needs and Determination of Availability of Funds to the CPA at least five days before the initiation of the concerned procurement activity.

The procurement forecasts and procurement plans must be prepared and sent electronically (using a standardised form), and subsequently be approved by the Public Procurement Regulatory Commission (PPRC). No information on intended procurement activities of a contracting authority may be published or disclosed to anybody prior to the publication of the standard notices (indicative notice or contract notice). The procurement forecast must correspond to the budget of the contracting authority for the fiscal year concerned. Where multi-year contracts are intended, there must be a "reasonable basis" to assume that the appropriations will be made available to the contracting authorities in the future fiscal years.

## Initiation of public procurement

When a contracting authority intends to conduct a procurement activity, the contracting authority will use one of the notices prepared and promulgated by the PPRC.<sup>37</sup> All notices are published on the official web-page for public procurement in Kosovo\*.<sup>38</sup> The contracting authority must publish a contract notice when it conducts an open procedure, restricted procedure, negotiated procedure (after the publication of a contract notice and design contest) in the Albanian, Serbian and English language.

To establish technical specifications that refers to a specific make or source, or a particular process, or to trademarks, patents, types or a specific origin or production, is as a general rule prohibited. However, such reference may be used exceptionally, if it is accompanied by the words "*or equivalent*".

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37 PPRC has prepared and published all forms of notices for conducting procurement activities: Indicative Notice, Contract Notice, Design Contest Notice, Contract Award Notice, Design Contest Result Notice, Cancellation Notice for the Procurement Activity, Cancellation Notice of the Contract Award.

38 Komisioni Regullativ i Prokurimit Publik, available at: <http://krpp.rks-gov.net>.



The PPRC and Procurement Review Body (PRB) are mandated to evaluate whether a one-supplier procedure is acceptable or not.

The responsible Procurement Officer shall be the only person authorised to enter into or sign a public contract on behalf of the contracting authority.<sup>39</sup> The signature confirms that the contract has been awarded in compliance with the Law on Public Procurement. For all procurement activities the contracting authority, respectively the Chief Administrative Offices (Permanent Secretary) – in close cooperation with the Procurement Department – must establish a Tender Evaluation Committee with advisory functions to the Procurement Officer.

The **final decision on the award** of a contract remains the responsibility of the Procurement Officer. The Procurement Officer may accept the committee's recommendation or reject it. Where the Committee's recommendation is rejected, the Procurement Officer shall explain the reasons in writing. Such explanation shall be contained in the record of the procurement activity. The Chief Administrative Offices of the respective contracting authority shall immediately be informed about such rejection. The information should be given in writing.

To ensure there is no conflict of interest, the members of the Tender Evaluation Committee should not be involved in the preparation of the specifications or Terms of Reference for the tender.

In case a member of the Tender Evaluation Committee finds out that he/she has a conflict of interest in the tender evaluation, he/she shall declare his/her interest in the tender, leave the meeting, and shall not participate further in the evaluation process in relation to that tender. The individual, who no longer takes part in the evaluation, is still bound by the general confidentiality rules.

## Implementation of awarded contract

The Article 81 of the Law on Public Procurement provides rules for how Contract Management Activities should be performed. Contracting authorities must, as part of the preparation of the procurement activity, produce a contract management plan on matters of organisational, economic, technical

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39 Besides the signature of the responsible procurement officer, contracts of large value (exceeding EUR 125.000,00 (goods and services) and EUR 500.000,00 (construction) of contracting authorities shall also be signed on behalf of such contracting authority by the Chief Administrative Officer/Permanent Secretary, as well as the Minister or other relevant public authority concerned. The signatories accept the rights and obligations established by the contract and confirm that the contract is in full compliance with the PPL.

and legal aspects of the contract management.<sup>40</sup> The management plan must be agreed between the parties to the contract and signed by them before the implementation of the contract is initiated. The contract management plan must include, as a minimum:

- The name of the officer(s) of the contracting authority responsible for the management of the contract, and where applicable, the supervising qualified resident or project engineer(s);
- Number and categories of assisting personnel available to the Officer for contract management purposes, including externally recruited technical experts;
- A time schedule or a project plan, diagrams on contract management activities covering the duration of the contract.

The PPRC monitors contract management and regulates the engagement of subcontractors, each time with the approval of the contracting authority. The tenderer must indicate in his tender any share of the contract they may intend to subcontract to third parties and any proposed subcontractors. Such indication has no effect on the contractual liability of the tenderer in relation to the contracting authority or others.

### 3.4. MACEDONIA

The Law on Public Procurement<sup>41</sup> covers both the classic and utilities sectors in considerable detail.<sup>42</sup> Article 6 of the Law states that the rules of Law also apply in the field of defence, subject to some exceptions in cases where essential security interests of the country may be adversely affected. The exceptions related to state security allow for defence procurement to be entirely exempted from the scope of the general public procurement regulations.

In 2014, the Law on Public Procurement was amended four times, twice in 2015, and once in January 2016. The changes were primarily related

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40 Project management teams; frequent review of the contract; protocols for handover of commissioned equipment; regular dialogue with the contractor; use of correct quality standards; management of payments/claims; complaints procedures; control remedies specified in the contract, and performance security held for defects/corrections; inspection of worksites, materials and production facilities; insurance of effective delivery, storage and security of the items covered by the contract; scheduling handovers; variation/changes.

41 Law on Public Procurement, *Official Gazette*, No. 136/2007, with subsequent amendments.

42 SIGMA, *Baseline Measurement Report: The Principles of Public Procurement, the Former Yugoslav Republic of Macedonia*, OECD Publishing, Paris, 2015. Report available at: <http://www.sigmaweb.org/publications/Baseline-Measurement-2015-fYRMacedonia.pdf>.

to the operations of the Public Procurement Commission (PPC) and its establishment as an independent state body, with effect from January 2016.<sup>43</sup> An additional important change was the requirement to use electronic procurement for most procedures, with the aim to increase it from 30% in 2016 to 100% by 2018.

The comprehensive e-procurement system (the ESPP) run by the Public Procurement Bureau (PPB) for several years, provides the basic framework for ensuring the transparency of procurement opportunities and equal access for economic operators within public procurement under the Law on Public Procurement. The e-procurement system facilitates the publication of notices also for small value contracts.

## Planning of public procurement

The PPC considers applications for approval made by contracting authorities in specific circumstances. Contracting authorities must obtain approval from the PPC prior to publishing a contract notice in the following situation: approval of technical specifications: a contracting authority must seek approval where the contracting authority has, in relation to a supplies contract: 1) undertaken a market analysis,<sup>44</sup> and 2) established by means of this analysis that there are insufficient economic operators in national and international markets to meet the requirements of the technical specification.<sup>45</sup> Draft technical specifications cannot be made public as it would give an undue advantage to those receiving them.

## Initiation of public procurement

ESPP covers the phases in procurement from publication of contract notices to contract awards and includes contract notices, procurement documents and contract award notices. Manual data collection is also undertaken by

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43 SIGMA, *Monitoring Report: The Principles of Public Administration, the Former Yugoslav Republic of Macedonia*, OECD Publishing, Paris, 2016. Report available at <http://www.sigmaweb.org/publications/Monitoring-Report-2016-fYRMacedonia.pdf>.

44 Law on Public Procurement, Article 36-a (4) to (7): The market analysis is very limited. Contracting authorities contact manufacturers to ask them whether they can meet the requirements for the technical specifications or selection criteria. The Centre for Civil Communications, *Report on Monitoring of Public Procurements*, January – June 2015, p. 17 highlights practical problems arising from the lack of sufficient foreign competition to meet the statutory minimum level of required competition.

45 Law on Public Procurement, Article 36-a (1), (3), (4), (5) and (7): The minimum required number of manufacturers ranges from three to five national manufacturers, or three to five foreign manufacturers, according to the value of the contract and type of procedure.

the PPB for procurement processes, using paper-based procedures<sup>46</sup>. However, procurement planning is currently not covered, nor is the contract management/delivery phase, and accurate data on participation is not made available. Some but limited information is published on contracting authorities' own websites.<sup>47</sup>

Contracting authorities must obtain approval from the PPC prior to publishing an award. A contracting authority must seek approval of the PPC where the contracting authority: 1) proposes selection criteria, other than those relating to the requirements and suitability to pursue a professional activity of potential bidders; 2) has undertaken a market analysis; and 3) has established by means of this analysis that there are insufficient manufacturers in the national market who are capable of fulfilling these criteria.<sup>48</sup>

### Implementation of awarded contract

The Law on Public Procurement lays down a mechanism whereby it is possible for a contracting authority to issue a negative evaluation of a given bidder and publish it on the ESPP. This excludes that bidder from all further contract award procedures in the country for a period of one year but may be extended for up to five years.

## 3.5. MONTENEGRO

The current Law on Public Procurement, adopted in 2012,<sup>49</sup> prescribes a set of new rules for utilities procurement (Chapter III). New rules on defence procurement were introduced in Chapter IVa (Articles 116a-i) when the Law on Public Procurement was amended in late 2014.

Part of public procurement in Montenegro is done electronically, with contracting authorities obliged to publish certain details on the Public Procurement Portal. Such documents include public procurement plans, invitations for open, restricted and negotiated procedures, and framework agreements.

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46 The requirement for e-procurement for all contracts by 2016 should improve data coverage and reliability.

47 Center Civic Communication, *Recommendations for Easier Access of Microenterprises to Public Procurements*, February 2015, available at: [http://www.ccc.org.mk/index.php?option=com\\_content&view=category&id=19&Itemid=95&lang=mk](http://www.ccc.org.mk/index.php?option=com_content&view=category&id=19&Itemid=95&lang=mk).

48 Law on Public Procurement, Article 36-a (2), (3), (4), (6) and (7): The minimum required number of manufacturers.

49 *Official Gazette*, No. 42/11.

The Law defines the main principles of public procurement: cost-effectiveness and efficiency, competition, transparency, and equal treatment of bidders.<sup>50</sup> The non-discrimination principle is also fully included in the legislation, as Montenegro does not apply domestic preferences. Special provisions on the prevention of corruption and conflict of interests provide additional responsibilities for contracting authorities.<sup>51</sup>

## Planning of public procurement

According to the Law on Public Procurement,<sup>52</sup> state authorities should adopt and submit to the Public Procurement Authority (PPA) a Public Procurement Plan. The deadline for doing so is January 31st of the current budget or financial year. The PPA is required to publish the plan on the public procurement portal. The Law further specifies the details that the Plans should contain: information on the contracting authority; title and the substance of public procurement; estimated value of public procurement for each individual planned public procurement and its position in a budgetary context, alternatively its position in a financial plan. In addition to this, the Law specifies that modifications to the Public Procurement Plan may be undertaken no later than 15 days before commencing the public procurement procedures, except in case of a budget revision. Finally, the Law stipulated that the Plan should be signed (and approved) by the Head of the Contracting Authority. It is also important to mention that according to the Law, the Plan must in addition be approved by the Ministry of Finance.

## Initiation of public procurement

The Contracting Authority is obliged to inform the Public Procurement Authority (PPA) on decisions to initiate procurement. The PPA must publish such decisions on its website, the Public Procurement Portal.

The Law introduced the obligation of the Contracting Authority to establish a Tendering Committee at the same time as the decision to start the procurement procedure is taken.<sup>53</sup> Other formal requirements include that the Committee must consist of an odd number of members, at least one member must be a lawyer, members must have expertise in a specific technical public procurement area, that at least one member must be an

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50 Arts. 5–8 of the Law on Public Procurement.

51 Arts. 15–18 of the Law on Public Procurement.

52 Article 38 of the Law on Public Procurement.

53 Article 59 of the Law on Public Procurement.

employee with the Contracting Authority, and that the Committee may be appointed for the period of up to 1 year.

The Law devotes significant attention to the prevention of a possible conflicts of interest on both sides (Contracting Authority and bidders). As to the Contracting Authority side, the Law stipulates that the participants<sup>54</sup> in the public procurement process must immediately notify the bidder regarding the existence of any potential conflict of interest. The Law further stipulates that the participants in the public procurement procedure may not enter into employment with the bidder to whom the public procurement contract has been awarded for at least two years after the public contract procedure was concluded.<sup>55</sup>

According to the Law, the Tendering Committee is obliged to report on the process of public procurement together with recommendations to the Head of the institution regarding selection of the most appropriate bid.<sup>56</sup> The same Law contains provisions obliging the PPA to publish decisions on bids on the Public Procurement Portal.<sup>57</sup>

The final procurement decision is made by the Head of the institution concerned, upon the recommendation provided by the Tendering Committee and Public Procurement Officer, respectively.<sup>58</sup> Therefore, the Law does not require the Head of the Institution to accept the recommendation by the Tendering Committee. In addition, there are no legal norms obliging the Head of the Institution to ask for a prior authorisation of the Council of Ministers, nor the parliament.

## Implementation of awarded contracts

The Administration for Inspection is responsible for controlling the implementation of awarded contracts.<sup>59</sup> The Law on Public Procurement does not contain rules on administrative measures that this agency may apply in case of violation of the Law on Public Procurement.<sup>60</sup>

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54 Public Procurement Officer, members of the Committee for opening and evaluation of bids, persons participating in preparation of the contract notice, invitation to tender and tender documents, persons participating in planning the public procurement and other persons participating, directly or indirectly, in the public procurement procedure, (Article 16).

55 See Law on Public Procurement, Article 16.

56 Law on Public Procurement, Article 59.

57 Law on Public Procurement, Article 19.

58 Law on Public Procurement, Article 106.

59 *Official Journal of Montenegro*, Nos. 42/11, 57/14, 28/15.

60 Administration of Inspection, *Report on Inspection Control of Public Procurement*, July – December 2015.

### 3.6. SERBIA

The legislative framework consists of the Law on Public Procurement,<sup>61</sup> which covers procurement in the public sector, the utilities sector, and the defence and security sector, along with the implementing bylaws, and the Law on Public Private Partnership and Concessions<sup>62</sup> with the implementing secondary legislation.

The Law defines the main principles of public procurement: efficiency and cost-effectiveness, competition, transparency, equal treatment of bidders, environmental protection, and energy efficiency.<sup>63</sup> Special provisions focusing on the prevention of corruption and conflicts of interest<sup>64</sup> adds to the responsibilities of contracting authorities and aim at ensuring internal risk assessment<sup>65</sup> and notification of irregularities. Special instruments such as supervision of the most valuable procurements by civil supervisors<sup>66</sup> ensure transparency on how the procedures are implemented in practice.

Works concessions are awarded in line with the Law on Public Procurement. A special procedure is conducted for service concessions, ensuring transparency through the publication of concession notices.

#### Planning of public procurement

The contracting authorities are obligated to prepare annual public procurement plans including, among other things, the object and value of the procurement. These plans are sent to the Public Procurement Office and the State Audit Institution<sup>67</sup>. The preparation of plans is intended as a mechanism not only to minimise the risk of corruption but mainly as a tool for proper management of public procurement. The funds that were originally included for a specific public procurement in the plan cannot be increased

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61 *Official Gazette*, No. 124/12 with later amendments.

62 *Official Gazette*, No. 88/11.

63 The Law on Public Procurement, Chapter I subchapter 3.

64 Chapter II of the Law on Public Procurement and Regulation on the Contents of By-law Further Regulating Public Procurement Procedure within the Contracting Authority, *Official Gazette*, No. 106/13.

65 The contracting authority is obliged to adopt an internal by-law regulating in detail the process of public procurement.

66 According to the Law on Public Procurement, Article 28, it is mandatory that procedures with a value above RSD 1 billion are supervised by the civil supervisor – a person appointed by the PPO to supervise the procedure by having permanent insight into all documents and communication between the parties. The civil supervisor is obligated to elaborate a report after the procedure is finished, and send it to the specified institutions.

67 The Law on Public Procurement, Article 51, and Regulation on Form and Contents of Procurement Plan and Procurement Plan Implementation.

by more than 10%, except in cases of natural disasters, accidents or major breakdowns, or events beyond the control of the contracting authority.<sup>68</sup> The Contracting Authority may change its procurement plan, however, in the case of a revised budget or amended financial plans.

The Public Procurement Office is responsible for establishing and maintaining the registry of concluded public contracts on the Public Procurement Portal.<sup>69</sup> In relation to e-procurement, the functions of e-noticing and e-tender documentation are in place.

## Initiation of public procurement

The Budget System Law and the Law on Public Procurement prescribe that the Contracting Authority may initiate a procurement procedure only if that particular procurement is covered by the Annual Procurement Plan, and if the funds for the procurement are provided in the Contracting Authority's Financial Plan. The Law on Public Procurement (article 59) introduces the possibility of *prior notice*.

Article 54 of the Law on Public Procurement requires that a Tendering Committee is established by the Contracting Authority. It further stipulates that when it comes to public procurement procedures whose estimated value is three times higher than RSD 5,000,000, a Public Procurement Officer must be member of the Committee. A Tendering Committee has at least three members, one of whom has to be a Public Procurement Officer or a person with a law school degree, or second-degree studies.

The Law on Public Procurement contains rules on conflict of interest. Article 29 of the Law prohibits a conflict of interest which is defined as a relation between the Contracting Authority and Bidder that may impact on the impartiality of the contracting authority in making decisions in a given public procurement procedure<sup>70</sup>. The Law introduced the obligation to provide a special statement signed by all the Committee members confirming that they are not in a (potential) conflict of interest in the concrete procurement. More specifically, Article 54 of the Law stipulates that persons who may be involved in a conflict of interest in public procurement cannot be appointed

68 The Law on Public Procurement, Article 51.

69 Regulation on Manner of Keeping and the Contents of the Register of Public Contracts adopted by the Ministry of Finance, *Official Gazette*, No. 57/2013.

70 If the Contracting Authority's representative or with him or her related person is involved in the bidders' management; if the Contracting Authority's representative or with him or her related person owns more than 1% of the bidder's share or stocks; if the Contracting Authority's representative or with him or her related person is employed or working with the bidder or has business relationship with the bidder.



to the Committee. Furthermore, it stipulates that members of a Tendering Committee shall sign a statement confirming that they are not involved in any conflict of interest in a given public procurement, once the decision to establish the Committee has been made.

The Contracting Authority cannot award a public procurement contract to a Bidder in case a conflict of interest exists. A person involved in a conflict of interest cannot be a subcontractor for the Bidder who was awarded a contract, nor a member of a group of bidders to whom a contract was awarded.

### Implementation of awarded contracts

The State Audit Institution (SAI) includes public procurement in its audits of the administrative bodies. The external audit is focussed on compliance with the procedures contained in the Law on Public Procurement, while less attention is paid on performance. According to the Law on Public Procurement, contracting authorities have the obligation to send their annual procurement plans to both the PPO and the SAI by 31 January. This enables PPO and SAI to control if implementation of the awarded contract is in line with the procurement plan and awarded contract.

## 4. WHAT ARE THE KEY ISSUES IN THE IMPLEMENTATION OF THE OUTLINED LEGAL PROVISIONS COMMON TO WESTERN BALKANS COUNTRIES AND HOW TO OVERCOME THEM?

An analysis of the reports of competent institutions in the selected countries (state audit institutions, public procurement agencies, institutions charged with monitoring public procurement, and appeals commissions), clearly illustrates the key problems of the public procurement system. A list of reasons for partial and full annulment of the decisions on selection of bidders includes conditions for participation in tender, evidence for fulfilment of conditions (inappropriate requests related to the technical, financial and human resource capacities), technical specifications that are drafted in favour of one company, wage criteria for selection of bidders, etc.

Poor public procurement planning, unfeasible procurement, imprecise specification of goods, works and services to be procured, procurements with discriminatory terms and specifications, incomplete competition, insufficient capacities of the bodies to decide on appeals, and lack of control over the implementation of signed contracts, are the most important problems in public procurements in the region.<sup>71</sup>

Integrity risks exist in all phases of the public procurement process, starting from planning up to the implementation of the public procurement contract. All the countries in the region ought to consider the adoption of integrity pacts, increased transparency, organised trainings on integrity risks, and regularly rotating public officials working on public procurement jobs, as general measures for preventing the risk of corruption.

#### 4.1. PLANNING OF PUBLIC PROCUREMENT

**Planning of public procurement** implies a series of actions taken by the contracting authority in order to prepare for the public procurement procedure, and subsequent conclusion and implementation of the contract.<sup>72</sup> Such actions are: a better process to establish the need for procurement, allotting the required funds when adopting the budget or finalising the financial plan, and the adoption of a procurement plan which includes the details of which type of procedure to use, the estimated value of each separate piece of procurement, as well as other relevant elements. It is very important for the contracting authority to determine realistically and objectively its procurement needs from the standpoint of responsibilities and competences, but also on the basis of its available human resources and technical capacities.

Such initial steps are not transparent in any of the states. More precisely, the published plans adopted by the contracting authorities in the observed period do not include the key aspects of the plans have been developed – criteria, rules and the manner in which the object of public procurement and the estimated value were determined, and the way in which the market was examined, if it was examined at all.<sup>73</sup>

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71 Numerous illustrations of the listed problems in concrete public procurement cases are shown in the publication: *Public Procurement System in Bosnia and Herzegovina, Montenegro, Macedonia and Serbia*, Balkan Tender Watch, Open Society Foundation, Belgrade 2015. Available at: <http://balkantenderwatch.eu/btw-local/uploaded/Komparativ/BTW%20ANALIZA.pdf>.

72 S. Varinac, I. Ninic, *Serbian Public Procurement System Corruption Map*, Serbian Association of Public Procurement Professionals, OSCE Mission, Belgrade 2014.

73 *Public Procurement Systems in Bosnia and Herzegovina, Montenegro, Macedonia and Serbia*, p. 35.

Whether published or not, in all the analysed states, public procurement plans are frequently amended, often without any explanation as to why such amendments were made. Frequent changes to public procurement plans indicate either a lack of adequate and detailed planning or possible adjustments to the public procurement plan in order to suit certain bidders. In both cases, the principles of transparency, efficiency and economy, as well as the principle of equal treatment of bidders, are violated.

The grounds for and justification of public procurement are often not clear or sufficiently detailed, which renders the issue of why certain procurements are included in the plan. At the annual level, the plans mostly include the required parts, as prescribed by law – starting from the object of procurement and the amount of apportioned funds, to the budget appropriation, type of procedure, estimated value of the procurement, planned date for the initiation of the procedure and the conclusion of the contract. Even so, planning remains the weakest link in the public procurement chain, since it is still impossible to ascertain whether the planned public procurement is indeed directly linked to the contracting authorities' work and in line with its planned goals. Whether the technical specifications and quantities correspond to the real needs of the contracting authority, whether the estimated value of a specific public procurement is adequate to meet the objectives of the procurement, the technical specifications and the quantities needed, whether there are other possible solutions for satisfying the contracting authority's needs, and whether the contracting authorities have the goods being procured on stock – these are but some examples of inadequate planning.

In addition, to initiate unrealistic procurements is facilitated by the absence of decisions or internal acts of the contracting authority including standards for why something is to be procured, and in what quantity and of what quality.<sup>74</sup>

**Contracting authorities should adopt certain standards that will include criteria for assessing the need to procure something, and a justification to procure it in a certain quantity or of a certain quality.** The contracting authority could, for instance, have such criteria for company cars and they would define after what mileage or after what type of failure the procurement of new cars should be initiated.

Procurement plans are developed within very short timelines, and there is frequently not enough time to ascertain the needs in a manner that would ensure well-justified and realistic public procurements.<sup>75</sup> As a result, public procurement plans are frequently amended, as mentioned above; moreover,

74 S. Varinac, I. Ninic, p. 7.

75 Office of the Auditor General of Kosovo\*: Annual Audit Report for the year ended on 31 December 2014, <http://www.oag-rks.org>.

considerable funds are made available but not made use of. In short, a large number of urgent public procurements, that are more susceptible to corruption and may undermine competition in public procurement, are conducted. This characterises the entire region.

## 4.2. INITIATION OF A PUBLIC PROCUREMENT PROCEDURE

**Initiation of a public procurement procedure** is the stage when the procurement plan starts to be implemented. A number of problems were identified in all countries at this stage of the process. Here, only the most important problems will be mentioned – the problems that may put at risk the integrity of the procurement system. One of the problems identified is the unclear or imprecise specification of goods, works or services to be procured. Combined with lowest price as the key criterion, unclear and imprecise criteria may easily result in the procurement of goods, works and services that do not correspond to the needs or that are of inferior quality. The risk of such problems is particularly prominent in Macedonia, where the lowest price is the sole measure.<sup>76</sup>

On the other hand, there are numerous instances of discriminatory criteria in the specification and of parallel requirements used by the contracting authorities. These range from cases of ordering a particular brand without any apparent reason, through specifying characteristics that can be met by one particular product only, to demanding that bidders have considerable stocks available, regardless of whether such stocks have any relevance for the implementation of the contract. Another form of discriminatory criteria is unrealistically high bank guarantees that the bidders need to present.

In order to protect the public officials working on public procurement jobs, it should be envisaged that the orders related to public procurement should be given by the manager/chief/head in writing only – that is, it should be prescribed that the persons participating in the public procurement process are under the obligation to act only under written instructions.

In all six analysed countries, the major problem identified in the field of public procurement is very low competition for contracts. The competition (number of bidders) is lower in all the countries in 2015 than it was in the previous years, which implies a negative trend. In Bosnia and Herzegovina,

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<sup>76</sup> Macedonia 2016 Report: "The generalised use of the 'lowest price' criterion and the obligation for contracting authorities to obtain approval from the Public Procurement Council if they wish to use non-price criteria when awarding contracts had negative effects on offers and contracts."

Serbia, Montenegro and Macedonia the competition, or average number of bidders, in 2015 was below 3 bidders per public procurement. Kosovo\* is an exception with 6.1 bidders per tender, but even there a declining trend should be noticed.<sup>77</sup>

Countries across the world have made use of a variety of measures to reduce bureaucracy, enabling SMEs through capacity development and limiting corruption risks affecting SMEs. Measures include one-stop shops; data-sharing and standardisation; common implementation dates for new rules; simplification of administrative procedures; and tailored guidance and trainings for SMEs, such as the one from Italy described below.

**Box 1**  
**Supplier Training Desks (STDs) in Italy**

Italy has strengthened its co-operation with suppliers by setting up Supplier Training Desks (STDs) (“Sportelli in Rete” in Italian) within the offices of suppliers’ associations. STDs provide training and assistance to local enterprises and in particular micro, small and medium enterprises (MSMEs) on the use of electronic procurement tools. The project consists of a network of dedicated training desks over the country where the central purchasing agency Consip experts train the workforce from the associations that will subsequently train local MSMEs on the use of electronic procurement tools. In Italy, MSMEs (Micro Enterprises) tend to participate to lower value public procurement tenders. Their participation to tenders from EUR 100,000 to 300,000 corresponds to 65%, whereas to tenders from EUR 1 to 5 million their participation decreases up to 51% and to 30% for tenders with a value higher than EUR 5 million.

The project addresses point 5 of the European Small Business Act (SBA): *“Adapt public policy tools to SME needs: facilitate SMEs’ participation in public procurement and better use State Aid possibilities for SMEs”*, it has also been quoted as a good practice, at a European level, in the *“European Code of Best Practices Facilitating Access by SME’s to Public Procurement Contracts”* and has been the winner of the European E-Government Awards in the category *“empowering business”*.

This project has been well received and attended by MSMEs. Since the beginning of the project, more than 2250 MSMEs were supported by the Supplier Training Desks and obtained the qualification to the public e-marketplace implemented by Consip for low value purchases through e-catalogues (MePA). Around 1,000 of these enterprises were qualified in 2013, which corresponds to 44% of the total. Eleven National Enterprises Associations are involved in the project. Their role is fundamental since they are recognised, by the enterprises, as the local reference institutions. As a result, in 2013, more than 21,000 SMEs represented 98% of online enterprises (online at least once between 1st of January and 31st of December) and 14.000 SMEs represented 98% of active enterprises (active means having been awarded at least once between 1st of January and 31st of December).

Furthermore, in 2013, 97% of the number of transactions (337,682) was handled by SMEs and 93% of the value (EUR 907 million) was gained by SMEs.

<sup>77</sup> In 2016, the average number of bidders was 5.8.

Today, more than 200 training desks are active and scattered around the country, providing continuous free training and assistance. The MePA has allowed thousands of SMEs to make business during the last five years making it a very suitable procurement tool for SMEs, which are the highest percentage of enterprises using it. Consip's active role in setting up an efficient e-procurement platform and commitment in establishing a very collaborative partnership with the Enterprises Associations has changed the perception of Consip: it is no longer seen as a threat, but as a business opportunity in a transparent and competitive environment.

*Source: CONSIP*

Analysis of the work of state audit institutions in the region show that the majority of irregularities relates to conclusion of contracts without having conducted the required procedure, in addition to shortcomings in tender documents, publishing notices, and the like. Shortcomings also included initiating negotiation procedures where the conditions for such procedures were not met.

The frequent use of single source procurement (negotiated procedure) is one of the key problems in public procurement in Kosovo\*. The award of a tender to a single company that is 'specialised' in a specific service or manufacturing of goods sometimes raises serious concerns. Was the intention to bypass open competition and the compliance requirements of the open competition procurement procedure?<sup>78</sup>

When it comes to the commissions that evaluate bids, it is noticeable that these commissions often do not include experts in the field as members. This reduces the commission's role to the assessment of the formal terms of the tender. Active participation of experts would considerably change that situation and determine whether the planning and drafting of tender documents was done inadequately or unprofessionally.

Even though the laws of all the countries observed envisage provisions meant to prevent and resolve conflicts of interest when appointing the commissions, this issue is not adequately regulated in any of them. The statements of non-existence of conflict of interest are mostly signed on the same day the commission is formed, that is, before any insight into who the bidders are. An additional problem was identified in Serbia, due to different definitions of what constitutes a conflict of interest in the Law on Anti-Corruption Agency and the Law on Public Procurement, and a lack of guidelines to resolve the possible conflict of competences between the Anti-Corruption Agency and the Republic Commission for the Protection of Interests in Public Procurement Procedures. The situation is similar in Bosnia and Herzegovina when it comes to handling conflicts of interest.

<sup>78</sup> KCSS, *Monitoring and Evaluating the Kosovo's Security Sector*, p. 54

Procurement officials bear an important responsibility in maintaining integrity and, therefore, the situation as described above impacts negatively on the trust that citizens hold in the government's ability to effectively deliver goods and services. As a recognition of this, all countries have set up national integrity standards for all public officials, including standards for specific at-risk positions. The latter obviously includes procurement officials.<sup>79</sup>

A few countries, including France and Canada, have introduced specific codes of conduct for procurement officials, in addition to the general integrity standards, in the form of a code of conduct or code of ethics for public service as such. They have also developed guides or guidelines to help procurement officials apply these standards in daily practice. The standards expected of procurement officials, in particular specific restrictions and prohibitions, aim at ensuring that officials' private interests do not improperly influence the performance of their public duties and responsibilities. Most common conflict-of-interest situations are related to personal, family or business interests and activities, gifts and hospitality, disclosure of confidential information, and future employment.

#### **Box 2**

##### **Code of Conduct for Procurement Officials in Canada**

The Government of Canada spends billions of dollars a year on the procurement of goods and services. The government has a responsibility to maintain the confidence of the vendor community and the Canadian public in the procurement system, by conducting procurement in an accountable, ethical and transparent manner.

The *Code of Conduct for Procurement* provides all those involved in the procurement process – public servants and vendors alike – with a clear statement of mutual expectations to ensure a common basic understanding among all participants in procurement.

The *Code* reflects the policy of the Government of Canada and is framed by the principles set out in the *Financial Administration Act* and the *Federal Accountability Act*. It consolidates the federal government's measures on conflict of interest and anti-corruption, as well as other legislative and policy requirements relating specifically to procurement. The Code of Conduct for Procurement applies to all transactions covered by the Treasury Board Contracting Policy. This *Code* is intended to summarise the existing law by providing a single point of reference to key responsibilities and obligations for both public servants and vendors. In addition, it describes Vendor Complaints and Procedural Safeguards.

The government expects that all those involved in the procurement process will abide by the provisions of this *Code*.

Source: [www.tpsgc-pwpsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html](http://www.tpsgc-pwpsc.gc.ca/app-acq/cndt-cndct/contexte-context-eng.html)

79 Specific standards for procurement officials are set in laws and regulations, in Mexico, the United States and Turkey.

Integrity pacts may be adapted to many different contexts and have been applied in various regions of the world. They are flexible tools that may be applied to: construction contracts, goods and services contracts, state asset privatisation programs, as well as government-regulated services such as public-private partnerships, telecommunications, water supply and waste collection services. They have been used by several countries:

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Italy	the pact has been introduced mainly at municipal level: Milan City Council
United Kingdom	Integrity pacts have also been adapted and implemented with a particular focus on the defence sector

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Ethics or integrity training for public officials, and procurement officials in particular, can raise awareness, develop knowledge and commitment, and help develop critical elements to advance a culture of integrity in public organisations. The UN Convention against Corruption (UNCAC) requires that the State Parties adopt, maintain, and strengthen systems “that promote education and training programmes to enable them [public officials] to meet the requirements for the correct, honourable and proper performance of public functions, and that provide them with specialised and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions.” Training on integrity, ethics and anti-corruption is provided in many countries around the world to prevent corruption and mismanagement of public funds. Countries such as Germany and France provide specific integrity training for procurement officials.

**Box 3**  
**Integrity Training in Germany**

The Federal Procurement Agency is a government agency that manages purchasing for 26 different federal authorities, foundations and research institutions that fall under the responsibility of the Federal Ministry of the Interior. It is the second largest federal procurement agency after the Federal Office for Defence Technology and Procurement.

The Procurement Agency has taken several measures to promote integrity among its personnel, including support and advice by a corruption prevention officer, the organisation of workshops and training on corruption, and the rotation of its employees.

Since 2001, it is mandatory for new staff members to participate in a corruption prevention workshop. With the help of a prosecutor from the district prosecution authority, they learn about the risks of getting involved in bribery and the briber’s possible strategies. Another part of the training deals with how to behave when these situations occur; for example, by encouraging them to report it (“blow the whistle”). Workshops highlight the central role of employees whose ethical behaviour is an essential part of corruption prevention. In 2005 the target group



of the workshops was enlarged to include not only induction training but also on-going training for the entire personnel. About ten workshops took place with 190 persons who gave a positive feedback concerning the content and the usefulness of this training. The involvement of the Agency's "Contact Person for the Prevention of Corruption" and the Head of the Department for Central Services in the workshops demonstrated to the participants that corruption prevention is one of the priorities for the agency.

Another key corruption prevention measure is the staff rotation after a period of five to eight years in order to avoid prolonged contact with suppliers, as well as to improve motivation and make the job more attractive. However, the rotation of members of staff still meets difficulties in the Agency. Due to a high level of specialisation, many officials cannot change their organisational unit, their knowledge being indispensable for the work of the unit.

*Source: Federal Ministry of Justice, Germany*

#### **Box 4**

##### **Specialised Training for Public Procurement in France**

The Central Service of Corruption Prevention, an inter-ministerial body attached to the Ministry of Justice in France, has developed training material for public procurement to help officials identify irregularities and corruption in procurement. Below is a case study example out of this training material which illustrates the challenges faced by various actors at different steps of the procedure. It also highlights the difficulty of gathering evidence on irregularities and corruption.

##### **Issue at stake**

Following an open invitation to bid, an unsuccessful bidder complains to the mayor of a commune accusing the bidding panel of irregularities because his bid was lower than that submitted by the winning bidder. How should the mayor deal with the problem?

##### **Stage one: Checking compliance with public procurement procedures**

The firm making the complaint is well known and is not considered "litigious". The mayor therefore gives its claim his attention and requests the internal audit service to check the conditions of award of contract, particularly whether the procedure was in compliance with the regulations (the lowest bidder is not necessarily the best bidder) and with the notices published in the official journal. The mayor learns from the report prepared by the bidding committee that, although the procedure was in accordance with the regulations, the bid by the firm in question had been revised upwards by the technical service responsible for comparing the offers. Apparently, the firm had omitted certain cost headings which were added on to its initial bid.

##### **Stage two: Replying to the losing bidder**

The mayor lets the losing bidder know exactly why its bid was unsuccessful. However, by return post, he receives a letter pointing out that no one had informed the company of the change made to its bid, which was in fact unjustified since the expenditure which had purportedly been omitted had in fact been included in the bid under another heading.

### **Stage three: Suspicions**

The internal audit service confirms the unsuccessful bidder's claim and points out that nothing in the report helps to establish any grounds for the change made by the technical service. It also points out that it would be difficult for an official with any experience, however little, not to see that the expenses had been accounted for under another heading. The mayor now requests the audit service to find out whether the technical service is in the habit of making such changes, whether it has already processed bids from the winning bidder, and if contracts were frequently awarded to the latter. He also requests that it check out the background of the officials concerned by the audit. Do they have experience? Have they been trained? Do they have links with the successful contractor?

Could they have had links with them in their previous posts? What do their wives and children do? Examination of the personnel files of the officials and the shares of the company that won the contract fail to find anything conclusive: the only links between the officials or their families and the successful bidder are indirect.

### **Stage four: Handing the case over to authorities of the Ministry of Justice**

Having suspicions, but no proof, the mayor hands over information so that investigations can begin. The investigators now have to find proof that a criminal offence (favouritism, corruption, undue advantage, etc.) has been committed and will exercise their powers to examine bank accounts, conduct hearings, surveillance, etc. The case has now moved out of the domain of public procurement regulations and into the domain of criminal proceedings.

### **Conclusion**

Unable to gather any evidence and with no authority to conduct an in-depth investigation or question the parties concerned, the mayor takes the only decision that is within his power, which is to reorganise internally and change the duties of the two members of staff concerned. However, he must proceed cautiously when giving the reasons for his decision so as to avoid exposing innocent people to public condemnation or himself to accusations of defamation while the criminal investigation is in progress.

The mayor also decides that from then on the report by the technical services to the bidding committee should give a fuller explanation of its calculations and any changes it makes to the bids, as well as inform systematically bidders of any changes.

*Source: OECD (2007), Integrity in Public Procurement: Good Practice from A to Z, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264027510-en>*

Some countries increase transparency by debriefing bidders on contract award decisions and explaining how they were reached. This practice improves suppliers' confidence that processes are conducted in a fair manner and encourage them to participate in future processes. Almost all G20 countries publish award decisions. Countries such as Canada, the United Kingdom and the United States debrief bidders on how the award decision was taken.

**Box 5**  
**Verbal Debriefing in the United Kingdom**

Regulations in the United Kingdom require departments to debrief candidates for contracts exceeding the European Union procurement thresholds. They also strongly recommend debriefing for contracts below the thresholds.

Debriefing discussions – either face-to-face, by telephone or videoconference – are held within a maximum of 15 days following the contract award. The sessions are chaired by senior procurement personnel who have been involved in the procurement.

The topics for discussion during the debriefing depend mainly on the nature of the procurement. However, the session follows a predefined structure. First, after introductions, the procurement selection and evaluation process are explained openly. The second stage concentrates on the strengths and weaknesses of the supplier's bid to improve their understanding. After the discussion, the suppliers are asked to describe their views on the process and raise any further concerns or questions. More importantly, at all stages, it remains forbidden to reveal information about other submissions. Following the debriefing, a note of the meeting is made for the record. Effective debriefing may reduce the likelihood of legal challenge if suppliers are thereby convinced that the process has been carried out correctly and according to the rules of procurement and probity.

*Source: OECD (2007), Integrity in Public Procurement: Good Practice from A to Z, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264027510-en>*

### 4.3. IMPLEMENTATION OF AWARDED CONTRACTS

In all countries in the region, the transparency of the **process of implementation of already awarded contracts** in public procurement, is problematic. The impression is that, once the contracts are concluded, not even the contracting authorities engage in a systematic analysis and control of how the contracts are followed up, even though it is precisely in this phase that the corruption shows its effects on the entire public procurement process.

What is particularly problematic at this stage of the procedure is the permission for the contract to be implemented in a different way than what was originally offered and stipulated. This usually happens in the form of prohibited annexes to the contract: change of stipulated price (even if the tender documents do not include situations that might justify or allow that); change in payment terms and conditions so that, for instance, the stipulated price is paid in advance – entirely or partially, even though the public procurement contract specified that the payment would be made only after the work was performed or the service or goods delivered (that is, only after the bidder had fulfilled all obligations); change of the stipulated time limit for fulfilling

the contract, where the contracting authority allows the bidder to provide the service or perform works within time limits longer than those agreed (that is, allow the bidder to delay implementation of the contract); change in the substance of the tender where the contracting authority allows the bidder to deliver something that is of a lower quality or of inferior technical standards, compared to what was offered (this also relates to provision of services and works); change in the content of the procurement where the contracting authority allows the supplier to deliver something that was not envisaged in the procurement contract; change of the stipulated amount of goods to be delivered (that is, change of the stipulated scope of works or services, where the contracting authority demands or allows the implementation of the contract to be below or to exceed what was stipulated), etc.

This particular problem could be overcome through increased transparency during this stage of the process, by publishing – in addition to data related to the conducted public procurement procedures and contracts awarded – relevant data linked to the implementation of the contract (how much was actually paid, what was delivered, how much was delivered and how).

Nevertheless, the rules and practice of planning, initiating and conducting the public procurement procedure are carried out without adequate control of how the contract is implemented in practice. In such a system, sufficiently efficient, regulated and corruption-free procurement will not take place. It is worth mentioning that many contracting authorities often lack the technical and other capacities to deal with quality control of the goods, works and services delivered. They often lack the capacity, or competence, to carry out such checks, and the prices for analysis and control conducted by institutions from abroad exceed the funds available to the contracting authorities. Given the above limitations, the contracting authorities can only hope that the supplier will implement the contract in good faith.

There are suggestions to introduce the so-called “black lists of companies” based on contracts that were not properly implemented. Only in Macedonia the Law on Public Procurement introduced a mechanism for a contracting authority to issue a negative reference and exclude a bidder from all further contract award procedures in the country for a certain period. However, the application of similar rules in the other countries in the region is problematic since they are not in line with the interpretation of the Court of Justice of the European Union. The general principles of EU law and Court of Justice case law indicate that the use of official, automatic exclusion lists is generally not permitted under EU law.<sup>80</sup>

80 See, for example, C-213/07 *Michaniki*, C-538/07 *Assitur*, C-376/08 *Serrantoni and Consorzio stabile edili* and C-465/11 *Forposta and ABC Direct Contact*. For further discussion on

## 5. INTERNATIONAL AND REGIONAL PRACTICES THAT COULD BE USED FOR PUBLIC OFFICIALS' TRAINING

Comparative experiences and lessons learned from good practice could support efforts in building integrity in the public procurement.

### 5.1. PROTECTION OF OFFICIALS FROM PRESSURE AND INFLUENCE

A key challenge across the six countries is to find solutions to ensure the protection of officials involved in procurement from any pressure and influence, including political influence, in order to help guarantee impartiality in procurement decision making.

Key conditions for protection from influence include: a) clear ethical standards for procurement officials; b) an adequate institutional framework that covers budgetary autonomy and human resource management based on merit (e.g. appointment, selection and career development); c) sufficient independence for procurement officials to carry out their work, to make them fully responsible for decisions, combined with appropriate checks and balances.

The application of standards of conduct starts with **recruitment**.

Some countries have indicated that they take into account ethical considerations in the recruitment process by:

- Issuing background checks for positions representing a potential risk to national security or other important national interests, for instance in the United Kingdom;
- Verifying the background of officials before their appointment. In Mexico, public officials, including procurement officials, must show evidence that they have not been barred or disqualified to hold positions in the Federal Administration;
- Evaluating candidates' capacity to handle ethical dilemmas. This may take the form of a certification process that assesses competence and skills as well as preparedness to handle ethical risks.

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this issue, see Sigma Public Procurement Brief 24, "Automatic Exclusion Lists in Public Procurement" (2013), available at: [http://www.sigmaxweb.org/publications/Exclusion\\_Lists\\_Public\\_Procurement\\_2013.pdf](http://www.sigmaxweb.org/publications/Exclusion_Lists_Public_Procurement_2013.pdf)

A growing number of countries use **training** to build competence and skills for public officials to handle complex procurement procedures. Such training should also raise awareness of possible risks to integrity. Training on procurement and integrity issues may be carried out prior to commencing work, but to raise awareness of ethical issues and practical dilemmas it should be offered on an on-going basis to tackle emerging issues or address specific risks linked to particular positions or processes.<sup>81</sup>

Some governments have developed **procedures** that enable procurement officials to identify and disclose relevant private interests that may potentially conflict with their official duties. Such procedures may be limited to financial interests (e.g. shareholdings, investments) but also include other interests such as relationships and additional/secondary employment. Disclosure of personal interests or other relevant information is usually required to be provided periodically – generally on commencement in office and thereafter at regular intervals. For this tool to be effective, the reliability and efficiency of this mechanism must be checked and the completeness of the information disclosed must be verified on a regular basis.

In recent years a few countries have introduced specific restrictions and prohibitions for procurement officials, not only for the time of their tenure but also for employment after leaving their public office. In the United States precise post-employment prohibitions have been developed for officials involved in procurement and contract administration for contracts worth over USD 10 million. However, a key challenge is to enforce post-public employment provisions and to detect possible breaches.<sup>82</sup>

## 5.2. USING A CHECKLIST FOR PROCUREMENT OFFICIALS

A checklist may outline major areas of corruption risk for procurement officials.<sup>83</sup> A ‘no’ answer indicates a potential control weakness that may

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81 In the United Kingdom, all commercial officers within the Ministry of Defence are required to undertake training courses before being issued with a commercial licence by a senior officer. Training may also be done on a voluntary basis – in Norway, open training programmes are offered to public officials by important agencies, the private sector and the National Public Procurement Board – or mandatory such as in the United States.

82 For instance, in Brazil, the Office of the Comptroller General conducted a significant investigation as part of the “Sabujo Project”. The “Sabujo Project” is a search and data matching system used by the Brazilian Office of the Comptroller General as a decision making system. It found that, despite prohibitions, 313 officials were owners and 2479 were shareholders of 1928 companies that had contracts with the Central Government, and that between 2004 and 2006 these companies sold over BRL 407 million in goods and services to the government.

83 For more information on Checklist see: *Procurement of Goods and Services – Best practice guide for public bodies*, Independent Commission Against Corruption, December 2004.

require follow-up action on the part of procurement officials. Without follow-up action, the identified weakness may open for opportunities for corruption.

Each organisation should assess its own system and establish their own purchasing policy procedures. This may be done through a procurement manual. The importance of documented policy and procedures is to provide written instructions on duties and responsibilities. Such instructions should be clearly explained to all staff, so that they know exactly what authorities and discretion they are given and how to proceed in carrying out their work. The drafting of a procurement manual may be based on the following questions:

No	Questions	Answers	
1	Have policy and procedures in respect of procurement been defined and documented in a procurement manual?	yes	no
2	Is the procurement function centralised and under the responsibility of a procurement unit?	yes	no
3	Are there written criteria for selecting suppliers?	yes	no
4	Is the performance of suppliers regularly evaluated?	yes	no
5	Is there a panel for evaluation (potential) suppliers?	yes	no
6	Does the panel consist of persons from different sections?	yes	no
7	Are evaluations documented?	yes	No
8	Are there clear guidelines that establish the type of goods to be purchased, e.g., quality standards?	yes	No
9	Are there clear guidelines that establish the methods for determining quantities, such as re-order level or re-order quantity?	yes	No
10	Are there clear guidelines to make sure that specifications are generic so as to allow maximum competition?	yes	No
11	Do instruction to bidders include all information necessary to prepare responsive bids, such as eligibility requirements, language and currency of bid, and how long the offer will be valid?	yes	No
12	Does your organisation ensure guidelines that provide suppliers with sufficient time to prepare their tenders?	yes	No
13	Does the invitation to bid clearly state the deadline and place for the receipt of bids, and when the opening of bids will take place?	yes	No
14	Do the instructions to bidders clearly explain the evaluation criteria and the points to be allocated to each criterion?	yes	No

No	Questions	Answers	
15	Are bidders required to provide appropriate security with their bids?	yes	no
16	Are security measures established to prevent unauthorised access to tender information prior to the opening of tenders?	yes	no
17	Are late tenders returned unopened?	yes	no
18	Are bids opened and will the evaluation start immediately after the deadline for submission?	yes	no
19	Are minutes kept from the opening of tenders and are they signed by all the parties at time of opening?	yes	no
20	Does your organisation ensure that the different committees include appropriately qualified persons?	yes	no
21	Do the different committees call for specialist advice when needed?	yes	no
22	Does your organisation ensure that evaluations take account of factors other than price? Such factors would include quality of goods or service, maintenance, delivery, warranty period, and training.	yes	no
23	Are minutes from meetings of evaluation committees kept, and are they signed by all members of the evaluation committee?	yes	no
24	Are justifications given for not accepting the lowest bid?	yes	no
25	Does your organisation ensure that justifications for decisions are sufficiently detailed and objective?	yes	no
26	Are bids evaluated solely on the basis of the criteria stated in the tender documents?	yes	no
27	Does your organisation ensure that evaluation of bids is completed within the bid validity period?	yes	no
28	Does your organisation archive evidence of the final board approval where applicable?	yes	no
29	Does your procurement manual clearly state who should be responsible for verification of goods/services at time of delivery?	yes	no
30	Does your organisation archive evidence of the above verifications?	yes	no
31	Does your organisation have clear procedures for handling unsatisfactory deliveries, such as poor quality?	yes	no
32	Does your organisation ensure the appropriate follow-up in case of unsatisfactory deliveries?	yes	no
33	Does your system provide for random checks by senior officers?	yes	no



No	Questions	Answers	
34	Does your organisation ensure that staff dealing with procurement have adequate experience and skills in management and procurement of materials?	yes	no
35	Does your organisation provide for rotation of staff working in the procurement unit?	yes	no
36	Does your organisation have a specific code of ethics to address issues such as acceptance of gifts for staff engaged in procurements?	yes	no
37	Are officers involved in procurement required to declare any conflict of interest that may arise in a particular case?	yes	no
38	In case of a conflict of interest, does the management ensure that the officer is excluded from the procurement process?	yes	no
39	Are officers involved in procurement informed that they are not allowed to accept gifts or any other gratification from suppliers or representatives of suppliers?	yes	no
40	Are the staff given regular and adequate training?	yes	no
41	Is procurement subject to internal audit, and is the follow-up of such audit adequate?	yes	no
42	Does your organisation ensure that the successful tenderer supply a guarantee for implementation of the contract as agreed, or provide a deposit for the execution of the contract?	yes	no

## 6. TRAINING EXERCISES

### TRAINING EXERCISE 1

#### Group Discussion on Tender Securities

Split into groups of no more than six for a debate on the use of tender securities.

Half of the groups will take the position that tender securities should be used for all contracts.

The other half will take the position that tender securities are only appropriate for highly complex or high-value works contracts.

Issues to be addressed include (but are not limited to):

- the need to protect the interests of the contracting authority;
- the costs of obtaining the securities;
- the effects that this may have on price.

Each group is to present their arguments and conclusions in turn. A vote is to be taken at the end.

## TRAINING EXERCISE 2

Divide the number of participants into groups of 4–5 trainees who would sit around one table. Provide each group with the following instructions:

*Municipality Y is about to start a restricted procedure to procure digitisation services for the municipal library. It is known that the procedure will be very competitive, as several specialised IT companies are interested in the contract. To the extent it can, the Municipality would like to avoid litigation against the contract award procedure.*

*As a group you should advise the management, in your role as procurement unit, how best to avoid or minimise litigation and/or related delays.*

*The Municipality is considering using electronic or postal communication in its notifications of contracting decisions to tenderers. You are requested to advise on deadline implications.*

*Local law provides for a compulsory pre-trial complaints procedure, i.e. aggrieved tenderers must seek review with the contracting authority before they proceed with legal action. Under local law, if the contracting authority does not reply to the complaint within 10 days from its receipt, then such complaint is deemed to have been tacitly rejected and deadlines for legal action start to run. The Municipality anticipates receiving complaints due to the competitiveness of the award procedure but is short on staff. Therefore, it is already considering allowing the 10-day reply deadline to lapse without replying to complaints it does not consider valid, in order not to allocate resources to such a task. You are requested to advise on deadline and litigation implications.*

## TRAINING EXERCISE 3

Divide the number of participants into groups of 4–5 trainees who would sit around one table. Provide each group with the following instructions:

*The association of municipalities of a large city has run a restricted procedure to award the building and operation of a factory to treat the city's waste. It has reached the decision to award the contract to one of the tenderers and, as required under the law, has notified all tenderers of it, providing a summary of the relevant reasons and mentioning the exact standstill period. Because of the size and desirability of*

*the contract due to its profit margins and the experience it offers, the association has already received several pre-trial complaints. The association considers that most complaints are inadmissible but would like to expressly reject them and provide clear reasons for such rejections, as a matter of good practice and sound administration but also to assist auditing procedures, which are likely to be strict due to the sheer size of the contract.*

*Each group should advise on a number of related questions in your role as procurement officer:*

- A waste treatment company that has not participated in the contract award procedure lodges a complaint, alleging defects in the assessments of the tender evaluation committee at both the selection and award stages, and asking for the procedure to be cancelled.*
- A tenderer who was qualified at the selection stage but whose tender was unsuccessful has lodged a complaint against the contract award decision, alleging that the successful tenderer had not submitted sufficient proof of its past experience, which was one of the selection criteria. The tenderer claims that it refrained from challenging the selection decision, which was duly notified to all economic operators who had submitted expressions of interest, in order not to delay the award procedure.*
- A tendering consortium that qualified at the selection stage was unsuccessful; its tender ranked fourth. Out of its three members, two are local companies that work on a number of projects with the city. The third is a foreign company that participated in the consortium because it was eager to enter the country's waste treatment market, which has only recently started to develop and is likely to offer lots of business opportunities. There are doubts as to whether the award criteria were correctly applied as regards weighting of life cycle costs. The two local companies do not wish to lodge a complaint, because they do a large part of their business with several of the municipalities involved and feel that a complaint will harm their relationship with these municipalities. The foreign company wishes to lodge a complaint because it has allocated resources to the preparation of the complaint and considers that it has some valid grounds to ask for the setting aside of the contract award decision. In the end, the foreign company lodges the complaint on its own.*



# Free Access to Public Information

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## 1. ACCESS TO PUBLIC INFORMATION AND INTEGRITY CHALLENGES IN THE WESTERN BALKANS

Integrity is a notion contrary to the notion of corruption. Integrity is the approach to the key values – behaving in accordance with certain key values and being consistent in their use. Institutional integrity is an organisation’s resistance to corruption, and one of the key values that helps prevent corruption is transparency. Without transparency, there is no true democracy – a form of government which should serve and be used by all citizens.<sup>1</sup> Free access to information is a critical mechanism for monitoring transparency and holding public authorities accountable, and one of the key factors for anti-corruption efforts. Therefore, providing free access to public information is crucial to ensure and promote institutional integrity. Free access to information also strengthens citizen’s trust in institutions and creates conditions for good governance.

In the former Yugoslav legal theory and practice, the right of access to information was mostly perceived as the right to be informed about what the authorities wanted the citizens to know, and it was accompanied by the obligation to provide such information.<sup>2</sup> This right was extended mostly to journalists and the associated labour organisations dealing with information activities. Providing of information to other groups was conditional upon the

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1 See Judgment in case *Youth Initiative for Human Rights v. Serbia*, Application No. 48135/06.

2 Truth be told, the legislation of some SFRY republics prescribed it as an express obligation, whilst the regulations of others included a less precise formulation on general or equitable accessibility of information. V. Cok, *Informing the public: Transparency of Work and Access to Information – Legal Theory and Legislation*, Savremena administracija, Belgrade 1982, p. 80.

existence of social interest.<sup>3</sup> As for individuals' right of access to information – in the SFRY regulations – it did not exist.<sup>4</sup>

At the same time, notwithstanding the proclaimed principle of transparency of the actions of public authorities, one should bear in mind that the SFRY had hundreds of regulations governing the concept of a “secret”.<sup>5</sup> Moreover, to a certain extent, the SFRY nurtured a culture of secrecy – there were topics no one spoke of and the majority was either silent or obediently accepting that some questions were permitted, while others were prohibited.<sup>6</sup> In Albania, free access to public information and freedom of expression were even actively suppressed, particularly through the use of the notorious Article 55 of the Albanian Criminal Law, entitled “Agitation and Propaganda Against the People’s Government.”<sup>7</sup> In these undemocratic regimes, the option to mark documents as secret was in frequent use, while disclosure of data from such documents was considered as a threat to national or public security, the country’s military defence, its international relations, or intelligence services.<sup>8,9</sup>

Despite the democratic changes and considerable progress made through the adoption of constitutional and statutory provisions that regulate the right of access to information, the practice in this field still remains problematic.<sup>10</sup> Natural and legal persons who try to access sensitive information held by public authorities face, as a rule, a wall of resistance. Such information is either arbitrarily declared secret or confidential, or their disclosure is delayed indefinitely – the requests are not acted on within the statutory time limits or the person seeking access is informed that the public authority is not in the possession of the requested information. There are numerous examples of such practice.<sup>11</sup> Another problem is the limited mutual exchange of public

3 SFRY Constitution.

4 V. Cok, p. 78.

5 J. Popovic, *Legislative Regulation of Data Confidentiality in the Countries on the Territory of the Former Socialist Federal Republic of Yugoslavia*, Atlanti, Trieste 2010, pp. 229–238.

6 J. Kregar, V. Gotovac, Đ. Gardasevic, *Regulation of the Right to Access Information*, Transparency International Croatia, 2004, p. 4.

7 V. X. Zaganjori, *Freedom of Expression and Access to Information*, p. 1, available at [https://www.ecoi.net/fileupload/dh678\\_01358.pdf](https://www.ecoi.net/fileupload/dh678_01358.pdf).

8 R. Sabic, “Open issues on the Application of Law on Free Access to Information of Public Importance in the Period After the Adoption of Law on Secrecy of Information”, in *Access to Information of Public Importance and Protection of Classified Information*, OEBS and CUPS, Belgrade 2012, p. 26.

9 J. Popovic, “Legislative Regulation of Data Confidentiality in the Countries on the Territory of the Former Socialist Federal Republic of Yugoslavia”, Atlanti, Trieste 2010, pp. 229–238.

10 This is clearly seen when comparing the RTI ratings (Right to Information Ratings, [www.rti-rating.org](http://www.rti-rating.org)) of the analysed countries and their scores in the WJP Open Government Index, where the countries have lower scores when it comes to practices related to the exercise of the right to information, <http://data.worldjusticeproject.org/opengov/>.

11 For instance, the Serbian Ministry of Economy had refused to act on the ruling of the Commissioner for Information of Public Importance and Data Protection and forward to

information between various public authorities, where one authority requests information from the other following a request filed by a person seeking access to information.

The following observation seems to be true for all the analysed countries – “in real situations, public officials and authorities tend to deny requests if they perceive the information as personal data or a secret in any way, even when the information does not qualify as personal data or a secret under the law.”<sup>12</sup> It is interesting to note that in almost all six countries included in the analysis the adoption of the legislation on free access to public information preceded the adoption of the modern legislation on secret information, although, as Vodinelic<sup>13</sup> points out, the right of free access to information predates all other subject-matters concerning data. This could serve as another illustration of the idea that the culture of secrecy is still deeply rooted in all the countries analysed, and that full implementation of the right of access to public information requires consistent execution of all the measures prescribed by law, coupled with additional awareness-raising activities in public authorities on the importance and necessity of free access to information.

This conclusion is confirmed to a certain extent by the Global Open Data Index,<sup>14</sup> which monitors the extent of the openness of data that states make available to their citizens. According to this index, the best ranked among the analysed countries is Serbia, which is ranked 41<sup>st</sup> of 94 countries, with the Global Open Data Index score of 41 out of 100. It is followed by Albania, ranked 47<sup>th</sup> with a score of 36, Montenegro ranked 49<sup>th</sup> with a score of 35, Macedonia ranked 51<sup>st</sup> with a score of 31, and Bosnia and Herzegovina and Kosovo\*, sharing the 58<sup>th</sup> place with a score of 26. It should be noted that this index covers a wide range of issues, from the transparency of budget information to weather forecasts. The scores indicate that in some of the countries that are the subject of this research, the openness of some important data categories, such as the current overview of the government expenditures by transactions, is evaluated by zero, that is, these data are not open at all.<sup>15</sup>

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Transparency Serbia, an NGO, the Management and Consultancy Services Contract signed between the Serbian Government and Smederevo Steel Factory, HPK Management and Dutch HPK Engineering.

12 *Law on the Right to Access to Information in the Republic of Croatia: Application of Public Policy Analysis in the Work of Students of the Faculty of Political Science*, 2007, p. 94

13 V. Vodinelic, “Information Triangle Standardising”, in: *Access to Information of Public Importance and Protection of Classified Information*, OSCE and CUPS, Belgrade 2012, p. 19.

14 Available at: <https://index.okfn.org/>.

15 This indicator is 80% in Albania and 50% in Montenegro, while in other countries that are the subject of the research it is 0.

## 2. WHAT ARE THE CONTENTS OF THE INTERNATIONAL STANDARDS ON ACCESS TO PUBLIC INFORMATION FROM THE ASPECT OF INTEGRITY?

To understand the right of free access to information, at the outset, we need to distinguish two aspects of that right. The first aspect is the right of a person with an eligible interest to access documents that may be relevant for decision-making in a proceeding conducted before a public authority. The second aspect is much wider, and it implies the right of the public to have access to public documents that represent public information. The first aspect of this right is in fact only a form of exercising the right to a fair trial, while the second one is more directly linked to freedom of information and is the main subject of this Chapter.

The right to access information held by public authorities has recently been recognised as one of the fundamental human rights.<sup>16</sup> The exception is Sweden, where the right of the public to access public records was introduced within the framework of the regulation on freedom of the press in 1776.<sup>17</sup> The first Freedom of Information Act in the United States was enacted in 1966<sup>18</sup> and was followed by the enactment of similar acts in other countries. In recent decades, the legislative activity in this area has been particularly intense – both at the national and international levels. In addition, in some countries, the right to access information is guaranteed by the Constitution.<sup>19</sup> The right of access to public information prescribed by the legislation and consistently applied in practice is one of the fundamental principles of public administration.<sup>20</sup>

What are the international standards on free access to public information?

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16 T. Mendel, *Freedom of information (a Comparative Legal Survey)*, United Nations Educational Scientific and Cultural Organisation (UNESCO), New Delhi 2003, p. iii.

17 OECD, “The Right to Open Public Administrations in Europe: Emerging Legal Standards”, *Sigma Papers*, No. 46, OECD Publishing, 2010, p. 7. Available at: <http://dx.doi.org/10.1787/5km4g0zfq27-en>. The same regime applied also to Finland, which at the time was part of the Kingdom of Sweden. Finland adopted its regulation on this issue in 1951.

18 As D. Banisar points out (*Freedom of Information Around the World 2006: A Global Survey of Access to Government Records Laws, Privacy International*, 2006), US President Lyndon Johnson said on that occasion: “I signed this measure with a deep sense of pride that the United States is an open society in which the public right to know is cherished and guarded.”

19 Spain, Estonia, Finland, Poland, Portugal, Romania, Slovenia. The Right to Open Public Administrations in Europe: Emerging Legal Standards, p. 7.

20 SIGMA, *Principles of Public Administration*, OECD Publishing Paris, 2014, Accountability, Principle 2.



1. An applicant requesting access to information should not be obliged to give reasons for such a request.<sup>21</sup> This is important, as it reflects the very essence of this right – access to information should be free and unconditional. The formal requirements for submitting applications should be kept to a minimum.<sup>22</sup> This means that it is sufficient for the application to be submitted in a written form – on paper or electronically.<sup>23</sup> In addition, if an application is not sufficiently precise, the public authority should not ignore it but rather assist the applicant to clarify the application,<sup>24</sup> or try to identify the official document that contains the requested information.<sup>25</sup> Only if that is unsuccessful, the public authority is not obliged to comply with the request.

2. Any public authority that has received a request for access to information, which may or an official document, should handle such requests without any discrimination, on an equal-treatment basis.<sup>26</sup> Requests should be handled promptly, i.e., requests should be handled within a reasonable time limit that has been specified in advance,<sup>27</sup> and the specified time limit cannot be met, the applicant should be informed about it.

3. A request for access to information may be refused if it is manifestly unreasonable. This provision protects public authorities from requests that would be an unreasonable burden for the authority or that present an obvious abuse of rights – that could also include the case of applicants who unnecessarily resubmit the same request several times.<sup>28</sup> Even in the case of a partial refusal, the reasons for the refusal of the request must be explained.<sup>29</sup> The only exception to this may be the event that the grounds for refusal can only be formulated in way that may reveal information that is in fact exempt from the right to free access to information, which will be discussed further below.

4. To be truly free, access to information must not imply unreasonable costs for the applicant. That means that public authorities should not charge for access to information<sup>30</sup> – one should be able to inspect official documents

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21 Item V 1 of the CoE Recommendation, Article 6 of the Regulation No. 1049/2011 on Access to Documents of the European Parliament, the Council and the Commission.

22 Item V 2 of the CoE Recommendation.

23 This is, for example, specified explicitly in Article 6 of the Regulation.

24 Article 6, Paragraph 2 of the Regulation.

25 Item VI 5 of the CoE Recommendation.

26 Item VI 2 of the Recommendation.

27 Item VI 4 of the Recommendation. The Regulation, for example, specifies the time limit of 15 days.

28 Item VI 6 of the Recommendation.

29 Item VI 7 of the Recommendation.

30 Item VIII 1 of the Recommendation.

free of charge. However, applicants may be charged a fee for the delivered copies of official documents in the amount not exceeding the actual costs incurred by the public authority.<sup>31</sup>

5. If the request has not been dealt with within the specified time limit, or if the request has been refused, the applicant should be ensured access to an expeditious and inexpensive review procedure before a court or before another independent and impartial authority.<sup>32</sup>

## LIMITATIONS TO THE RIGHT OF ACCESS TO PUBLIC INFORMATION

The right of free access to information, like other human rights, may be subject to certain limitations. In which circumstances can states prescribe limitations to this general right?

1. Firstly, limitations to the right of access to information must be set down precisely in law,<sup>33</sup> as well as justified in a democratic society and proportionate to the importance of that that is protected. That could include the following:
  - national security, defence, and international relations
  - public safety
  - the prevention, investigation and prosecution of criminal activities
  - disciplinary investigations
  - privacy and other legitimate private interests
  - commercial and other economic interests
  - the equality of parties to court proceedings
  - environmental protection
  - state economic, monetary and exchange rate policies
  - inspection, control and supervision by public authorities
  - the confidentiality of deliberations by various public authorities during the internal preparation of a matter.<sup>34</sup>

The right to access to information may be refused if the disclosure of the information contained in the official document would harm or could potentially

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31 Item VIII 2 of the Recommendation.

32 Items IX 1 and 2 of the Recommendation.

33 Item IV 1 of the Recommendation.

34 Compare Item IV of the Recommendation, Article 3 of the Convention of the Council of Europe, and Article 4 of the EU Regulation.

harm any of the protected interests, unless there is an overriding public interest in favour of disclosure of the information.<sup>35</sup> Therefore, it is crucial to balance the right of the public to know and the need to protect the above interests. At the same time, that means that no category of information is excluded *per se* from the free access regime, and the authorities deciding on whether some information should be kept away from public knowledge must interpret the right to limit access to information in a narrow sense.<sup>36</sup>

Although the area of free access to information has seen considerable progress and development in recent decades, there are still no uniform standards adopted and accepted by all or at least by most Western countries. This applies particularly to the limitations to the right of free access to information.

One of the most important international documents in this area, aiming to develop and provide clear guidelines for the public authorities involved in drafting and implementing the legislation on free access to information in the sphere of national security, is: *Global Principles of National Security and the Right to Information*, or *Tshwane Principles*. This document deals with the above listed areas as justifiable grounds for withholding information, suggesting at the same time that any other grounds for withholding information should comply with the same or at least with similar standards.<sup>37</sup>

The Tshwane Principles underline that national security should be used as the grounds for denying access to information only in exceptional cases, and that it should be interpreted narrowly. In this regard, it is stated that only the authorities that have the exclusive jurisdiction over this area (national security protection) can use this grounds for refusing access to information. The Principles further indicate that the very fact that there is a presumption of *national security protection* cannot in itself be sufficient grounds for denying access to information. A set of conditions must be fulfilled in order for national security protection to be appropriate and justified as grounds for denying access. These relate to the need for the public authority to demonstrate that the restriction:

- (1) is prescribed by law
  - (a) as something that is necessary in a democratic society, which means
    - (i) that the disclosure of the information must pose a real risk that may cause significant harm to a legitimate national security interest; and

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35 Item IV 2 of the Recommendation.

36 SIGMA, p. 40.

37 The Global Principles on National Security and the Right to Information (Tshwane Principles), available at: <https://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>.

- (ii) the risk of harm from the disclosure must outweigh the overall right of the public to know, i.e. the right of access to information;
- (iii) the restriction must comply with the principle of proportionality, and must be the least restrictive means available to protect against the harm;
- (iv) the restrictions must not impair the very essence of the right of the public to have free access to information
- (b) that protects a legitimate national security interest, and
- (c) that the law provides adequate safeguards against possible abuse
- (2) as well as that there is effective oversight of the validity of restrictions by an independent supervisory authority, and full judicial protection.<sup>38</sup>

The Principles *inter alia* seek to define the types of information that the public administration authorities have the right to withhold on national security grounds, including:

- a) information on operational utility for ongoing defence plans, operations, and capabilities;
- b) information about the production, capabilities, or use of weapons systems and other military systems, including communications systems;
- c) information about specific measures to safeguard the territory of the state, critical infrastructure, or critical national institutions against threats or use of force or sabotage, the effectiveness of which depends upon secrecy;
- d) information pertaining to or derived from the operations, sources, and intelligence services' methods, insofar as they concern national security matters;
- e) information concerning national security matters supplied by a foreign state or an inter-governmental body with an express expectation of confidentiality, and other diplomatic communications insofar as they concern national security matters.<sup>39</sup>

At the same time, the Principles suggest that it is a good practice for the national legislation to set forth an exclusive list of information categories that are specified as the narrowly as the above categories or more detailed.

On the other side, in order to facilitate the implementation of what is referred to as the "public interest test", the Principles also list the information categories

38 Principle 3 of Tshwane Principles: Requirements for Restricting the Right to Information on National Security Grounds.

39 Principle 9, Item a) of Tshwane Principles: Information that Legitimately May Be Withheld.

where there is a strong presumption of overriding public interest in favour of disclosure. Specifically, Principle 10 specifies the following categories:

- a) information regarding violations of international, human rights or humanitarian law;
- b) protection of the right to personal liberty and security, prevention of torture, and the right to life;
- c) government structure and powers (availability of the information about the existence of all defence and security sector authorities, their legal regulations, and the information needed for evaluating and controlling their public expenditures);
- d) decisions to use military force or acquire weapons of mass destruction;
- e) the security sector financial information (including all information sufficient to enable the public to understand public expenditures in the security sector, such as budget proposals and end-of-year financial and execution statements, financial management rules, public procurement rules, etc.);
- g) public health, public safety, or the environment.<sup>40</sup>

### 3. REVIEW OF THE LEGAL FRAMEWORK IN THE FIELD OF ACCESS TO INFORMATION IN THE WESTERN BALKANS

#### 3.1. ALBANIA

The right of access to information is guaranteed by Article 23 of the Constitution, which stipulates that everyone has the right, in accordance with the law, to access information relating to the work of the public authorities and persons performing public office.<sup>41</sup> Albania adopted a new Law on the Right to Information<sup>42</sup> in 2014, which ranked the country quite high, in the fifth place, in the Global Right to Information Rating List (RTI Rating), with a

40 Principle 10 of Tshwane Principles: Categories of Information with a High Presumption or Overriding Interest in Favour of Disclosure.

41 Constitution of the Republic of Albania, English translation, 1998. Text approved by referendum on 22 November 1998, and amended on 13 January 2007, translated under the auspices of OSCE – Albania, available at: <http://www.osce.org/albania/41888?download=true>.

42 Law No. 119/2014, English translation – The Law on the Right to Information. The Law is available at: [http://www.rti-rating.org/view\\_country/?country\\_name=Albania#right](http://www.rti-rating.org/view_country/?country_name=Albania#right).

score of 127 out of 150.<sup>43</sup> This new legislation specifies that public information is any data recorded in any form or format, during discharge of any public office, irrespective of whether it is prepared by a public authority.<sup>44</sup> The term “public authority”, in addition to the administrative authorities, legislative and judicial authorities, local government authorities, public administration authorities, also includes commercial companies in majority state ownership and other legal or natural persons who have been granted by law, secondary legislation or in any other form the right to perform a public office.

The right to access public information is guaranteed to all natural or legal persons, local or foreign, including stateless persons.<sup>45</sup> The applicant requesting information is not obligated to indicate the reasons for the request.

The information request must be submitted in writing and can be delivered in person or by regular mail or email. It has to be noted that the applicant must give his/her correct identity and sign the application personally.<sup>46</sup> All requests for accessing public information are registered in a special Register of Information Requests and Responses, and all public authorities are obliged to maintain such a register in accordance with Article 8 of the Law. That allows for the information requested on one occasion from a public authority to be made available also to all other prospective applicants that may request access to the same information. The data in the register is updated every 3 months.<sup>47</sup> However, the above rule does not mean that other applicants cannot request access to the same information separately. In that case, the time limit for the disclosure of information is shorter than the time limit specified by law – only 3 days.

The time limit allowed for the public authority to disclose the requested information is 10 business days from the date of the application. If the application is not sufficiently clear, the public authority may request the applicant to clarify it within 48 hours. If the public authority does not hold the requested information, it is obliged to refer the application to the relevant authority within 10 days, and to notify the applicant about it. If accessing the information means reviewing or considering extensive documentation, looking

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43 RTI Rating analyses the quality of the legislation on free access to information, and the rating methodology and scores and available at: <http://www.rti-rating.org/index.php>. The RTI Rating is a website launched by two non-governmental organisations – *Access Info Europe* and *Centre for Law and Democracy*, with the idea to provide activists and legislators with a reliable tool for assessing the legal framework for the right to access public information in their country. The RTI Rating contains information about the regulations in this area in 89 countries, and the ranking is based on their own in-house-developed methodology.

44 Article 2 of the Law.

45 Article 3 of the Law, Article 2, paragraph 3 of the Law.

46 Article 11 of the Law.

47 Article 8 of the Law.

for information in various offices or on various premises that are physically separated from the headquarters of the public authority, or if it is necessary to consult other public authorities before deciding on whether to allow access to the information that has been requested, the above time limit may be extended by a maximum of 5 business days. The applicant must be notified about such extension. If the access to the information has not been provided within such extended time limit, the application is considered refused.<sup>48</sup>

The applicant may access the requested information by obtaining a copy in printed or electronic format. Accessing information is free of charge, and the applicant may be charged only a fee that is proportionate to the cost of the duplication of the information and the average market cost of the information delivery service. Electronic delivery of information is free of charge.<sup>49</sup> The Commissioner for Freedom of Information has issued guidelines specifying that public authorities should provide the first 10 printed pages of a document free of charge. The limitations to the right of access to information are set down in the Law. Information may be withheld exclusively on the grounds that it is contained in an official document classified as “state secret”. In that case, the public authority is obligated to initiate promptly the classification review procedure with the public authority that originally assigned the classification. The applicant must be notified promptly about the classification review procedure, and the public authority may decide to extend the time limit for delivery of information to 30 days.<sup>50</sup> Furthermore, the right to information may be restricted if that is necessary and proportionate, and if its disclosure may harm the following interests:

- the right to privacy
- trade secrets
- copyrights
- patents.

The right of access to information cannot be restricted if the owner of the information has given consent for the disclosure of the information, or if the owner is considered a public authority in accordance with definition in the Law on the Right to Information. In any case, the right of access to information cannot be denied if there is an overriding public interest in favour of disclosure. Moreover, the right to access information may be restricted if the disclosure would cause a clear and serious harm to the following interests:

- national security;
- crime prevention, investigation, and prosecution;

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48 Article 15 of the Law.

49 Article 13 of the Law.

50 Article 17 of the Law.

- conduct of an administrative investigation within a disciplinary proceeding;
- inspection and auditing of public authorities;
- state monetary and fiscal policy formulation;
- equality of parties before court and the conduct of court proceedings;
- preliminary consultations and discussions between public authorities on public policy development;
- strengthening international or intergovernmental relations.

In these cases, too, the right of access to information cannot be restricted if there is an overriding public interest to know.

If the public authority refuses the application, such decisions must be delivered to the applicant in writing, and it must include a justification.

Any person considering that his/her rights under the Albanian Law have been violated has the right to file an administrative complaint to the Commissioner for the Freedom of Information and Protection of Personal Data, in accordance with the provisions of the law governing free access to information and the Administrative Procedure Act.<sup>51</sup> The complaint is to be submitted to the Commissioner for Freedom of Information and Protection of Personal Data within 30 days from the decision refusing the application or from the expiry of the time limit for disclosure of information. The Commissioner is obligated to decide on the complaint within 15 days, specifically by:

- rejecting the complaint if the time limit has expired, if the complaint has not been submitted in writing, or if the complaint does not indicate the applicant's name/title and address,
- accepting the complaint and ordering the public authority to ensure access to the required information in full or partially, and specifying the time limit for the public authority to do so,
- refusing the complaint in full or partially.

If the Commissioner fails to decide upon the complaint within the specified time limit, the complainant has the right to address the courts. In case the complainant or the public authority disagrees with the decision of the Commissioner, both parties may initiate an administrative dispute challenging the decision.

The Law on the Right to Information specifies explicitly that any person who has suffered harm due to a violation of the provisions of this Law has the right to indemnity in accordance with the Civil Code.<sup>52</sup>

51 Article 24 of the Law.

52 Article 26 of the Law.



It is important for public officials to know that each public authority must appoint freedom of information coordinators. These coordinators are responsible to ensure that the applicants get access to public information, establish and maintain the register of requests and responses, coordinate the work on meeting the applicants' requests, refer requests to the competent public authorities, and verify cases in which information is provided to citizens free of charge.

The Law also stipulates fines for non-compliance with the obligations prescribed by law. The responsibility is shouldered either by the responsible person in the public authority – the highest-ranked public official – or by the freedom of information coordinator. The fines range from ALL 50,000 to 100,000, or ALL 150,000 to 300,000, respectively – which means that the minimum prescribed fine is only slightly lower than the average monthly earnings in Albania in 2016.

### 3.2. BOSNIA AND HERZEGOVINA

The Constitution of Bosnia and Herzegovina does not provide for the right to information. Although Article 2 of the Constitution stipulates that the European Convention for the Protection of Human Rights and Fundamental Freedoms is directly applicable in Bosnia and Herzegovina, Article 3, which lists the protected human rights and fundamental freedoms, does not mention the right to information even in a broad sense. Free access to public information is regulated in the same way at all three government levels.<sup>53</sup> According to the RTI ranking,<sup>54</sup> Bosnia and Herzegovina has 102 points and is ranked in the 29<sup>th</sup> place.

In accordance with the applicable legislation, all natural and legal persons have the right of access to information held by public authorities. The term “public authority” is understood to mean executive, legislative and judicial authorities, bodies appointed or established by law to carry out a public office, all other administrative authorities, and legal persons owned or controlled by a public authority. The term “information” is understood to mean any material communicating facts, opinions, data or any other content, including any copy or part thereof, regardless of its form or characteristics, when it is compiled or how it is classified.<sup>55</sup>

53 Law on Freedom of Access to Information in Bosnia and Herzegovina, *Official Gazette of the BiH*, Nos. 28/2000, 45/2006, 02/2009, 62/2011 and 100/2013; Law on Freedom of Access to Information in the Federation of Bosnia and Herzegovina, *Official Gazette of the FBiH* Nos. 32/2001 and 48/2011; Law on Freedom of Access to Information, *Official Gazette of RS*, No. 01–572/2001.

54 See footnote 43.

55 Law on Freedom of Access to Information in BiH, Articles 2–4; Law on Freedom of Access to Information in the FBiH, Articles 1–3; Law on Freedom of Access to Information of RS, Articles 1–3.

The applicant requesting access to information is not obliged to explain the reasons for the request. The application must be submitted in writing, in one of the official languages in Bosnia and Herzegovina, and must indicate: sufficient details as to the nature or contents of the information requested to enable the public authority to identify the requested information; and the name and address of the applicant. Should the public authority be unable to comply with the request due to the absence of the formal requirements, including if the application is not sufficiently clear, the applicant must be notified in a written notice, no later than 8 days upon receipt of the application, that the public authority is unable to disclose the requested information, referring the applicant to available legal remedy, or the right to complain. In addition, this notice must include all specific issues that could clarify the application, and a copy of the Guidelines for Individuals for Accessing Information Held by Public Authorities, and the Registry Index (types of information held by the public authority, the form in which the information is available, and the details on how the information can be accessed), which must be compiled by all public authorities concerned. If, upon receipt of the notice, the applicant revises the application, such revised application is considered a new application.<sup>56</sup>

Should the responding public authority not be the authority competent to decide upon the application, the application must be referred, no later than within 8 days, to the competent public authority, and the applicant must be notified about the referral. Upon receipt of the application, the competent public authority should undertake all necessary actions to collect the requested information and consider all facts or circumstances that are relevant to the processing of the application. If the access to information is granted, the public authority will notify the applicant about it in a written notice – informing the applicant that he/she may access the information in person, at the premises of the competent authority, and/or whether it is possible to duplicate the information, specifying the cost of duplication, and whether such duplication would be possible only after the applicant has made the appropriate payment. The first 20 pages of the duplicated information are free of charge, and thus, the first 20 pages (or fewer) of the information will be provided as part of the notice that the application has been accepted. If the public authority denies access to the requested information, in part or in full, it is obliged to notify the applicant about it. That notice must contain the legal grounds for the exemption of the information from the free access regime, indicating all material issues relevant to the decision, including the public interest considered and a notification that the applicant has the right to appeal.<sup>57</sup>

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56 Law on Freedom of Access to Information in BiH, Article 12, paragraph 3; Law on Freedom of Access to Information in the FBiH, Articles 11–12; Law on Freedom of Access to Information of RS, Articles 11–12.

57 Law on Freedom of Access to Information in BiH, Articles 11–13; Law on Freedom of Access to Information in the FBiH, Articles 13–16; Law on Freedom of Access to Information of RS, Articles 13–16.

The time limit for the public authority to decide upon a request for access to information is 15 days upon receipt of the request. However, this time limit may be extended if any legally prescribed limitations to the right of access to public information apply, and if the public authority must test the public interest in favour of disclosure. There are no legal restrictions for such extended time limit.

The limitations to the right of access to information are laid down in law at all three levels of government. Based on a detailed consideration of each individual case, an exemption from the disclosure of the requested information may be determined if the public authority has established that the information is exempted from public disclosure or if has established, after applying the public interest test, that the disclosure of the information is not in the public interest.

What exemptions are prescribed by law?

1. When it could be reasonably expected that the disclosure would cause substantial harm to the legitimate goals in the following categories: foreign policy, defence and security issues, protection of public safety, monetary policy interests, crime prevention and detection, protection of the decision-making process by the public authority insofar as it involves providing opinions, advice or recommendations by the public authority, its employees or any persons acting on behalf of the public authority – and does not involve factual, statistical, scientific, or technical information.

2. When the competent authority determines that a request for access to information involves the confidential commercial interests of a third party. The competent authority in that case must notify the third party in writing about the specifics of the request, specifying the time limit of 15 days upon receipt of the notice for the third party to respond in writing that it considers such information to be confidential and give reasons as to why harm would result from the disclosure. Upon receipt of such a response, the competent authority would confirm the exemption. If the third party fails to respond within the specified period, the information would be disclosed.

3. When the public authority reasonably establishes that the requested information involves the privacy of a third person. However, the competent public authority is obliged to disclose the requested information, notwithstanding that it has claimed an exemption, when doing so is justified by the public interest. The public authority is obliged to take into consideration any harm or benefit that may result from the disclosure. If the authority assesses that, despite the existence of an exemption, there is a public interest in favour of disclosing the information, the third party having a

commercial interest, or the third party to whom the privacy of the information relates, has the right to appeal the decision.

The Law on Freedom of Access to Information in Bosnia and Herzegovina prescribes that the supervision of its implementation is carried out by the Administrative Inspectorate of the BiH Ministry of Justice.<sup>58</sup> According to this article, any natural or legal person may address an Administrative Inspectorate, orally or in writing, to protect their right of free access to information if the public authority makes it impossible for them to exercise that right. Based on such an application, the Administrative Inspectorate is obliged to carry out administrative supervision, and prepare a report containing the established factual situation and the identified irregularities in the work of the public body. If the Administrative Inspector finds that the law has been violated, he/she would issue a decision ordering the manager of a public authority to take action to remedy the irregularities within a specified time limit; if the order is not followed through, the Administrative Inspector would initiate misdemeanour proceedings.

The other two laws do not specify clearly to which authority the appeals against the decision should be addressed – this information is an integral part of the notice that the public authority submits to an applicant whose request has been denied, or to a third party. The Ombudsman institutions at all three government levels have limited powers in so much as that they can:

- analyse the compiling and providing of information, such as guidelines and general recommendations for the easier implementation of the Law,
- include in the performance reports dedicated parts related to their activities pursuant to the law on access to information.

### 3.3. KOSOVO\*

The right of access to public information is regulated by the Constitution, which, in Article 41, stipulates that all persons enjoy the right to access public documents, and that documents held by public and state authorities are public, with the exception of those with restricted access on grounds of privacy, business secrets or information classified as confidential. The means and method to exercise this right are regulated in greater detail by the Law on Access to Public Documents.<sup>59</sup> The implementation of the Law is ensured by the Decree No. 3/2011 on Government Services for Communication with Citizens, and the Rulebook No. 1/2012 on the Code of Ethics for Public

58 Article 22 b. of the Law.

59 Law No. 03/L-215 on Access to Public Documents, *Official Gazette*, No. 88.

Communications Officers. According to the RTI Ranking,<sup>60</sup> Kosovo\* is ranked in the 25th place, with a total of 106 out of possible 150 points.

The Law on Access to Public Documents stipulates that all applicants, or all natural and legal persons, have the right of access to public documents.<sup>61</sup> The applicant requesting information is not obligated to explain the reasons for the request for information, and also has the right to remain anonymous vis-à-vis third parties.<sup>62</sup> The Law stipulates<sup>63</sup> that an official document means any information recorded in any form, originating from or received by a public institution, including all official letters issued or received by a public institution verifying or certifying something, regardless of the physical form or characteristics – specifying explicitly that such information can be in the form of written or printed text, in audio form, optical or visual recordings, photographs, drawings, working materials, or portable automatic data processing equipment.<sup>64</sup> Public institutions are understood to mean the government or administrative authorities, legislative or judicial institutions, natural or legal persons if they exercise administrative powers or public office or have public funding, as well as independent institutions established in accordance with the Constitution.

The procedure to obtain access to a public document is initiated at the request of an applicant, and the request may be submitted in the form of a direct request, a written request, or a request filed electronically or through the registry.<sup>65</sup> The requests must be submitted in a form that enables the public institution to identify the document, and if that is not the case, the public institution will ask the applicant to clarify the request, and will assist the applicant in doing so.<sup>66</sup> The Law does not specify any time limit for the applicant to submit the revised application.

If the public institution does not possess the requested document, and has knowledge that it is held by another public institution, it will refer the application within a maximum of 5 business days from the receipt of the application to that public institution, notifying the applicant about it.<sup>67</sup> The Law stipulates explicitly that requests for access to official documents must be reviewed and handled promptly, which is specified in greater detail in

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60 See footnote 43.

61 Articles 3 and 4 of the Law.

62 Article 6 of the Law.

63 Article 3 of the Law.

64 Article 3 of the Law.

65 Article 4 of the Law.

66 Article 6 of the Law.

67 Article 7 of the Law.

Paragraph 8 of Article 7 of the Law, stipulating that the public institution must issue a decision within 7 days from the registration of the request either granting access to the requested document or refusing the request in writing, fully or partially. This decision must be justified and must include instructions on legal remedies.<sup>68</sup> The time limits for dealing with a request to access public information may be extended to maximum 15 days if the information or the document must be requested outside of the public institution, or if the request refers to access to several pieces of information. The public institution must notify the applicant about the extension of the time limit promptly, and within a maximum of 8 days, indicating the reasons that have caused the extension.<sup>69</sup>

If the public institution fails to adopt a decision upon the request within the legally specified time limit, the request is deemed refused, and the applicant has the right to institute proceedings before the supervisory authority.

The grounds for denying access to a public document include the following:

- if the same applicant has already requested access to the same document, and the public institution has evidence that the applicant has previously misused public information or a public document,
- if the content of the requested public document is incomprehensible,
- if, regardless of the assistance by the public institution, it is not possible to identify the document.<sup>70</sup>

If a document has already been made public and is easily accessible to the applicant, the public institution may fulfil its obligation by informing the applicant how to obtain the requested document.<sup>71</sup>

The public institution may also deny access to a document based on the need to protect one of the following interests:

- national security and protection and international relations
- public security
- criminal investigations and prosecution
- disciplinary investigations
- inspections, controls, and supervision by public institutions
- privacy and other legitimate private interests

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68 *Ibid.*

69 Article 8 of the Law.

70 Article 11, paragraph 2 of the Law, Article 13 of the Law.

71 Article 11 of the Law.

- commercial and other interests
- state economic, monetary and exchange rate policies
- equality of parties to court proceedings and efficient administration of justice
- environmental protection
- the deliberations within or between the public institutions concerning the examination of specific matters.

The public institution may refuse access to a document, fully or partially, or may withhold a part of the document that is covered by one of the legally prescribed restrictions, while granting access to the remaining parts of the document.<sup>72</sup> Before it refuses access to a document, the public institution must apply the harm test – the access to information will be restricted if the disclosure would or could be harmful to any of the above stated interests, and the public interest test – to establish whether there is an overriding interest in favour of disclosure.<sup>73</sup> If such an overriding interest exists, the public institution is obliged to disclose the document.

Regarding access to the information classified as secret, the Law stipulates that requests for access to such information are submitted in accordance with the Law on the Classification of Information and Security Clearances.<sup>74</sup> According to that Law, all requests for access to classified information in the possession or under the control of any public authority are submitted to the manager of the public institution concerned, who makes the decision to allow or to deny access to the classified information.<sup>75</sup> This implies that all persons requesting access to classified documents must pass through the confidentiality clearance procedure prescribed by the Law,<sup>76</sup> which significantly impedes access to the information classified as secret.

In accordance with the Law on Access to Public Documents,<sup>77</sup> all public institutions are obliged to assign an officer or a unit that would be responsible for receiving requests for access to information, and initially reviewing of the applications for access to documents. All requests should be addressed to them. Upon receipt and initial review, this officer or unit will assess and identify the relevant unit within the public institution that has or should have

72 Article 12 of the Law.

73 *Ibid.*

74 Law No. 03/L-178 on Classification of Information and Security Clearances, *Official Gazette*, No.76/10.

75 Article 23 of the Law.

76 Articles 21–40 of the Law.

77 Article 5 of the Law.

the requested information in its possession and will refer the request to that unit. Once it has identified the requested document, the said unit will send it to the applicant. The unit or officer for communication with citizens must keep precise records of the number of requests for access to public documents.

If a request for access to an official document is refused or not answered, the applicant may, within fifteen (15) business days upon receipt of the response from the public institution, or after the unanswered request had been sent, file a request asking the institution to review the decision. While the Law does not regulate in detail the appeals procedure, it explicitly stipulates that the provisions of the Law on the Administrative Procedure should apply accordingly.<sup>78</sup>

The Law on Access to Public Documents also stipulates that applicants may contact the Ombudsperson to assist them in exercising their rights in case their requests have been refused. The Ombudsperson is an independent body, established by the Constitution<sup>79</sup> and regulated in greater detail by the Law on Ombudsperson Institution,<sup>80</sup> and its role is to ensure that the right of access to official documents is ensured in accordance with the law. The Ombudsperson has the power to take the necessary measures to promote and support the right of access to official documents and submits regular reports to the parliament on the exercise of the right of access to official documents. However, the decisions of the Ombudsperson are not binding.

### 3.4. MACEDONIA

The right of access to information is regulated by the Constitution of Macedonia. Article 16 of the Constitution stipulates that free access to information and freedom to receive and disseminate information is guaranteed to everyone. This right is regulated in greater detail by the Law on Free Access to Public Information.<sup>81</sup> According to the RTI Ranking,<sup>82</sup> Macedonia is placed in 16th place, with a total of 113 out of possible 150 points.

The Law<sup>83</sup> stipulates that all legal or natural persons have the right of access to information, and states explicitly that foreign legal or natural

78 Article 15 of the Law.

79 Articles 132–135 of the Constitution.

80 Law No. 05/L-019 on the Ombudsperson Institution.

81 Law on Free Access to Public Information, *Official Gazette of the Republic of Macedonia*, Nos.13/2006, 86/2008, 6/2010, 42/2014, 148/2015 and 55/2016.

82 See footnote 43.

83 Article 3 of the Law.



persons also enjoy this right, in accordance with this Law and other laws. In accordance with the Law, public information is information in any given form, created and owned by the information holder, while a document is any record of information, irrespective of its form – written or printed text, maps, schemes, pictures, sketches, working materials, vocal, magnetic, electronic, optical or video recordings, or even portable automatic data processing equipment.<sup>84</sup> Public information holders are the public authorities and institutions, local government authorities, public institutions, as well as legal or natural persons performing public powers.<sup>85</sup> All information holders must appoint one or several officials responsible for the implementation of the right of access to public information.<sup>86</sup> Furthermore, public information holders are obliged to maintain and regularly update a list of information in their possession and to publish it in a way that is accessible to the public (on webpages, noticeboards, etc.).<sup>87</sup>

The procedure for obtaining access to information is initiated upon the applicant's request, which can be submitted verbally, in writing, or in electronic form. If the applicant submits a verbal request, the information holder is obligated to ensure that the applicant gets access to information in a way that would give the applicant sufficient time to review its contents, and to write an official note documenting it. If the response to the verbal request is positive, the applicant will be given a possibility to review the requested information within a maximum of ten days from the date of the request. If the information holder responds negatively to the request, or if it is not able to respond immediately, or if the applicant has a verbal or written complaint to the way he/she was allowed to review the information contents, the official person from the information holder is obliged to write an official note documenting it.<sup>88</sup> Written requests or requests in electronic form are submitted in the form specified in greater detail by the Commission, which is an independent supervisory body. The request must indicate the name of the information holder, the name and surname of the applicant requesting information, the details about the information that is requested, and the desired way of receiving the information contents. The applicant is not obliged to explain the reason for the request, but he/she must indicate that the request relates to public information. If the request is incomplete, the information holder may request that the applicant clarify the request, indicating the consequences of his/her failure to do so. The applicant has a time limit of 3 days from the date he/she was informed that the request needed to be clarified. The

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84 Article 3 of the Law.

85 Article 3 of the Law.

86 Article 8 of the Law.

87 Article 9 of the Law.

88 Article 13 of the Law.

official person responsible for handling requests for information is obliged to assist and advise the applicant. If the applicant fails to supplement the request within the specified time limit, the information holder will conclude that the request has been withdrawn. If the supplemented request still is not sufficiently clear and comprehensible, and the information holder still is not able to process the request, the information holder may adopt a decision rejecting the request.<sup>89</sup> If the information holder that received the request does not possess the requested information, the information holder should refer the request immediately to the appropriate public institution, within a maximum of ten days upon receipt of the request. The applicant should be informed that the request has been referred.

The information holder is obligated to respond to the request promptly or, at the latest, within 30 days after the request has been received.<sup>90</sup> This time limit may be extended if the information holder needs a longer period of time, if it is necessary – due to reasons specified by law – for a part of the document to be withheld, or due to the volume of the requested document – the extended time limit must not exceed 40 days.<sup>91</sup> The information holder is obliged to inform the applicant about the extension of the time limit, at the latest, three days before the expiry of the 30-day time limit. If the information holder fails to act within the specified time limits, the applicant has the right to file a complaint with the Commission within eight days.

The information holders may refuse a request, in full or partially, if it has been established that the requested information is covered by the legally prescribed limitations. More specifically, in accordance with Article 6 of the Law, the information holders may withhold information if it relates to:

- information that is classified with a proper degree of secrecy in accordance with law,
- personal information whose disclosure would cause harm to the protection of private information,
- information relating to archives classified as confidential,
- information whose disclosure would cause harm to the confidentiality of the tax procedure,
- information obtained or produced during investigation in the course of criminal or misdemeanour proceedings, or during executive and civil proceedings, whose disclosure would have harmful consequences for the proceedings,

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89 Article 17 of the Law.

90 Article 21 of the Law.

91 Article 22 of the Law.

- information concerning commercial or other economic interests, including monetary and fiscal policy interests, whose disclosure would have harmful consequences,
- information contained in a document that is still under preparation, whose disclosure would cause misinterpretations of its contents,
- information that harms industrial or intellectual property rights.
- If it has been established that the requested information belongs to one of the above categories, the information holder is obliged to apply the harm test to assess the potential harm to the interest that is protected against the public interest in favour of disclosure. Notwithstanding the rules prescribed by the Law, the information holder is obliged to disclose information if it has established that the public interest in favour of disclosure overrides the potential harm to the public interest that is protected. If the document or a part of the document contains information that maybe withheld, and if that can be separated from the document in such a way as not to harm its security, the information holder will exclude such information and inform the applicant about the remaining contents of the document.

If the information holder allows access to information, an official note is to be compiled documenting that, and the applicant will be given immediate access to the information contents.<sup>92</sup> If the information holder refuses the request, partially or in full, it is obliged to explain the reasons for the refusal of the request. If the information holder does not provide the applicant access to the requested information, and if the information holder fails to adopt and deliver the decision refusing the request, it is considered that the request has been refused, and the applicant may file a complaint.

The applicant has the right to appeal the information holder's decision refusing the request with the Commission for Protection of the Right to Free Access to Public Information, within 15 days upon receipt of the decision.<sup>93</sup> In case the information holder fails to act within the prescribed time limit, the time limit for appeal is somewhat shorter – only eight days. The Commission must decide upon the applicant's appeal within 15 days upon receipt of the appeal.

While the inspection of information is free of charge, the applicant requesting information is obliged to pay a compensation fee that is equal to the material costs of transcribing, photocopying or making electronic records of the information. The fee levels are specified in a decision adopted by the Government of Macedonia.<sup>94</sup>

92 Article 24 of the Law.

93 Article 28 of the Law.

94 Decision on Determining Reimbursement of Material Costs for Information Provided by Information Holders, available at: [http://www.komspi.mk/?page\\_id=312](http://www.komspi.mk/?page_id=312).

### 3.5. MONTENEGRO

The right of access to information is regulated by the Constitution of Montenegro. Article 51 of the Constitution stipulates that everyone has the right to obtain information held by public authorities and organisations that exercise public office. The Constitution stipulates that the access to information may be restricted if that is in the interests of protecting life, public health, morality and privacy, the conduct of criminal proceedings, security and defence of Montenegro, or foreign, monetary and economic policies. The restrictions are specified in greater detail in the Law on Free Access to Information.<sup>95</sup> According to the RTI Ranking,<sup>96</sup> Montenegro is ranked the lowest of all the Western Balkan countries – in the 51st place, with a total of 89 out of possible 150 points. However, it should be noted that this ranking refers to the previous Montenegrin law, and that the 2012 Law on Free Access to Information is a considerable improvement. Unfortunately, this progress is undermined by the amendments to the Law on Free Access to Information adopted in 2017. Pursuant to these amendments, the following data is exempt from the Law on Free Access to Information:

- 1) information on parties to court, administrative and other proceedings based on law, where access to data related to such proceedings is prescribed by a regulation,
- 2) information that must be kept secret pursuant to the law governing data secrecy,
- 3) classified information owned by international organisations or other countries, and classified information that originate from or are exchanged as a part of cooperation with international organisations or other countries.<sup>97</sup>

The Law on Free Access to Information stipulates that all national or foreign natural or legal persons have the right of access to information without the obligation to state the reasons and explain the interest behind the request for information. The Law prescribes<sup>98</sup> that information is a document or a part of a document in a written, printed, video, audio, electronic or other form, including its copies, regardless of the contents, source (author), date of creation, or the classification system. The public authority is the information

95 *Official Gazette of Montenegro*, Nos. 44/2012 and 30/2017.

96 See footnote 43.

97 In May 2017, an initiative was filed to the Montenegrin Constitutional Court for assessing the constitutionality of the amendment exempting classified information from the Law on Free Access to Information. At the time of writing of this study, the Constitutional Court did not decide on the initiative.

98 Article 9 of the Law.

holder if it has the information in its actual possession. The public authority is understood to mean the legislative, executive, judicial or administrative authorities, local government authorities, institutions, companies, or other legal persons founded or cofounded or in the majority ownership by a state or local government authority, legal persons whose operations are financed predominantly from the public revenues, as well as entrepreneurs or legal persons that exercise public powers.

The procedure for accessing information may be initiated at a written or oral request by the applicant. The written request is to be submitted directly, by regular mail or electronically, and the oral request should be submitted directly to the authority, on the record. One request may include access to several documents or pieces of information. The request should indicate the title of the information or the details based on which it may be identified, the way in which the access is requested, and the details about the applicant.<sup>99</sup> If the request is incomplete or incomprehensible and therefore cannot be processed, the public authority should give the applicant a time limit of eight days from the date of the request to correct the irregularities, and should inform the applicant on how they can be corrected. If the applicant fails to do so, the public authority will adopt a conclusion rejecting the request.<sup>100</sup> The public authority is not obliged to provide electronic access to any information that has been published in Montenegro or that is available on the website of public authorities. Instead, it should simply inform the applicant in writing, within five days from the submission of the request, where and when the requested information has been published.<sup>101</sup>

The public authority is obliged to act upon the request for access to information within 15 days from the date of the request. If it is necessary to protect life or freedom of a person, the response to the request must be given promptly, and no later than within 48 hours.<sup>102</sup> The specified time limit of 15 days may be extended by the public authority by additional eight days if the requested information is particularly extensive, if it contains some information that is classified as a secret, or if its identification requires searching a large volume of information, which significantly impedes the regular activities of the public authority. The public authority must inform the applicant about any such extension.

The public authority may refuse the request for access to information or grant access to the requested information. The decision granting access

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99 Article 19 of the Law.

100 Article 28 of the Law.

101 Article 26 of the Law.

102 Article 31 of the Law.

to information must include: the form in which the information may be accessed, the time limit in which the information may be accessed, and the cost of the procedure.<sup>103</sup> If the authority has decided to refuse access to the requested information, it is obliged to explain in detail the reasons for denial of access. On what grounds can access to information be denied? In the following events:

- if accessing the information requires or implies new information to be generated;
- if the applicant was granted access to the identical information in the previous six months;
- if there are legal grounds for restricting access to the requested information.<sup>104</sup>
- The legal grounds for restricting access to information are prescribed in a somewhat broader sense than in the Constitution – the public authority may restrict access to information or parts of the requested information if it is in the interest of:
  - the protection of privacy, except for the information relating to high-ranking public officials where it relates to the discharge of public office, income, property and conflict of interest of those persons and their relatives, as well as any information relating to allocated public funds, except social security, health care, and unemployment benefits.
  - security protection, foreign, monetary and economic policies in accordance with the laws regulating confidentiality of information that is classified in accordance with the secrecy regulations,
  - crime prevention, investigation and prosecution in order to ensure protection from disclosure of any information referring to crime reporting and perpetrators, contents of all actions undertaken in the course of pre-trial and criminal proceedings, evidence collected through observation and investigation, secret surveillance measures, protected witnesses and collaborators of justice, and the effective conduct of the proceedings,
  - performance of official duty in order to ensure protection from disclosure of any information referring to inspection and supervision plans, public authorities' internal and interagency consultations for defining positions for the elaboration of official documents and proposal of decisions for specific cases, collegial bodies' actions and decision-making, and initiation and conduct of disciplinary proceedings,

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103 Article 30 of the Law.

104 Article 29 of the Law.

- protection of private and commercial interests from disclosure of any information that relates to the protection of competition, as well as of business secrets related to intellectual property rights.
- if the information constitutes a business or tax secret, in accordance with the law.<sup>105</sup>

Before denying access to information, a public authority must apply the harm test – access to information will be restricted if it significantly harms one of the interests outlined above, or if the disclosure of information would have harmful consequences that are of greater importance than the public interest to know. On the other hand, the information may be disclosed if there is an overriding public interest in favour of disclosure of the information or a part of the information (public interest test). The latter situation arises if the information contains any data that potentially indicates: corruption, non-compliance, illegal use of public funds, abuse of power, a criminal offense or grounds for revocation of court judgement, illegal acquisition or spending of public funds, or a threat to public safety, life, public health or the environment.

However, the harm test is not applied for information relating to high-ranking public officials and social benefits. If access is requested to information that contains some pieces of information that are classified in accordance with the secrecy regulations, it is necessary to obtain prior consent from the authority that decided that classification. Nevertheless, the Judgment of the Administrative Court from 8 February 2016<sup>106</sup> and the Judgment of the Supreme Court of Montenegro from 22 January 2016<sup>107</sup> clearly indicate that the lack of consent by the authority that originally classified the information does not *per se* constitute sufficient grounds to refuse the request for access to that information. The public authority is in this case obliged to apply the harm test, and only then, on the basis of the harm test, it may refuse the request for access to information. This interpretation is extremely important for public officials because it indicates that it is not sufficient for the Law on Access to Information to be interpreted linguistically, and that it must be interpreted in a targeted manner, taking into account the provisions of Article 2 of the Law, which stipulate that the Law is based on the principles of free access to information and the right of the public to know, which are exercised in accordance with the standards contained in the ratified international human rights and freedoms agreements and the generally accepted rules of international law. It is important to point out that the Law explicitly stipulates that the court has the right to assess whether the public authority that originally classified a document or some specific information did so in accordance with

105 Article 14 of the Law.

106 Judgment of the Administrative Court No. U 307/2016, dated 8 February 2016.

107 Judgment of the Supreme Court Uvp 390/2015.

the requirements contained in the secrecy regulations, with the appropriate degree of properly.<sup>108</sup> The harm test is not performed for any information that is marked as classified by other states or by international organisations.

The applicant does not pay any fee for the request, but he/she carries the actual costs incurred by the authorities for duplicating, scanning, and delivering the requested information. These costs are prescribed by the Decree on the Reimbursement of Expenses in the Process of Accessing Information.<sup>109</sup>

The applicant, or another person having an interest, may appeal the decision on access to information with the Agency for Protection of Personal Data and Access to Information (hereinafter: “the Agency”), through the public authority that has decided upon the request in first instance. The only exception to this is the decision denying access to the information containing pieces of information marked as classified – in this case, the decision cannot be appealed, and it may be contested only by a lawsuit to initiate an administrative dispute.

The Law also lists the grounds for appeal<sup>110</sup> – a violation of the rules of procedure, an incomplete or incorrectly defined factual situation, and misapplication of material law. The first-instance authority is obliged to act within five days in accordance with the powers referred to in Article 125 of the Administrative Procedure Act<sup>111</sup> – which means that it can adopt a decision refusing untimely and unauthorised appeals or appeals filed by persons not authorised to file appeals – or, if it finds that the appeal is justified, it can accept the appeal and issue a new decision fully replacing the previous decision. If it fails to adopt a new decision, the first-instance authority must refer the appeal to the Agency. The Agency is obliged to decide on the appeal within 15 days from the appeal.

The Agency is authorised to submit requests for the initiation of misdemeanour proceedings for violations of the provisions of the Law on drafting and updating guidelines for access to information, which public authorities are obliged to prepare in accordance with the provisions of Article 11 of the Law.

It is important that public officials are aware that the Law stipulates explicitly that the government employees who, conscientiously carrying out their duties, disclose any information on abuse or irregularities in the course of

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108 Article 44 of the Law.

109 *Official Gazette of Montenegro*, No. 66/16.

110 Article 35 of the Law.

111 *Official Gazette of Montenegro*, No. 56/2014.



carrying out a public office or official powers cannot be held liable for a violation of a work obligation.<sup>112</sup>

### 3.6. SERBIA

The right of access to information is regulated by the Serbian Constitution. Article 51 of the Constitution stipulates that everyone has the right to access information held by public authorities and organisations vested with public powers, in accordance with the law. This right is regulated more specifically by the Law on Free Access to Public information.<sup>113</sup> According to the RTI ranking,<sup>114</sup> Serbia has the highest ranking of all the Western Balkan countries – it is in the 2nd place, with a total of 135 out of possible 150 points.

The Law on Free Access to Information stipulates that everyone has the right to be informed whether a public authority holds specific information, including whether such information is accessible elsewhere, and has the right to access to such information.<sup>115</sup> This right belongs to everyone, under equal conditions, irrespective of their citizenship, temporary or permanent residence, and other personal characteristics.<sup>116</sup>

The Law stipulates that public information is understood to mean any information held by a public authority, created during work or related to the work of the public authority, contained in a document, and relating to anything that the public has a justified interest to know.<sup>117</sup> Public authorities, for the purposes of the Law, mean state authorities, territorial autonomy authorities, local government authorities, organisations vested with public powers, as well as legal persons founded, or predominantly or fully financed, by a public authority.<sup>118</sup>

The Law contains an important assumption in Article 4 – it is considered that there is always a justified public interest to know the information held by public authorities that refers to a threat to, or the protection of, public health and the environment. With regard to other information held by public authorities, it is considered that there is a justified public interest to know unless proven otherwise by the public authority. This means that, when

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112 Article 45 of the Law.

113 *Official Gazette of the Republic of Serbia*, Nos. 120/2004, 54/2007, 104/2009 and 36/2010.

114 See footnote 43.

115 Article 5 of the Law.

116 Article 6 of the Law.

117 Article 2 of the Law.

118 Article 3 of the Law.

handling the applicants' requests for access to information, the authorities carry the burden of proving that there is no public interest to know, and that legally based limitations to access to information therefore apply. Even then, the Law clearly stipulates that the rights specified in the Law may exceptionally be subject to limitations if that is necessary in a democratic society to prevent serious harm to an overriding interest in accordance with the Constitution or as prescribed by law.<sup>119</sup>

The procedure to obtain access to information is initiated upon the applicant's written request or based on a verbal request that the applicant has made for the record. The latter kind of request must be registered in special records. The request must indicate the name of the public authority, the full name and surname and the address of the applicant, and the most precise description possible of the requested information, as well as other details that will facilitate identifying the requested information. The applicant is not obliged to state the reasons for the request.<sup>120</sup> If the request does not contain the above elements, or if it is incomplete, the authorised person in the public authority is obliged to instruct the applicant free of charge on how to revise the request. The applicant is given a time limit of 15 days upon receipt of the instructions to complete the revision. If the applicant fails to correct the irregularities, or if he/she revises the request, but such revised request still contains irregularities that make it impossible to be processed, the public authority will adopt a decision rejecting the request as incomplete.<sup>121</sup>

The public authorities are obliged to act upon the requests without any delay, and at the latest within 15 days upon receipt of the request.<sup>122</sup> The Law specifies also a shortened time limit for acting upon a request if it relates to information that is presumed to be of relevance to the protection of a person's life or freedom, including the protection of public health or the environment – in that case, the time limit is 48 hours upon receipt of the request. The Law also stipulates a possibility to extend the time limit if the public authority is unable, for a justified reason, to confirm to the applicant that it holds the requested information, or to ensure the applicant access to the document. However, in that case, the public authority is obliged to forward a notice to the applicant within seven days, specifying the extended time limit that should not exceed 40 days. If the public authority fails to respond to the request within the specified time limit, the applicant may file a complaint with the Commissioner for Access to Public information.

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119 Article 8 of the Law.

120 Article 15 of the Law.

121 *Ibid.*

122 Article 16 of the Law.

If the public authority refuses to notify the applicant, either entirely or partially, about the possession of the requested information, or denies the applicant access to the document containing the requested information, it is obliged, within 15 days upon receipt of the request, to make a formal decision refusing the request and to provide a written explanation of its decision. It must also instruct the applicant about the legal remedy at his/her disposal to appeal the rejected request.<sup>123</sup>

If the public authority grants the request, the requested information will be accessed on the official premises of the public authority. Access to information is free of charge, but the applicant is obliged to pay a fee to cover the costs of duplication of the document containing the requested information. The fee levels are specified by the Government.<sup>124</sup> Journalists, when requesting a copy of a document for professional reasons, human rights organisations, and all persons requesting any information that relates to a threat to, or protection of, public health or the environment, are exempt from the obligation to pay the fee.

When can public information be withheld? The Law specifies several grounds:

1. if it would:

- pose a threat to the life, health, safety or another vital good of a person,
- threaten, obstruct or impede crime prevention or detection, indictments for a criminal offence, pre-trial proceedings, trial, execution of a sentence, or enforcement of punishment, or any other legal proceedings, or unbiased treatment or a fair trial,
- pose a serious threat to national defence, national or public security, or international relations,
- considerably undermine the government's ability to manage the national economic processes, or significantly impede the fulfilment of the justified economic interests,
- disclose information or a document classified according to legal regulations, or an official document based on the law, as a state, official, business or other secret, that is, if such a document is accessible only to a limited group of persons, and its disclosure could seriously legally or otherwise harm the interests that are protected by law, and if such interests override the public interest in favour of disclosure.<sup>125</sup>

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123 Article 16 of the Law.

124 Article 17 of the Law.

125 Article 9 of the Law.

When it is necessary to protect the life or freedom of a person, the request must be answered promptly, and at the latest within 48 hours.<sup>126</sup> The prescribed time limit of 15 days may be extended by a public authority by additional eight days if the information requested is particularly extensive or if it contains pieces of information that are classified in accordance with the secrecy regulations, or if identifying the requested information requires searching a large volume of information, which significantly impedes the regular work of the public authority. The public authority must inform the applicant about the extension.

The public authorities may refuse a request for access to information or adopt a decision allowing access to information. The decision allowing access to information must indicate: the way in which access is allowed, the time limit for obtaining access, and the cost of the procedure.<sup>127</sup> If the public authority has refused access to the requested information, it is obliged to explain in detail the reasons for denying access. It is important to note that access may be denied not only if there are grounds for restricting access, but also:

- if accessing the information requires or implies that new information needs to be generated,
- if the same applicant was granted access to the same information in the previous six months.<sup>128</sup>

2. The public authority does not have to provide the applicant access to public information if that information has already been published and is publicly available in the country or on the Internet. However, in the response to the request, the public authority should in that case indicate the information carrier (the number of the official gazette, the title of the publication, etc.).

3. If the public authority challenges the accuracy or completeness of the already published information, it should make publicly available the accurate and complete information, that is, provide access to the document containing the accurate and complete information.<sup>129</sup>

4. The public authority will not allow the applicant to exercise the right of access to public information if the applicant abuses such right, especially if the requests are irrational or too frequent, if the same or previously obtained information is requested again, or if the applicant's requests refer to an unreasonably large volume of information.<sup>130</sup>

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126 Article 31 of the Law.

127 Article 30 of the Law.

128 Article 29 of the Law.

129 Article 11 of the Law.

130 Article 12 of the Law.

5. Another limitation is provided for in Article 14 of the Law – the public authority will not allow the applicant to exercise the right of access to information if it would thereby violate the right to privacy, the right to reputation, or any other right of the person to whom the requested information personally relates. Access will be allowed if the person to whom such information relates personally has consented to it, if such information regards a public personality, phenomenon or event of public interest, and especially if it regards a public or political office holder, or if it regards a person who has caused, with his/her behaviour, especially with regard to his/her private life, a request for information to be submitted.

To be able to withhold information, a public authority must apply the harm test – information will be withheld if it would harm an interest of greater importance than the public interest to know, whose existence is presumed by the law.

If the public authority rejects or refuses the applicant's request, the applicant may file a complaint with the Commissioner for Public Information and Personal Data Protection within 15 days upon receipt of the decision or other legal act.<sup>131</sup> Consequently, the applicant also has the right to complain if the public authority fails to respond to the applicant's request within the prescribed time limit, if the conditions for disclosing the requested information include payment of a fee that exceeds the necessary costs of duplication, if the authority fails to make the document accessible as prescribed by law, or if it impedes or prevents the applicant in any other way from exercising the right of free access to information. The Commissioner should deal with the complaint without any delay, and at the latest within 30 days from the submission of the complaint.<sup>132</sup> Prior to adopting a decision, the Commissioner is obliged to allow the authority to make a written statement, and, if necessary, to give the same possibility to the applicant. The Commissioner will reject any complaint that is inadmissible, overdue, or filed by an unauthorised person. If he/she finds that the complaint is justified, the Commissioner will adopt a decision ordering the public authority to ensure free access to information as requested. If, after the complaint has been filed and before the Commissioner has adopted his/her decision, the public authority allows the applicant to access to the requested information, or if it decides to review the request, the Commissioner will suspend the case. The Commissioner will suspend the case also if the applicant withdraws the complaint. Decisions adopted by the Commissioners are binding, final and enforceable, and are implemented by the Commissioner through imposing compulsory measures or fines.<sup>133</sup>

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131 Article 22 of the Law.

132 Article 24 of the Law.

133 Article 28 of the Law.

The decision by the Commissioner may be challenged in an administrative dispute, and that procedure is considered urgent.<sup>134</sup>

#### 4. WHAT ARE THE KEY ISSUES IN IMPLEMENTATION OF THE OUTLINED LEGAL PROVISIONS ON FREEDOM OF ACCESS TO INFORMATION AND HOW TO OVERCOME THEM?

It is beyond doubt that the key problem in the Western Balkans in the implementation of regulations and international standards on access to public information is the failure on the part of numerous public authorities to recognise this right as a human right, and that the exercise and observance of this right contributes to integrity. The previously mentioned culture of secrecy, which seems still solidly rooted in these societies, according to which the state should jealously protect and hide the information in its possession, is only starting to make way to full recognition of the public's – both the general public's and individuals' – right to know. In addition, what is worrying is the prevalent practice<sup>135</sup> of public authorities having to resort to the institute of the right of free access to information in their dealings with other public authorities. In Serbia, for instance, the Anti-Corruption Council, which is a government body, filed a total of 65 complaints to the Commissioner for Free Access to Information in 2015 alone, due to not having been granted access to information it had requested from other public authorities.

The conclusion that in none of the analysed countries freedom of access to public information has been accomplished to a full extent is supported by the findings in the annual reports of institutions that are vested, by law, with the right to decide in the appeals instance on appeals against decisions by public authorities relating to access to public information, or with the right to monitor the implementation of the regulations on access to information. All the reports point consistently to a practice of “administrative silence,” that is public authorities simply refusing to act on the requests for access to information, or failing to do so within the prescribed time limit. Such practice is present in Macedonia, Montenegro and Serbia. Moreover, there is an impression that access to public documents largely depends on the will of the manager of

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134 Article 27 of the Law.

135 See. Report of the Commissioner for Personal Data Protection and Access to Information of Public Importance of Serbia for 2015.

the public institution concerned, which is indicative.<sup>136</sup> In some cases, the grounds for denying access to information verge on the absurd – in one case, the public authority stated “we do not anyone’s service and we do not act based on somebody’s wishes.”<sup>137</sup> In other cases, the public authorities initiated appeals instance proceedings against the Commissioner’s decision, even when they did not have a legal basis for doing so (they did not have active procedural legitimacy), and then referred to the proceedings as the grounds for not following through the Commissioner’s orders, etc. What is also notable is the practice of many public authorities to deny requests based on the excuse that they are not in possession of the requested information – this is a frequent problem in one of the countries. Such practice may be a consequence of lack of a clear statutory mechanism for resolving the cases when a public authority, in the course of processing a request for information, finds itself not to be the correct addressee (and thus not in the possession of the requested information). However, it is just as likely that this practice is, in fact, yet another manifestation of the culture of secrecy – that is confirmed by the fact is that in a number of cases, the independent public body responsible for follow up procedures to verify such responses often found that the public authority concerned was indeed in possession of the requested information.<sup>138</sup>

Actually, practice has shown that the person requesting access to information may sometimes be informed that the public authority concerned is not in possession of the requested information even after an express order to make the requested information available to the applicant has been issued by an independent body or by the relevant court after court proceedings had been conducted. This happened in a case that was eventually resolved in the European Court of Human – the case is typical. The applicant had requested from the Security and Intelligence Agency information on the number of persons who were subject to electronic surveillance by that Agency in 2005. The Agency denied the request, invoking the provision of the law stating that information or a document that is formally marked as a state, official, business or other secret, the disclosure of which could seriously damage the lawful interest that has precedence over the freedom of information, may be legally denied. The applicant, a local non-governmental organisation, then filed a complaint to the Commissioner, who found that the Agency had violated the law, and ordered that the requested information should be made available to the applicant. The Agency filed an appeal against the Commissioner’s decision, but the Supreme Court determined it had no active process legitimacy and dismissed the appeal. After that, the Agency informed

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136 See. Kosovo\* Ombudsman Institutions Annual Report for 2015.

137 *Ibid.*

138 See. Montenegrin Report on the Status of Personal Information Protection and Status in the Field of Access to Information for 2015, available at: <https://www.azlp.me/index.php/me/izvjestaji/godisnji-izvjestaji>.

the applicant that it was not in possession of the requested information. The applicant then filed an application to the European Court of Human Rights, which found that the Agency's reply was unconvincing, and that Article 10 of the European Convention of Human Rights was breached.<sup>139</sup>

The circumstances of this case are a good illustration of what seems clearly to be the key problem in the implementation of the regulations on free access to public information – denial of access to information on the grounds of secrecy. A frequent practice is to deny access to information on the grounds of a confidentiality clause stipulated in investment contracts and contracts on other forms of business cooperation, as well as to deny access to information on the grounds of potential harm of the competitors' rights. The most drastic example is that from Serbia, from 2015. The Ministry of Economy denied access to the Contract on Management and Consultancy Services regarding the Iron and Steel Factory in Smederevo. In doing so, the Ministry invoked the regulations concerning protection of competition as justification, according to which the Republic of Serbia and the company that provided the contracted services had requested that information related to the contract be kept confidential. Hence, the Ministry claimed that it was unable to disclose the information related to that contract to the applicant.

In cases when access to information is denied based on confidentiality of the requested data, public authorities, as a rule, provide no proof that the document is indeed marked as secret in the manner prescribed by law. Furthermore, public authorities seldomly present decisive reasons and evidence supporting the decision not to disclose the information—quite to the contrary, public authorities deny access *a priori*, without applying the harm test to assess the potential harm caused by the disclosure, or the public interest test to assess the prevalence of the right of the public to know against other public interests that might be harmed by the disclosure. Such practice was challenged before the court in Montenegro and the Administrative Court and the Supreme Court,<sup>140</sup> in their respective judgments, clearly indicated that the statutory provision according to which access to information marked as secret is conditional upon the consent of the public body that originally classified the information as confidential does not mean that lack of such consent *per se* constitutes grounds for denying access to information. The courts asserted that the public authorities are even then under the obligation to conduct the harm test.

It is reasonable to assume that one of the reasons why the full implementation of the regulations on access to information, data confidentiality or personal data protection is such a challenge for public officials lies in the lack of internal accordance of the mentioned regulations in all the analysed

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139 See. Youth Initiative for Human Rights vs. Serbia, Application No. 48135/06.

140 See. 4.3. Montenegro.



countries. The very fact that some specific information is classified implies that the harm test should be conducted, and that the conclusion may well be that such information should be kept secret, precisely to protect certain interests as prescribed by law. Nevertheless, it is not surprising that public officials may face a difficult challenge in cases when access to a document that had already been marked as classified is requested. That implies that disclosure may cause harm to protected interests, which means that access to the requested public information may be denied. Moreover, in certain cases, it may well be the case that it is precisely the possibility of request to obtain access to that particular information that triggers the classification procedure. These rules imply the severity of damage (irreparable damage, grievous harm and the like), and the probability that such damage will actually be caused. However, a key problem regarding data classification in all the analysed countries lies in the fact that the public interests protected by the data secrecy regulations are not prescribed in the law in a sufficiently precise way. Consequently, the margin of discretion of the person in charge of deciding whether some information should be classified or not is rather broad – that makes the decision-making about the possibility of accessing the information already marked as classified considerably harder.

This implicit limitation may be resolved in several ways. For instance, an illustrative example of that is Slovenia, a country that is not a part of the present analysis. In order for a document or a piece of information to be marked as classified, it is necessary to conduct the harm test and the decision on classification must be accompanied by a detailed written justification. Other countries have also adopted mandatory secondary legislation, which set out in detail the criteria for marking information as classified, that is, provide elaborate guidelines that detail what may be considered as irreparable or severe damage.<sup>141</sup> In Serbia, too, rules that regulate the criteria for certain degrees of classification have been adopted.<sup>142</sup> That provides additional guidance for the classification of data but also helps public officials to make

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141 See, for instance, Australian government guidelines – Information security management guidelines- Australian Government security classification system, Approved November 2014, Amended April 2015; Also see to the Ordinance of the Czech government which includes a list of data and their respective degrees of classification. Government Regulation No. 522/2005 Coll. Government Regulation Specifying a List of Classified Information, available at <https://www.zakonyprolidi.cz/cs/2005522>.

142 Decree on the Criteria for Determination of Secrecy Levels “STATE SECRET” and “TOP SECRET” Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the Office of the National Security and Protection of Classified Information Council, Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the State Authorities in the Country, Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the Security Information Agency, Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the Ministry of Defence, Decree on Specific Criteria for Determining Secrecy Levels “SECRET” and “INTERNAL” in the Ministry of the Interior, available at: <http://www.nsa.gov.rs/lat/domace-zakonodavstvo.php>.

decisions on access to information through the correct application of the criteria prescribed by law.

It has already been noted that failure to conduct the harm and public interest tests represents a major challenge in the implementation of the regulations on free access to public information. Public authorities, for reasons that may be political but that may also include a general fear of disclosure of information, frequently prefer to deny access to information *a priori*, without thoroughly examining the potential consequences of disclosure and the public interest to know. It is, therefore, imperative for public officials to have proper training not only on the letter of the law and the contents of international standards. They also need practical support, through training, that will enable them to apply both the letter and the spirit of the law and to conduct the harm and public interest tests when appropriate.

Another frequent reason for denying access to information is the protection of privacy. In some cases, the protection of privacy and the protection of secrecy of information are used simultaneously as grounds to deny access to public information. In specific cases, access to information has been fully denied on the grounds of protecting the privacy, even when that is relevant for only a small part of the requested information (examples are citizens' single identification number, address, bank account number, etc).<sup>143</sup> Such practice implies the incorrect application of statutory provisions and a possibility to protect only a part of the requested information, indicating its scope and the reasons for doing so. Another indicative example of unjustified denial of access to information, based on an inadequate interpretation of the right to privacy, was the denial of the Higher Public Prosecutors' Office to make available to the public the name of the public prosecutor acting in the so-called "Savamala" case.<sup>144</sup> The Higher Public Prosecutors' Office initially took the position that the disclosure of the name of the public prosecutor in charge would jeopardise the prosecutor's privacy and that the publication of the case number would harm the course of the proceedings. Such interpretation of the exemptions from the rules on free access to information is manifestly wrong.

Practice has shown that citizens and the civil sector have most difficulties to obtain access to the information related to public expenditures, including public procurement. This shows that despite statutory provisions on proactive approach to public information and raising awareness of public authorities about the need and duty to disclose such information, public authorities still

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143 See Report on the Status of Protection of Personal Information and Status in the Field of Access to Information for 2015, Agency for the Protection of Personal Information and Free Access to Information of Montenegro.

144 The case of demolition of buildings in the Hercegovacka Street in Belgrade by unknown perpetrators, in the night between April 24 and 25, after the completion of the parliamentary and local elections in Serbia.

show resistance to full transparency of their financial operations and public fund management. For instance, the organisation BIRN Macedonia was able to calculate and publish information on the total costs of the renovation of buildings in the centre of Skopje paid from public funds only by combining publicly available information and the information requested based on the regulations on free access to information.<sup>145</sup>

What is also noticeable is the practice of denying access to information based on the claim that such information is already available to the public, but without indicating where the information was published or when. Sometimes subsequent checks show that the information was never made public. This, again, is characteristic of the persistent culture of secrecy.

On the other hand, it should be noted that many public officials face very concrete obstacles when deciding whether or not to grant access to information that have been marked as classified, particularly when they work in public authorities and bodies with a strict and complex hierarchy, such as the Ministry of Interior or the Ministry of Defence.

What are the possible ways to overcome the identified problems?

Practice shows that public authorities, in some particularly sensitive cases, often refuse to act on the orders of independent bodies, or even court judgments made in the proceedings relating to access to information. The reasons behind such practice are political, just as the mechanisms that should enable the observance of the rules on access to information are, in fact, political – and based on the fundamental principles of democracy. That is why it is not necessarily sufficient to provide concrete recommendations for the improvement of the regulatory framework. There is ample room to reiterate the need to reconfirm and further recognise of the right of free access to information as a basic human right. Improved observance of this human right can also be supported by informing public authorities that failure to provide a reply to requests for access to information is a violation of a personal right, and that the applicant, as the injured party, may initiate misdemeanour proceedings against the public authority. This position was recently adopted by Serbian Supreme Court of Cassation,<sup>146</sup> and it is particularly important given the general practice of failing to launch misdemeanour proceedings against those who have violated the law. Even it is relevant only to the legal system in Serbia, this legal position, in fact, has much wider implications. It indicates the way in which relevant courts, but

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145 According to this research, the cost of renovation had increased sevenfold compared to the initial price. The database including information on every building is available at: <http://skopje2014.prizma.birn.eu.com/mk>, and also as an Android application.

146 Legal position adopted at the session of the Civil Law Department of the Supreme Court of Cassation held on December 6, 2016, available at: <http://www.vk.sud.rs/sites/default/files/attachments/II%20Su-17%20157-16%20-%20pravni%20stav%20za%20verifikaciju.pdf>.

also public authorities, should understand the right of access to information and its observance in accordance with international standards.

What is undoubtedly necessary is additional support to public officials in handling requests for access to public information that may be exempt from the rules on free access to information. Detailed knowledge of the statutory provisions and international standards – including the case law of the European Court of Human Rights – and to practical information on how to apply the harm and public interest test, may considerably improve the observance of the right to access public information in practice. Such trainings should be complemented by clearly stating that a public officials who disclose information for which there is a public interest to know cannot be sanctioned for such actions, while in the opposite case, adverse consequences, including sanctions or misdemeanour or other proceedings may be applied to both the public authority and the responsible public official. Furthermore, the development of a set of practical guidelines that are both universal and sensitive to the various national regulatory frameworks would considerably facilitate the work of public officials deciding on whether or not to grant access to public information.

## 5. INTERNATIONAL AND REGIONAL PRACTICES THAT COULD BE USED FOR TRAINING OF PUBLIC OFFICIALS

The public interest test is used in a number of countries, including Slovenia, Ireland, UK, Lichtenstein, Estonia, Australia, Israel, Jamaica, and India. Public interest is a concept that is not precisely defined, and that ambiguity may cause difficulties for those who need to use it in order to decide whether to allow access to public information or not. Openness is, in itself, a principle that should be considered to be in the public interest.<sup>147</sup> In order to help public officials in the practical implementation of the rules on free access to public information, the authorities and bodies in charge of monitoring free access to information often issue guides or handbooks with instructions that explain the applicable norms, rules regulating this matter, providing guidelines and instructions on appropriate conduct for both the general public and public authorities. When it comes to the countries in the Western Balkan region, such publications focus mostly on informing the citizens on how to exercise their right of access to public information, rather than assisting the public authorities in implementing the relevant legislation. The Serbian Commissioner's Office has issued a Guidebook on the Implementation of the

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147 How and When is Public Interest Test Used? , p. 21

Law on Free Access to Public Information, which is very useful<sup>148</sup>— however, even this guide leaves some practical questions open and needs to add guidance notes and breakdown of the various steps of the procedure. Some indirect information and guidance can be found in the annual reports of the authorities and bodies in charge for monitoring the implementation of the freedom of information legislation and their practice of the rules, which are available on the webpages of most such bodies.<sup>149</sup>

Here are some examples:

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### **THERE IS NO PREVAILING INTEREST TO DENY ACCESS**

Nova Srbija City Board of Nis filed, in the capacity of applicant, a complaint to the Commissioner for Information of Public Importance on April 13, 2010, because it did not receive all the requested information in its request for access to information filed to the Mayor of Nis on March 26, 2010. Namely, the Mayor had partially granted Nova Srbija access to the requested information but had denied access to the following information: a copy of the contract concluded between the city of Nis and an air carrier and a copy of agreement between the city of Nis and the Nis Airport, a publicly owned company. Nova Srbija had attached a copy of the Mayors' response to the complaint.

Acting on the complaint, the Commissioner forwarded the complaint to the Mayor to give him the opportunity to provide his comments. In response, the Mayor forwarded copies of the requested documents to the Commissioner and stated that access to documents was not granted to the applicant since the contract between the city of Nis and Wind Jet air carrier stipulated that any disclosure of the contract, in full or partially, was conditional on the written consent of Wind Jet. Otherwise, it would be strictly prohibited.

The Commissioner ordered the Mayor to forward the requested information to Nova Srbija City Board of Nis within three days. In his ruling, the Commissioner stated that he had determined that the information requested was not information to which access could be denied or restricted according to law.

“Even if the mentioned contract clauses are interpreted as implying an express provision that any disclosure of information from the contract without Wind Jet’s written contract is prohibited, this ground cannot be deemed as justified. Article 9 and 14 of the Law on Free Access to Public Information prescribe exceptions from the rule that requested public information should be made available, and in this specific case disclosure without a written consent from Wind Jet does not and cannot constitute a valid argument for denial of access to the requested information since lack of written consent is not an exception prescribed by the law. The right of the public to know, or everyone’s right of access to public information, is guaranteed by the Constitution, and is implemented under the conditions prescribed by law and cannot be suspended by provisions of a commercial contract”.

*Source:* Serbian Commissioner Ruling No. 07-00-00694/2010-03.

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148 Available at: <http://www.poverenik.rs/images/stories/dokumentacija-nova/vodic/prirucnikza-primenuzakonacir.pdf>.

149 Available at: <http://www.azlp.me/me/izvestaji>, <http://www.poverenik.rs/sr/izvestaji-poverenika.html>, <http://www.ombudspersonKosovo.org/sr/godi%C5%A1nji-izve%C5%A1taji>, [http://www.komspi.mk/?page\\_id=2609](http://www.komspi.mk/?page_id=2609).

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**PERSONAL DATA CAN BE EXCLUDED BUT ACCESS  
TO THE REMAINING INFORMATION CAN BE GRANTED**

Foundation “Open Society Fund – Macedonia” filed a request for access to information to the Basic Court in Skopje, requesting access to a copy of the judgment in the case “Buckovski – Spare Tank Parts”, a high-profile case against a former defence minister. The court had denied access to the judgment. The Court found that the judgment included personal data under the Data Protection Law and, consequently, invoked a limitation to the right of access to public information with the state justification that a public authority may deny access if the information is related to personal data, the disclosure of which would entail a violation of the protection of personal data and might endanger that person’s safety. Moreover, the Court stated that it was not under the obligation to provide the applicant with information on a specific court case since the applicant was neither a party nor the counsel of a party. The Foundation filed an appeal against the decision of the court. Ruling on the case, the Commission found that the Law on Free Access to Information was simply an operationalisation of the constitutional right of access to public information, regardless of whether the applicant seeking access was a party or a counsel in the proceedings in the court case itself. The Commission also found that the court’s invoked limitation to access to the requested information – the safety of the person to whom the personal data related – had been decided without precisely stating exactly how the safety of the person concerned might be endangered. The Court had carried out the harm test, but the Commission found that the Court failed to state which harm would arise and, consequently, what interest should be protected. As for the fact that the Court’s sentence was not yet finally binding, the Commission found that its judgement, nonetheless, represented a final document in that stage of the proceedings. The Commission also underlined that the Court could not deny access to public information for all the cases tried before that Court but had to consider the circumstances in each individual case. The Commission, therefore, ordered the Court to allow the applicant access to the judgment, but with the deletion of all personal data such as the citizen’s single identification number and other data that might refer to a person’s mental, economic, cultural or social identity.

*Source: Macedonia, Examples of the Commission’s Report, Macedonia, 2009.*

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**THERE IS NO SERIOUS BREACH OF THE RIGHT TO PRIVACY  
NOR OTHER GRAVE LEGAL OR OTHER CONSEQUENCES  
IN CASE OF ACCESS TO CONFIDENTIAL INFORMATION**

Union University in Belgrade filed a request for access to public information to the Accreditation and Quality Assurance Commission in Belgrade, requesting access to documents filed to the Commission by three faculties in Belgrade, and specifically to documents on the award of academic titles to the teaching staff, alternatively to forward to the Union University copies of documents including information on who had awarded academic titles to the teaching staff and when.

The Quality Assurance Commission had denied the request stating that access to information on award of academic titles would breach the confidentiality of that information. The Commission also invoked the right to privacy and other personal rights as an interest established by law, which in the concrete case prevailed over the right of the public to know.

With regards to the right to privacy as the prevailing interest, the Commissioner of Public Access to Information found that the first-instance authority was wrong when it denied the applicant's request by invoking Article 14 of the Law. The Commissioner found that in that specific case the conditions for granting access to information existed, since award of academic titles at faculties is an event of interest to the public, and that the faculty teaching staff are holders of public offices.

With regards to confidentiality, the Commissioner stated that, in order to deny access to information, the public authority has to prove that such denial is justified in the concrete case for the purpose of protecting prevailing interests invoked as justification for the ruling. In that, two conditions must be met. First, the requested information has to be marked as a state, official, business or other secret by a regulation or an official act based on the law. Secondly, the disclosure of such a document or information would have to result in grave legal or other consequences for interests protected by law, in order to prevail over the public interest to access the information. The first-instance authority had not provided valid evidence for justifying the denial, that is, has not provided evidence that these two conditions were met.

*Source:* Serbian Commissioner's Ruling No. 070001170/201003

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## **THERE IS NO PREVAILING INTEREST**

MANS, a Montenegrin NGO, requested access to public information, that is, the copies of all payments made to the Pljevlja municipality by the Montenegro Electric Power Company of Niksic. The first-instance authority established it was in possession of the requested information but had refused access, invoking two exceptions as a justification. The first exception was the protection of trade or other economic interests related to business secrets – the first-instance authority found that the requested information constituted a business secret and that it could not be disclosed without the consent of the owner of such information. The second limitation invoked by the first-instance authority was the duty to keep imposed taxes secret, which, as prescribed by the Tax Administration Law, cannot be disclosed without a written consent of the taxpayer. The first-instance authority considered that the Tax Administration Law had precedence over the Law on Free Access to Information. MANS appealed against this decision.

The Montenegrin Agency Council found that the appeal was founded and annulled the ruling of the first-instance authority based on erroneous application of material law. The Council emphasised that Article 14 of the Law on Free Access to Information prescribes the limitations of access to information, and that this Article does not recognise tax and business secrets as grounds for limiting access to information. The Council also found that the first-instance authority had not carried out the harm test to prove that its position to deny the disclosure of the requested information would incur harm to a prevailing interest.



The Council ordered the first-instance authority to allow access to the requested information, stating that this information represents a testament of the legality of the company's operation, and that, contrary to the claims of the first-instance authority, it is failure to disclose the requested information that would cause mistrust in the operations of the first-instance authority.

*Source:* Ruling of the Montenegrin Agency for Personal Data Protection and Free Access to Information No. UP II 07-30-402-2/16

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On the other hand, some countries have issued detailed instructions and guidance on how to conduct the public interest test and also the harm test. The following is an example from a guidance note issued by the Irish Office of the Information Commissioner<sup>150</sup> on the need to conduct the harm test:

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In Case 060233 a Council had argued that release of certain records relating to a new prison could possibly assist the escape of convicted prisoners. The Department of Justice, Equality and Law Reform had stated that some information, in the wrong hands, could place the operation of the prison in jeopardy. The Commissioner said that she would have expected some form of analysis of how specific items of information could, if disclosed, have the said type of negative consequence that the exemption is intended to prevent. She stated that where neither the Council nor the Department had identified, explained or considered the likelihood of a particular harm occurring, she was satisfied that there was nothing in the content of the records that persuaded her that the exemption claimed was justified.

*Source:* Office of the Irish Information Commissioner, Guidance Note, Freedom of Information Act 2014, Section 32: Law Enforcement and Public Safety, p. 6

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After amending its access to information law, the Slovenian Commissioner's Office issued a brochure on how and when to use the public interest test.<sup>151</sup> The United Kingdom has also issued a Guidance on how to implement the public interest test, and its visual representation is given below.

## 1. PUBLIC INTEREST TEST

A public interest test comprises three fundamental steps, which include (1) establishment of factors enabling access to information, (2) establishment of factors against giving access to information, and (3) weighing the factors for and against giving access. This can be illustrated through the following flow diagram:

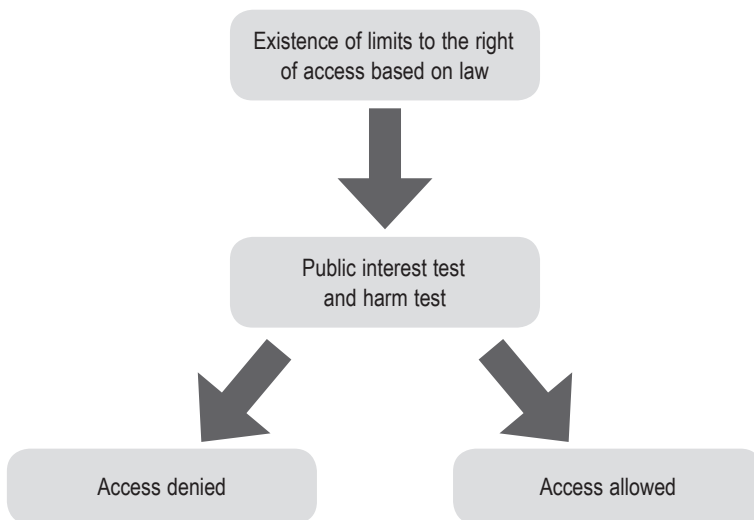
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150 Guidance Note Freedom of Information Act 2014 – Section 32: Law Enforcement and Public Safety, available at: <http://www.oic.gov.ie/en/Publications/Guidance/>.

151 Available at: [https://www.ip-rs.si/fileadmin/user\\_upload/Pdf/brosure/test\\_javnega\\_interesa.pdf](https://www.ip-rs.si/fileadmin/user_upload/Pdf/brosure/test_javnega_interesa.pdf).



Figure 1: Flow diagram of public interest test<sup>152</sup>

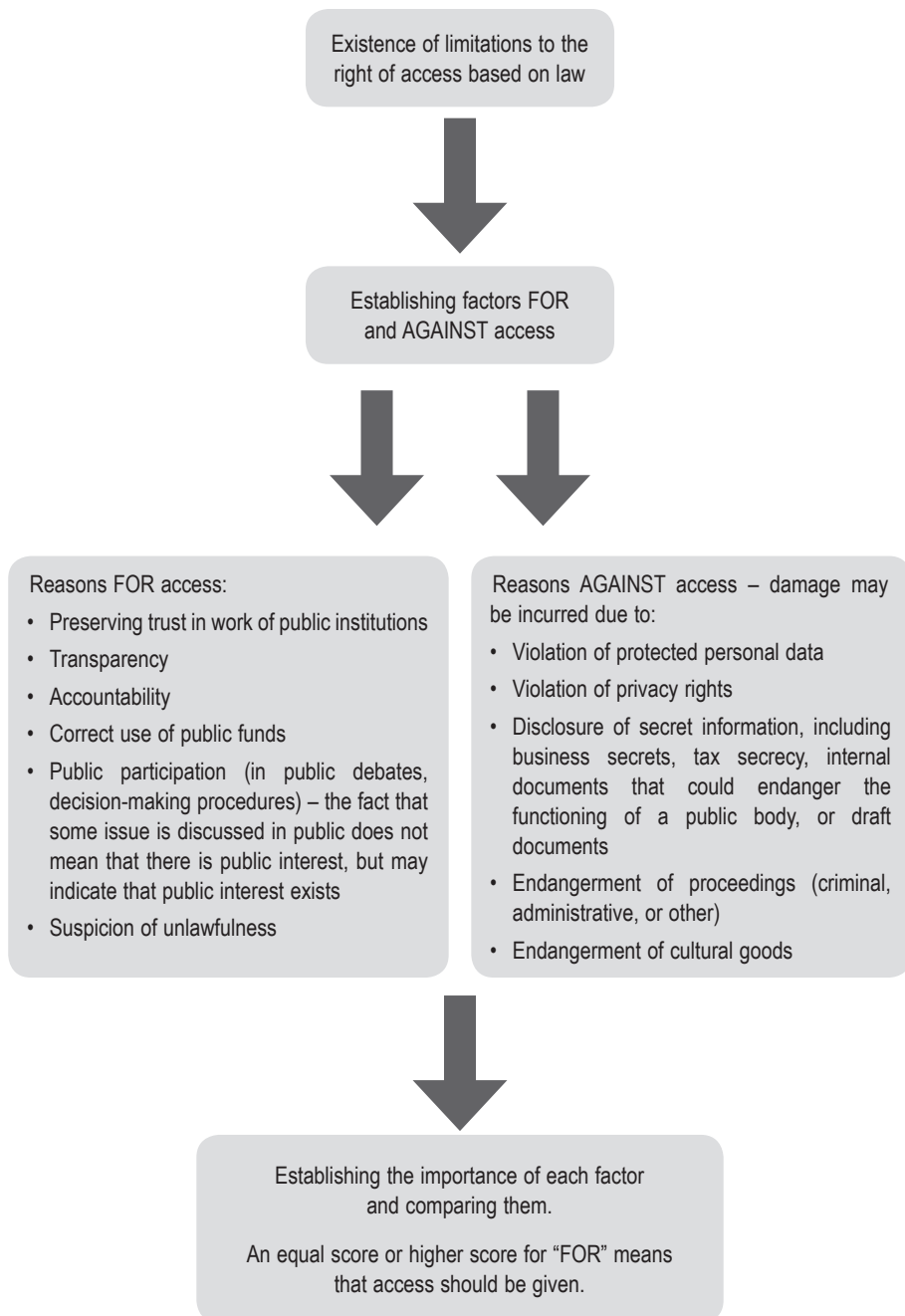


In addition, in 2012, United Kingdom has issued a flowchart of how to handle information requests. This flowchart, coupled with more detailed instructions on how to conduct the public interest and the harm tests, provides a very useful step-by-step guide that can easily be followed by every public official charged with handling requests for access to public information. Currently, the UK Information Commissioners' Webpage includes a detailed interactive step-by-step guide for public institutions on how to handle information requests— which is in fact an upgrade of the flowchart. However, the flowchart still represents an instrument that may be very useful for all the Western Balkans countries in facilitating the access to public information – provided it is adapted to national legislation. Below, the flowchart is shown in full (Source: V. L. Lemieux, S. E. Trapnell, *Public Access to Information for Development – A Guide to the Effective Implementation of Right to Information Laws*, p. 119–121).

Another useful instrument in order to address one of the major challenges in access to public information – how to ensure public access to government information without jeopardising legitimate efforts to protect national security – is the Tshwane Principles. And even though, as explained in the section dealing with international instruments, the Tshwane principles relate to issues of national security, they provide good guidance on how to handle access to public information related to any category of classified information. A summary of the principles may also provide useful guidance.

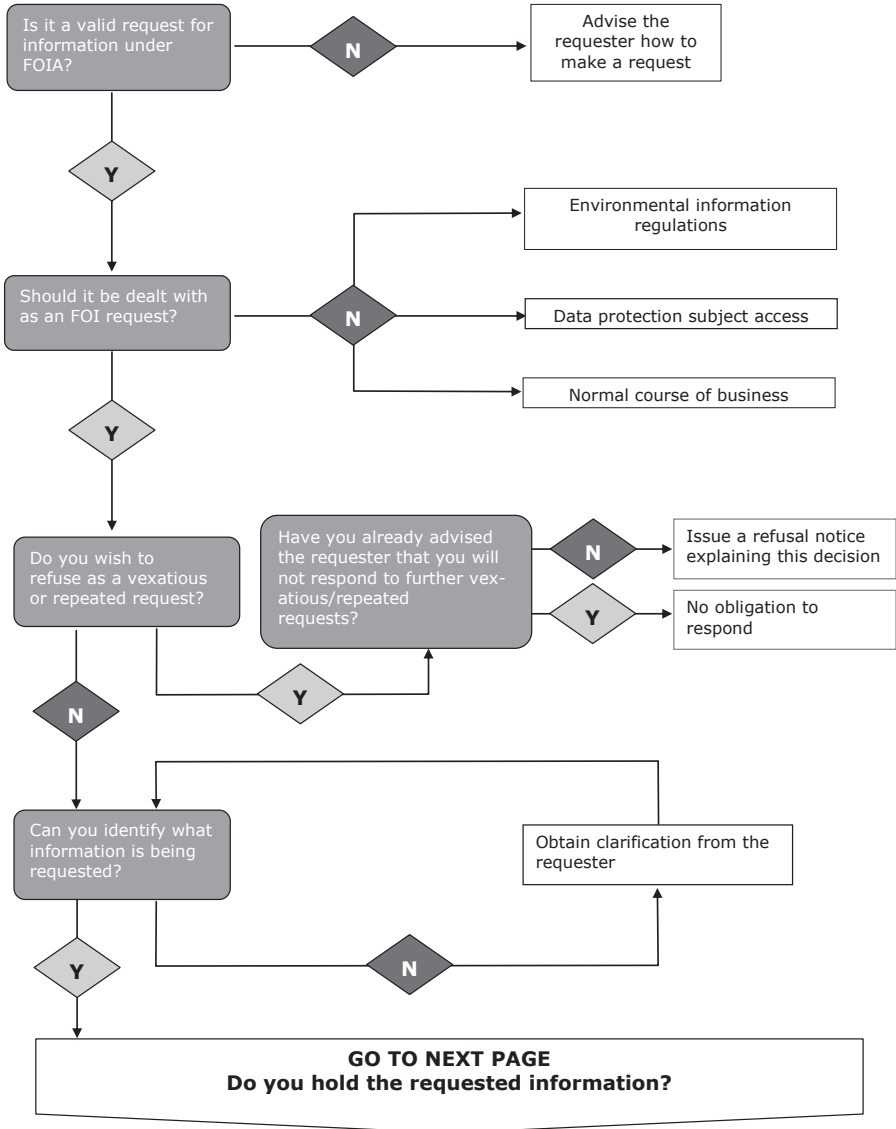
<sup>152</sup> Information Commissioner's Office: *The Public Interest Test, Freedom of Information Act*, p. 5, available at: [https://ico.org.uk/media/for-organisations/documents/1183/the\\_public\\_interest\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf). 22.4.2015.

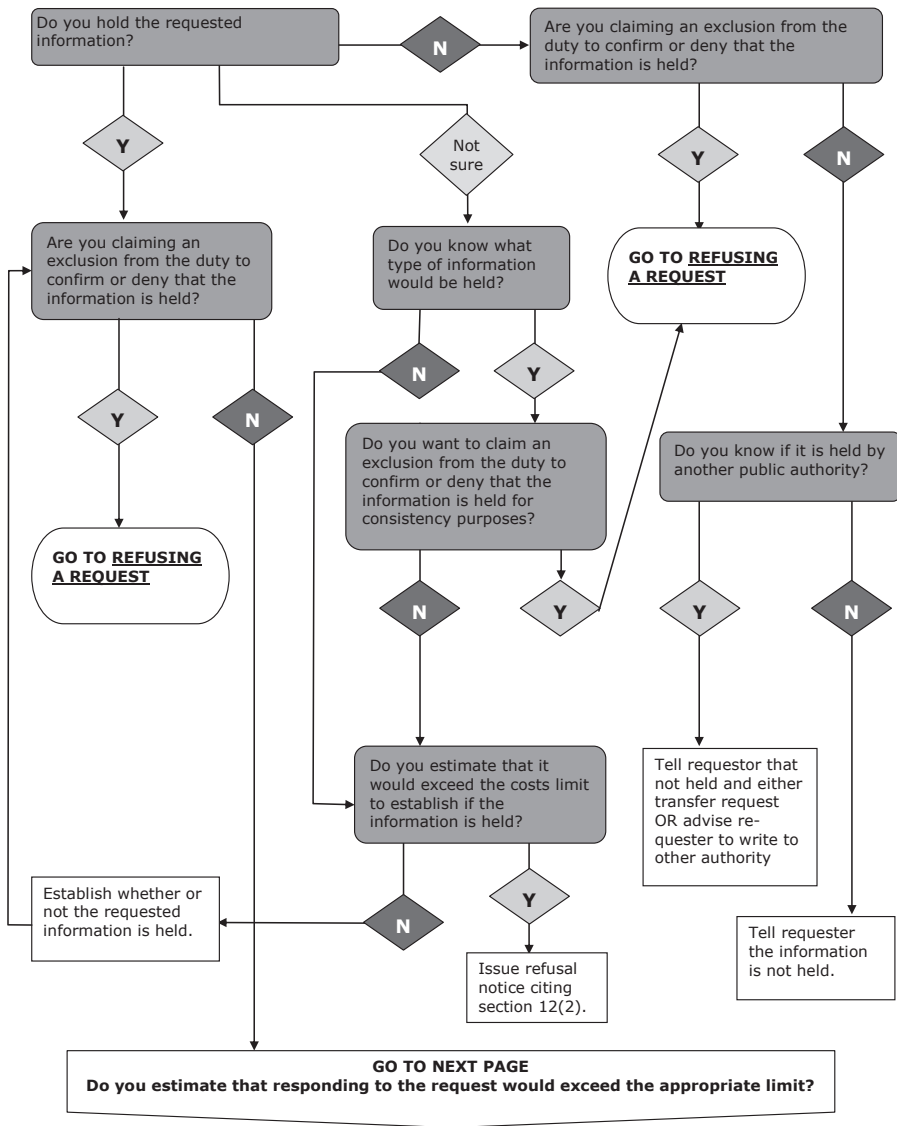
Figure 2. Conducting the public interest and harm tests<sup>153</sup>

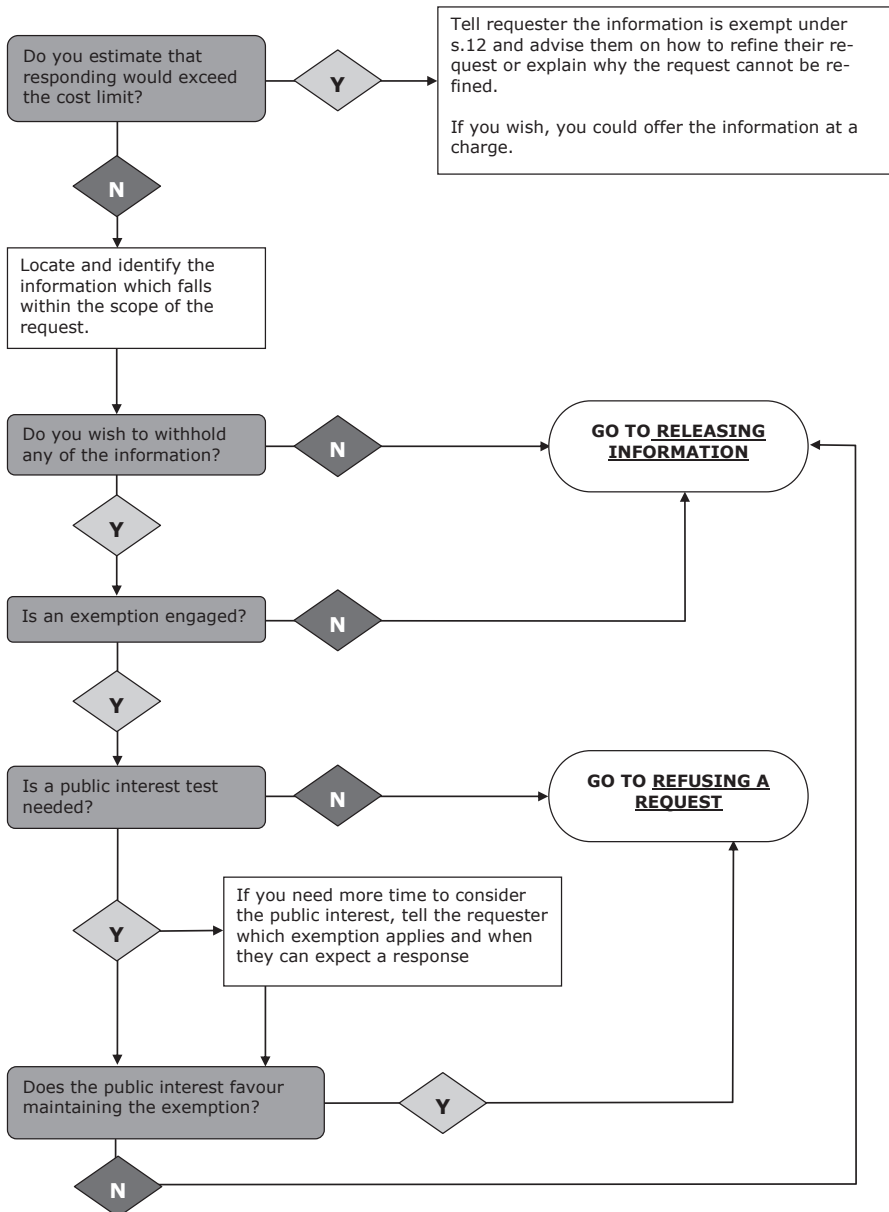


<sup>153</sup> Adjusted from N. Odic, R. Galovic, *Proportionality and Public Interest Tests as Instruments for Establishing Balance between the Right to Access Information (Principle of Transparency) and its Constraints in the Republic of Croatia*, Faculty of Law, Zagreb, available at: [www.unizg.hr/.../Odic\\_Galovic\\_Test%20razmjernosti%20i%20](http://www.unizg.hr/.../Odic_Galovic_Test%20razmjernosti%20i%20)

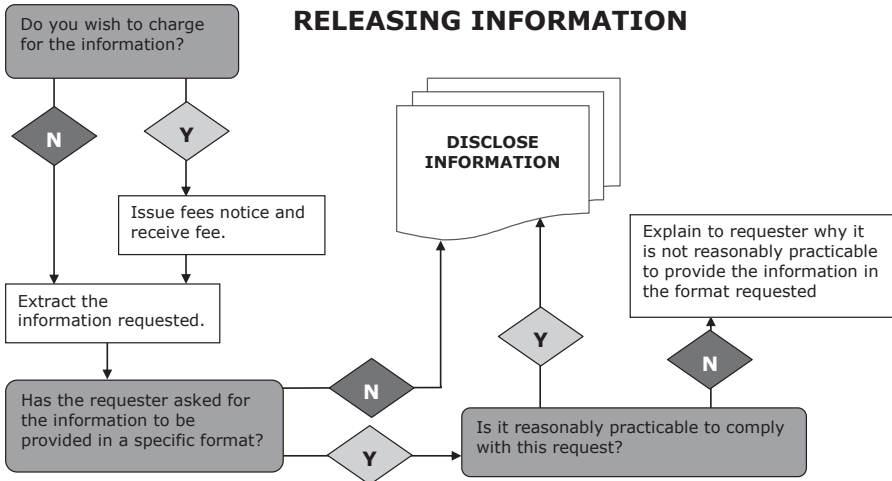
## Start here



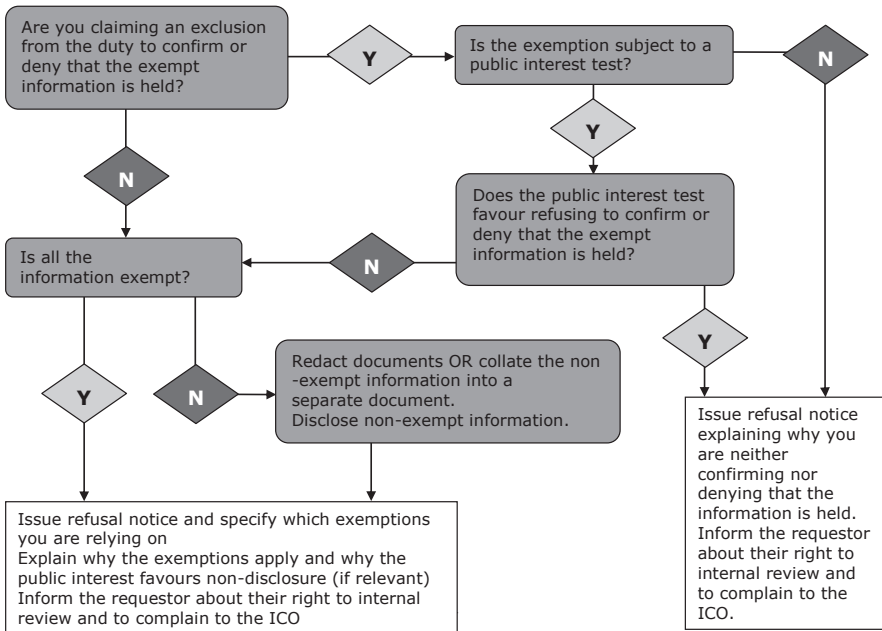




## RELEASING INFORMATION



## REFUSING A REQUEST



## An Overview: Fifteen Things the Principles Say<sup>154</sup>

1. The public has a right of access to government information, including information from private entities that perform public functions or receive public funds. (Principle 1)
2. It is up to the government to prove the necessity of restrictions on the right to information. (Principle 4)
3. Governments may legitimately withhold information in narrowly defined areas, such as defence plans, weapons development, and the operations and sources used by intelligence services. Also, they may withhold confidential information supplied by foreign governments that is linked to national security matters. (Principle 9)
4. But governments should never withhold information concerning violations of international human rights and humanitarian law, including information about the circumstances and perpetrators of torture and crimes against humanity, and the location of secret prisons. This includes information about past abuses under previous regimes, and any information they hold regarding violations committed by their own agents or by others. (Principle 10A)
5. The public has a right to know about systems of surveillance, and the procedures for authorizing them. (Principle 10E)
6. No government entity may be exempt from disclosure requirements—including security sector and intelligence authorities. The public also has a right to know about the existence of all security sector entities, the laws and regulations that govern them, and their budgets. (Principles 5 and 10C)
7. Whistle-blowers in the public sector should not face retaliation if the public interest in the information disclosed outweighs the public interest in secrecy. But they should have first made a reasonable effort to address the issue through official complaint mechanisms, provided that an effective mechanism exists. (Principles 40, 41 and 43)
8. Criminal action against those who leak information should be considered only if the information poses a “real and identifiable risk of causing significant harm” that overrides the public interest in disclosure. (Principles 43 and 46)
9. Journalists and others who do not work for the government should not be prosecuted for receiving, possessing or disclosing classified information to the public, or for conspiracy or other crimes based on their seeking or accessing classified information. (Principle 47)
10. Journalists and others who do not work for the government should not be forced to reveal a confidential source or other unpublished information in a leak investigation. (Principle 48)

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154 Source: <https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>.

11. Public access to judicial processes is essential: “invocation of national security may not be relied upon to undermine the fundamental right of the public to access judicial processes.” Media and the public should be permitted to challenge any limitation on public access to judicial processes. (Principle 28)
12. Governments should not be permitted to keep state secrets or other information confidential that prevents victims of human rights violations from seeking or obtaining a remedy for their violation. (Principle 30)
13. There should be independent oversight bodies for the security sector, and the bodies should be able to access all information needed for effective oversight. (Principles 6, 31–33)
14. Information should be classified only as long as necessary, and never indefinitely. Laws should govern the maximum permissible period of classification. (Principle 16)
15. There should be clear procedures for requesting declassification, with priority procedures for the declassification of information of public interest. (Principle 17)

These principles may be coupled with a general recommendation to allow access to information that has been classified at the lowest level, after having conducted the public interest and harm tests, without the need to obtain prior approval of the person who had declared the information classified.<sup>155</sup>

## 6. TRAINING EXERCISES

1. A public authority is requested to grant access to the records of electronic voting, which include information on how certain members of the local self-administration legislative body have voted on certain items on the agenda, which is considered public information. Is there a statutory obligation to grant access to such information to journalists, having in mind the fact that the work of this body is public, and the concern that access to such records may influence the independence of members of the local parliament and their freedom of will? Should access to such information be granted? What steps should be taken in order to reach a decision?
2. A public authority has received a request for access to public information, requesting a list of all owners and members of non-commercial farmsteads that have exercised the right to use support funds, as prescribed in the

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155 See. A. Rabrenovic, R. Radevic, “Limits of the Right to Free Access to Information in the Security Sector – Example of Montenegro”, *Foreign Legal Life*, No. 3/2016, p. 36.



relevant secondary act. The public authority has formed a register in accordance with that secondary act. The same act prescribes that the register can be used for the purpose of collecting statistical data and to carry out analytical tasks and planning public policies, and that it cannot be used for other purposes. The register, *inter alia*, includes the name of the company, identification number, date of birth, place of birth, sex, place of residence, including address, phone number, etc. Should the public authority allow access to this data? When deciding on access, what options can the public authority consider (potential exclusion of certain data)?

3. A public authority vested with the power to register companies has received a request to forward to the applicant, in electronic form, the copies or all databases this public authority possesses which related to natural and legal persons registered as for profit or non-profit organisations, in an electronically searchable format. The public authority has provided a public file available on its webpages that encompasses the data and documents, and direct links to these registers. How should the public authority act?

4. An applicant has requested from the National Bank access to documents that include information on which banks were subject to direct control by the National Bank in the previous year and what measures were taken with regards to those banks. The National Bank has denied the request and stated that a secondary act prescribes that data and documents collected by the National Bank in control proceedings are classified as confidential, and that disclosure of requested information would constitute a reputational risk for the banks that were subject to control, or that disclosure would adversely affect the financial results and capital of the banks due to a negative public reaction that might affect the banks' market position. Did the public authority act correctly? How would you conduct the public interest test and the harm test?



# Administrative Procedures

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## 1. ADMINISTRATIVE PROCEDURES AND INTEGRITY CHALLENGES IN THE WESTERN BALKANS

Administrative procedures are a set of rules on appropriate conduct when deciding from the position of the state power on the rights and obligations – including legal interests – of natural or legal persons under certain circumstances.<sup>1</sup> In the Western Balkan countries, this matter is regulated, as a rule, by law – by the General Administrative Procedure Act as the main, general legislation. However, rules on administrative procedures may additionally be found in a number of special regulations governing certain administrative areas, such as taxes, foreign currency operations, public procurement, etc.; consequently, these rules are applicable only to these specific areas.

While the administrative procedure laws are not part of the anti-corruption laws, they are important for integrity and anti-corruption efforts because they prescribe all the activities that need to be taken, or rather, the operations that need to be carried out in the business process to reach a decision on an administrative matter. They regulate also all the decisions that result from administrative procedures or that are made in the course of administrative proceedings.<sup>2</sup>

The group of persons vested with the power to pass decisions by implementing administrative proceedings is very wide and includes not only the civil service, but the entire public sector.<sup>3</sup> The cases involved are

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1 On the notion, meaning and importance of administrative proceedings see Dragan Milkov, *Administrative Law II – Administrative Activity*, Faculty of Law, Novi Sad 2016, p. 67

2 D. Milkov, *Administrative Law II – Administrative Activity*, Faculty of Law, Novi Sad 2016, p. 67.

3 These, primarily, public officials and state employees in public bodies and organisations (ministries, administrations, directorates, secretariats, agencies, institutes, centres) and persons working in local self-administration unit organisations. General service employees working in public services (publicly owned companies, public institutions and other organisations vested with public powers in accordance with law) have the power to decide

frequently complex. Public officials should protect only the interests of the institutions they work for or the institutions they represent, and not their own interests or other illegitimate interests. One of the functions of administrative procedures is to minimise the possibility of such abuse, and this is precisely why they are so important from the standpoint of integrity.

The role of administrative procedures in strengthening the integrity of individuals, public servants and the institutions they work for or represent, and consequently the integrity of the society as a whole, is multi-faceted. Firstly, administrative procedures the uniformity of actions in identical or substantially similar situations.<sup>4</sup> Secondly, whether administrative proceedings will be efficient and fast depends on the rules governing them – speed and effectiveness are important since delays in decisions that determine the rights and obligations of natural and legal persons may incur damage to such persons and may also open for corruption. In addition, administrative proceedings based on a set of pre-established and known procedures for performing certain tasks facilitate the training and specialisation of those who implement them, which represents a prerequisite for a correct application of the rules.<sup>5</sup> The rules contained in administrative procedures are important also for the efficient monitoring of the work of those who conduct administrative proceedings, which also helps prevent abuse of position.

However, administrative procedures *per se* are not a guarantee that the administrative functions will be carried out in practice. They need to be adequate, that is, the actions that are envisaged need to be carefully defined, based on previous experience and appropriate standardisation. However, if they are not applied as envisaged, it will be very difficult to prevent unlawful actions, which in turn may result in irregular decisions. This might easily infringe on the legal interests of the persons who are a party to the proceedings, and would also be contrary to the public interest – unlawful actions and irregular decisions jeopardise the legal state and the rule of law.<sup>6</sup>

The persons who apply administrative procedures have integrity when they act impartially, independently and transparently, applying the required

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on one's rights and obligations or legal interests; such powers are also vested in certain natural persons and other organisational forms (commissioners, ombudspersons, funds, sports' associations, and the like).

4 Đ. Dario, "Open Issues Relating to Administrative Proceedings in Croatia", in: *Collection of the Faculty of law of the University of Rijeka*, Rijeka 2007, p. 407.

5 D. Milkov, p. 68.

6 Đ. Dario, p. 67.

knowledge and skills in line with the ethical standards. Only under these conditions can they contribute to efficiency, transparency and accountability in their work, strengthening integrity of the institutions in which they work or which they represent. This also strengthens public integrity, due to the emerging public awareness that corruption is risky and unprofitable.

In Serbia, Macedonia, Montenegro, Bosnia and Herzegovina, Albania and Kosovo\*, a number of problems have been observed in terms of administrative proceedings that affect or may affect integrity. These problems are present to a lesser or greater degree in all these countries, and the following shortcomings can be singled out:

An excessive number of special rules for separate administrative procedures in specific administrative matters<sup>7</sup> (over 50 special procedures in total), which are not adequately harmonised with the overarching legislation.

In most countries, administrative procedure rules are overloaded with extraneous information or requirements, for example, numerous technical details. Such information should rather be transferred from the primary legislation and general acts to the secondary legislation. As a result of that, the regulations are not systematic, and the procedures are very complex. This makes the regulations difficult to understand and implement.

In most Western Balkans countries, the administrative procedure legislation tends to lack clear and precise criteria that a public official may use when exercising his/her discretion. In addition, even though some extent of discretionary power is necessary in administrative proceedings, in most regulations these powers are wider than it is necessary, which may lead to unequal treatment or corruption.

1. The issue of personal accountability of public officials to ensure lawfulness, expedience, and proper decisions is inadequately regulated. Namely, the majority of regulations do not regulate this type of accountability of public officials – the decision-making is, for the most part, formally vested with the manager (an individual or a collegiate body) and thus centralised.

2. Administrative procedures do not include adequate rules to ensure efficient control of public officials' work. This is visible especially in inadequate rules governing a party's right to have insight into the case file, inadequate rules governing efficient legal remedies, and lack of transparency of the administrative procedures.

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7 For instance, on customs, taxes, construction, pension insurance, health insurance, patents, foreign currency operations, interior affairs, reparcelling, etc.

3. Time limits for conducting procedural actions in the course of administrative proceedings are not adequately regulated, and there are no efficient sanctions for failure to observe them. As a result, administrative proceedings may be inefficient, which supports corruption.

4. Provisions governing administrative silence in most regulations in the observed countries are inadequate— instead of the stating that in case of no answer from the administration the party's request is granted, the general assumption is that the request is denied. This reflects negatively on integrity, as it enables public officials not to perform their tasks without any consequences, even when they intentionally fail to perform their tasks and intentionally harm the public interest.

5. The rules governing the recusal of public officials from proceedings are not sufficiently precise, which is most visible from the fact that the group of persons for which recusal is prescribed is too narrow. In some regulations, the criteria for recusal are insufficiently regulated, which results in too broad interpretation and is a potential source of abuse of position.

## 2. WHAT ARE THE INTERNATIONAL STANDARDS FOR ADMINISTRATIVE PROCEDURES WITH RESPECT TO INTEGRITY?

In the last decade of the 20<sup>th</sup> century, a series of corruption scandals have shaken not only countries in transition but also many developed countries around the world, which indicates the need for international (global) regulation of the ethical aspects of public services, and reinforcement of their integrity. Significant activities have been implemented by the most prestigious international organisations – the UN, OECD, Council of Europe, EU, and others. Thus, numerous documents, including international recommendations and guidelines for the introduction of new or for improving existing national norms and institutional framework have been adopted.<sup>8</sup> Although largely in the form of recommendations and guidelines, which are not formally binding, these documents are widely accepted as many countries have voluntarily incorporated them in their national legislation. One of the most important international conventions in the field of administrative procedures is the Convention for the Protection of Human Rights and Fundamental Freedoms, which promotes and protects the right to a fair trial.

8 S. Korac, *Ethical Dimension of Public Administration*, doctoral dissertation defended at the Faculty of Political Sciences, University of Belgrade 2013, p.151.

# 1. UN DOCUMENTS

1.1. One of the first documents adopted by the UN in this area was the International Code of Conduct (1996).<sup>9</sup> Article I, under the heading *General Principles*, specifies the rules relating to administrative procedures, promoting clearly the general principles of these procedures: the principle of independence (paragraph 1); the principle of acting in the public interest (paragraph 1); the principle of legality and the rule of law (paragraph 2); the principle of efficiency and effectiveness (paragraph 3); the principle of impartiality (paragraph 3); the principle of non-discrimination (paragraph 3); and the principle of proportionality.

1.2. In 2001, the UN General Assembly adopted the Standards of Conduct for the International Civil Service,<sup>10</sup> primarily intended for the UN officials. However, the impact of these standards goes beyond the UN, as the rules contained in them have been recognised as sound, and as such have been copied at the national level in several countries around the world. These standards relate also to administrative procedures, as they promote several general principles underlying these procedures: the principle of impartiality and independence (Article 5); the principle of impartiality (Articles 8, 9 and 11); the principle of accountability (Article 13) and the principle of non-discrimination (Article 15). In addition to emphasising the accountability of the UN officials in relation to the achievement of the UN's ideals, visions and values, the Standards of Conduct for the International Civil Service at the same time recall that integrity implies qualities such as probity, independence, loyalty, reliability, impartiality, incorruptness, tolerance, and understanding.<sup>11</sup>

1.3. The UN Convention against Corruption from 2003 is significant in that it obliges the signatories<sup>12</sup> of the Convention to develop pre-emptive anti-corruption policies and mechanisms, and to adopt a code of conduct to strengthen integrity (Articles 5 and 8).<sup>13</sup> More specifically, Article 1 sets out the objectives of the Convention: (a) to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) to promote, facilitate and support international cooperation and technical assistance

9 International Code of Conduct for Public Officials, Annex to Action against corruption—General Assembly resolution 51/59 of 12 December 1996, [www.un.org/documents/ga/res/51/a51r059.htm](http://www.un.org/documents/ga/res/51/a51r059.htm).

10 Standards of Conduct for the International Civil Service, International Civil Service Commission, UN General Assembly Resolution 56/244, dated 24 December 2001, <http://icsc.un.org/resources/pdfs/general/standardse.pdf>.

11 For more details see: S. Korac, p. 151.

12 The Convention has been widely accepted (140 States), including all the Western Balkan countries included in this study.

13 UN Convention against Corruption, UN General Assembly Resolution 58/4 dated 31 October 2003. Available at: [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf).

in the prevention of and fight against corruption, including asset recovery; (c) to promote integrity, accountability and proper management of public affairs and public property.

## 2. OECD DOCUMENTS

The OECD has adopted several Recommendations contained in the Principles for Managing Ethics in the Public Service.<sup>14</sup> A total of twelve of these principles elaborate four main integrity system management goals: determining and defining integrity, guiding towards integrity; monitoring integrity and enforcing integrity. These principles should serve as a guide for countries, and should be incorporated into their respective national instruments.

OECD/SIGMA (Support for Improvement in Governance and Management), established at the joint initiative by the OECD and the European Commission, also operates within the OECD. OECD/SIGMA has adopted several documents that are relevant to integrity of public officials, including the European Principles for Public Administration (1999), which are the most relevant to administrative procedures.<sup>15</sup> This document promotes and specifies the following administrative procedure principles: the principle of legal certainty, the principle of transparency, the principle of accountability, and the principle of efficiency and effectiveness.

In 2005, OECD/SIGMA developed a detailed checklist for the contents of a general law on administrative procedures.<sup>16</sup> This document specifies a list of the most important principles of administrative procedures that are relevant for integrity: legality, impartiality, procedural fairness, openness and transparency, accountability and liability. In addition, it includes principles governing the conduct of administrative proceedings (with the elaboration of their contents).<sup>17</sup> The fact that OECD/SIGMA monitors and oversees the administrative capacity-building process, as one of the main EU accession conditionalities, makes these rules binding in a certain sense, particularly for those countries that are in the process of joining the EU.<sup>18</sup>

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14 1998 Recommendation of the OECD Council on Improving Ethical Conduct in the Public Service, Including Principles for Managing Ethics in the Public Service, <http://www.oecd.org/gov/ethics/oecdprinciplesformanagingethicsinthepublicservice.htm>.

15 SIGMA, *European Principles for Public Administration*, SIGMA Paper No. 27, OECD publishing, 1999.

16 Check List for a General Law on Administrative Procedure, <http://www.sigmaweb.org/publications/37890936.pdf>.

17 These principles relate to: Scope of the Law; Principles Governing the Administrative Procedure; Administrative Act; Real Acts; Administrative Contracts; Special Procedures; Execution.

18 For more details see: D. Vucetic, "European Administrative Procedural Rules and General Administrative Procedure of the Republic of Serbia", in: *Collection of the Faculty of Law in Nis*, Nis 68/14, p. 178.



### 3. COUNCIL OF EUROPE DOCUMENTS

The standards in the EU for integrity and conduct of public officials are set out in several documents of the Council of Europe. The most important of these is undoubtedly the Model Code of Conduct for Public Officials from 2000.<sup>19</sup> The integrity standards specified in this document aim to assist public officials to adapt their conduct, but also to make the general public in Europe aware of the conduct they should expect from their public officials.<sup>20</sup> Article 4 of the above Model Code clearly states the principle of the legality of public officials' actions, Article 5 promotes the principle of independence and impartiality, while Articles 6 and 7 promote and protect the principle of proportionality. However, the document is not formally binding and is more of a *soft law*. Nevertheless, its rules are widely accepted and incorporated into the national legislation on administrative procedures in many countries.

The Council of Europe has also adopted several recommendations that are relevant for administrative procedures. These include: Resolution (1977) 31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities;<sup>21</sup> Recommendation Rec (2003) 16 on the Execution of Administrative and Judicial Decisions in the Field of Administrative Law;<sup>22</sup> Recommendation CM/Rec (2007) 7 of the Committee of Ministers to Member States on Good Administration;<sup>23</sup> Recommendation No. R (80) 2 Concerning the Exercise of Discretionary Powers by Administrative Authorities,<sup>24</sup> etc. The aim of these recommendations is not to unify the member states' legislation on general administrative procedures but, as stated in Resolution 31 from 1977, to improve the general recognition of specific principles in the member states' legislation and practice. In other words, these recommendations serve as a roadmap for the achievement of equity in the relations between the public administration and the citizens.<sup>25</sup>

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19 Code of Conduct for Public Officials, Recommendation Rec (2000)10 from 11 May 2000, <http://workspace.unpan.org/sites/internet/Documents/UNPAN038306.pdf>.

20 S. Korac, p. 152.

21 Resolution (77)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2009032&SecMode=1&DocId=752646&Usage=2>.

22 Recommendation Rec(2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805df14f](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805df14f).

23 Recommendation CM/Rec (2007) 7 of the Committee of Ministers to member states on good administration, [https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2007\)7E.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2007)7E.pdf).

24 Recommendation No. R (80) 2 Concerning the exercise of discretionary powers by administrative authorities <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=601039&SecMode=1&DocId=674666&Usage=2>.

25 D. Vucetic, pp. 176–178.

The Convention for the Protection of Human Rights and Fundamental Freedoms<sup>26</sup> was adopted under the auspices of the Council of Europe, and it has been ratified by all the Western Balkan countries included in this study. The part of the Convention relevant to administrative procedures is Article 6, which regulates the right to a fair trial. The European Court of Justice also applies this Convention as part of European law, although the EU is not its signatory.

#### 4. EU DOCUMENTS

The European Union has paid considerable attention to the issue of the public officials' integrity. That is confirmed particularly by the fact that, in accordance with Article 41 of the 2000 Charter of Fundamental Rights of the European Union, the political commitment of all the member states to ensure the citizens the right to good administration was proclaimed at the EU summit in Nice.<sup>27</sup> Article 254(a) of the Treaty of Lisbon provides that in carrying out their mission, the institutions, bodies, offices, and agencies of the Union shall have the support of an open, efficient, and independent European administration, and that the institutions, bodies, offices, and agencies of the Union should conduct their work as openly as possible to promote the participation of civil society.<sup>28</sup>

The provisions of Articles 15 and 16 of the Treaty on the Functioning of the European Union<sup>29</sup> contain the rules on the transparency of administrative actions conducted by the EU bodies, access to documents, and the processing of personal information. From the perspective of administrative procedures, the most important provision is that of Article 298, paragraph 1, of the Treaty on the Functioning of the EU, as it emphasises the procedural dimension of the right to good administration<sup>30</sup> (promoted under Article 41 of the EU Charter of Fundamental Rights, adopted in 2000, in Nice). However, these provisions are of a general nature, and need to be further elaborated through secondary legislation. In this regard, the most widely

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26 The Convention for the Protection of Human Rights and Fundamental Freedoms. Available at: [http://www.echr.coe.int/Documents/Convention\\_SRP.pdf](http://www.echr.coe.int/Documents/Convention_SRP.pdf).

27 "Charter of Fundamental Rights of the European Union", *Official Journal of the European Communities*, 2000/C 364, 18 December 2000, [http://ec.europa.eu/comm/external\\_relations/human\\_rights/doc/charter\\_364\\_01en.pdf](http://ec.europa.eu/comm/external_relations/human_rights/doc/charter_364_01en.pdf), p. 18.

28 "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community", Lisbon, 13 December 2007, *Official Journal of the European Union*, C 306, 17 December 2007, <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>, pp. 50, 118.

29 Treaty on the Functioning of the European Union (consolidated version), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12016ME/TXT>.

30 Article 298, paragraph 1 of the Treaty on the Functioning of the EU reads: In carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration.

recognised document at the international level is the European Code of Good Administrative Behaviour, which was drafted by the European Ombudsman and adopted by the European Parliament in 2001, making it binding for the public officials in all the authorities and bodies of the Union.<sup>31</sup>

The EU has adopted several directives that are relevant to administrative law, the most important one being Directive 2006/123/EC on Services in the Internal Market,<sup>32</sup> adopted on 12 December 2006. It requires the simplification of administrative procedures (Article 5), the designation of points of single contact with the administration (Article 6), the rule of the right to information (Article 7), and the use of electronic means of communication in administrative proceedings (Article 8). It also promotes the principle of non-discrimination and the principle of proportionality (Articles 10 and 20), as well as the principle of transparency (Article 22(1)(c)).<sup>33</sup>

### 3. WHAT IS THE GENERAL LEGAL FRAMEWORK FOR ADMINISTRATIVE PROCEDURES IN THE WESTERN BALKANS COUNTRIES?

#### 3.1. ALBANIA

**Legal framework:** The main source of the administrative procedural law in the Republic of Albania is the Administrative Procedure Act from 2015<sup>34</sup> (hereinafter: the APA).

**The principle of legality:** The principle of legality is regulated by Article 4 of the APA, which provides that public administration bodies exercise their

31 The European Code of Good Administrative Behaviour, [www.ombudsman.europa.eu/resources/code.faces](http://www.ombudsman.europa.eu/resources/code.faces).

32 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0123>.

33 D. Vucetic, (pp. 178–179) states also that the sources of the European administrative procedural law do not have the necessary clarity and precision, and that some of the provisions of the Code are not followed by the relevant legal norms, and that the Committee on Legal Affairs has proposed to the European Commission that, on the basis of the authorisation referred to in Article 298 of the Treaty on the Functioning of the EU, it should initiate the adoption of the European Administrative Procedure Act. However, this initiative has not yet been implemented, and there are many opponents of such a stance, indicating that the EU documents have sufficient grounds for the harmonisation of the administrative procedural rights, and even for their unification, and that recourse to the powers referred to in the above Article 298 of the Treaty on the Functioning of the EU does not have sufficient arguments, as it is relevant primarily to the European administration (and not to the national administrations).

34 General Administrative Procedure Act, Act No. 44/2015 from 30 April 2015.

administrative activities in accordance with the Constitution of the Republic of Albania, ratified international agreements, and the applicable legislation in the Republic of Albania, within the scope of their powers, and in conformity with the objectives for which those powers have been granted to them (paragraph 1). Paragraph 2 stipulates that the legitimate rights and interests of any party to the proceedings cannot be violated by the actions of the administrative authorities unless it is provided for by law and in accordance with the procedure prescribed by the law. Article 10 of the APA regulates the principle of lawful exercise of discretionary powers, and in paragraph 1 explicitly states that such powers should be exercised under the following conditions: they are provided for by law; they do not exceed the limits set by law; the decision adopted is in accordance with the objective for which the discretionary power has been granted and in accordance with the general principles of the APA; and the decisions adopted is in line with the previous decisions of that authority on identical or similar matters.

**The principle of proportionality:** The principle of proportionality is regulated by Article 11. of the APA, which in paragraph 1 provides that the public authorities, when limiting the rights or interests of the party to the proceedings, must comply with the principle of proportionality. Paragraph 2 of the same article specifies when it is considered that the public authorities' actions are in accordance with the principle of proportionality: that is necessary to achieve the purpose of the law and the means and measures that affect the rights or legal interests of the party to the least extent possible have been applied; that is suitable for achieving the purpose set forth by law; and such means and measures are proportionate to the need that has caused their implementation.

**The principle of accountability:** The principle of accountability is regulated explicitly by Article 15 of the APA, as a general principle of administrative procedures. It is specified that, when conducting administrative proceedings, the public authorities and their employees shall be accountable for the damage caused to private parties, in accordance with the relevant regulation. There is no explicit rule on the delegation of the decision-making power in administrative proceedings to a responsible official. In addition, Article 90 of the APA explicitly states that the final decision in the administrative proceedings is adopted by the public authority, while Article 99, paragraph 3, prescribes that the decision is signed off by the responsible official or the chairperson, i.e. the secretary of the collegial body.

**The principle of transparency:** The principle of transparency has been specified as one of the general principles of the APA. It is regulated by Article 5, which provides, as a general rule, that the public authorities should perform their activities transparently and in cooperation with the natural

or legal persons involved in that activity.<sup>35</sup> Article 10 of the APA specifies the principle of providing active assistance, stipulating explicitly the right of the parties and other persons involved in the administrative proceedings to obtain information on the proceedings, and to inspect the case files, including electronic records. Paragraph 3 of Article 10 stipulates that a public authority should inform the parties to the proceedings about their rights, to prevent them from suffering any negative consequences on that account.

**The principle of effectiveness and procedural economy:** The Albanian APA does not specify the principle of effectiveness and procedural economy as one of the general principles of administrative procedures. However, the rules relevant to procedural economy are contained in Article 91 of the APA, stipulating, as a general rule, that administrative proceedings must be completed promptly, within the legal time limits specified by a separate law (paragraph 1), or if such time limit is not specified, within 60 days (paragraph 2).<sup>36</sup> In the event of the state of emergency, the administrative proceedings must be completed within three months from the date of the abolishment of the state of emergency (paragraph 3). Any failure to comply with the specified time limits implies the obligations of the responsible authority or the responsible official to explain directly, within maximum 10 days, to the superior authority the reasons for the failure to comply with the time limit. Regarding the principle of effectiveness, which primarily requires a successful and comprehensive decision on the rights and intentions of the parties to the proceedings, the Albanian APA does not provide for a specific rule. However, that is linked to the principle of *ex-officio* investigation referred to in Article 77 of the APA, according to which a public authority should establish *ex officio* the relevant facts and evidence and decide on the limits of such proceedings. Paragraph 3 of Article 77 stipulates explicitly that the authority conducting pre-trial proceedings should obtain *ex officio* the evidence of facts, events or subjective circumstances. For that purpose, it may request from other authorities to provide specific evidence and may request the party to provide only the necessary elements for the identification. However, Article 78 of the APA specifies the obligation of cooperation between the public authority and the party in the course of the administrative proceedings, and, in this

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35 The principle of transparency is complemented in the APA by the principle of notification referred to in Article 6, according to which everyone has the right to access public information about the activities of public authorities, without the obligation to justify the request. If a public authority refuses to provide such information, it is obliged to adopt its decision in writing and to explain it, and to provide instructions about the right to appeal, as part of the decision. The public authority is not obliged to disclose information that presents a state secret (Article 7 of the APA, regulating the principle of protection of the state secret), or confidential personal information that is considered secret under separate regulations (Article 8 of the APA, regulating the protection of confidential data).

36 According to paragraph 3 of Article 91, it is envisaged that the 60-day time limit begins to run from the date when the party that initiated the administrative proceedings has submitted all the documentation necessary for deciding in that proceedings.

respect, the party is obliged to provide the evidence requested by the public authority at their request.

**The principle of impartiality:** The principle of impartiality points to the necessity for public officials to be objective in relation to the parties to the proceedings, which is a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle is elaborated in the rules of Articles 30–32 of the APA. Legal impediments to the conduct of administrative proceedings are specified by Article 30, and include the following events: a) public official has a direct or indirect personal interest in the decision-making at hand; b) his/her spouse, cohabitant or relatives up to the second degree, have a direct or indirect interest in the decision-making at hand; c) the public official or the persons referred to in sub-paragraph b) above have a direct or indirect interest in a case objectively the same or under the same legal circumstances as the issue at hand; ç) the public official has participated as expert, adviser, private representative or advocate in the case at hand; d) persons referred to in sub-paragraph b) of this article, have participated as experts, representatives, advisors or advocates in the case at hand; dh) against the public official or the persons referred to in sub-paragraph b) above a judicial process has been initiated by the parties in the administrative proceedings at hand; e) the case in question is an appeal against a decision taken by the public official or by the persons referred to in sub-paragraph b) above; è) the public official is member of a collegial body, or the persons referred to in sub-paragraph b) above are debtors or creditors of the interested parties in the administrative proceedings at hand; f) the public officials or the persons referred to in sub-paragraph b)above have received gifts from the parties before or after the start of the administrative proceedings at hand, g) the public official or the persons referred to in sub-paragraph b) above are friendly or hostile towards the interested parties in the administrative proceedings at hand; gj) the public official or the member of a collegial body or the persons referred to in sub-paragraph b) above have been involved in any of the following events: i. possible negotiations for future employment of the official or the persons referred to in subparagraph b) above while exercising office, or negotiations for any other form of post-office private interest relations; ii. engagement in private activities for profit purposes or any income-generating activity, as well as engagement in profit and non-profit organisations, trade unions or professional, political, government organisations, or any other organisations, h) in any case when it is provided by the legislation in force. The recusal procedure is regulated by Article 31 of the APA, specifying that a public official who observes any of the above impediments (which relates to him/her personally or to any other public official) must promptly inform his/her superior about it, in order for the public

official with the impediment disqualifying him/her to conduct the proceedings to be recused. A request for recusal may also be filed by the party to the proceedings on grounds of any impediment referred to in Article 30, and such request must be submitted in writing and properly documented. In each of these events, the public official will be suspended from the proceedings until the superior authority has decided on the request for recusal.

### 3.2. BOSNIA AND HERZEGOVINA

**Legal framework:** The main sources of the administrative procedural law in Bosnia and Herzegovina (hereinafter: BiH) include: 1. at the state level – the 2002 General Administrative Procedure Act<sup>37</sup> (hereinafter: the BiH GAPA); in the Federation of BiH – the 1998 General Administrative Procedure Act<sup>38</sup> (hereinafter: the FBiH GAPA); 2. in the Republic of Srpska – the 2002 General Administrative Procedure Act<sup>39</sup> (hereinafter: the RS GAPA).

**The principle of legality:** The principle of legality is regulated by Article 4 of the BiH GAPA, prescribing that the authorities acting in administrative matters should act in compliance with the laws, other regulations, and general acts of the institutions vested with public powers, adopted by such institutions on the basis of their public powers (paragraph 1). When public authorities have discretionary powers to decide, they are obliged to decide within the scope of their powers, and in accordance with the objective for which such powers have been granted (paragraph 2).<sup>40</sup> Article 4 of the FBiH GAPA stipulates the identical rule, while the Republic of Srpska regulates the principle of legality in Article 5 of the RS GAPA with almost identical content. However, none of the laws stipulates that a public authority, or a public official, is obliged to take into account previous decisions made on identical or similar administrative matters. This legal gap negatively affects the legal security of the parties in the administrative proceedings.

**The principle of proportionality:** The principle of proportionality is regulated by Article 5 of the BiH GAPA, and by Article 5 of the FBiH GAPA, through the rules specified under the heading *Principle of Protection of the Rights of the Parties and Protection of the Public Interest*. Both the laws stipulate the

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37 The General Administrative Procedure Act, *The Official Gazette of BiH*, Nos. 29/2002, 12/04, 88/07, 93/09, 41/13 and 53/16.

38 The General Administrative Procedure Act, *The Official Gazette of the FBiH*, Nos. 2/98 and 48/99.

39 The General Administrative Procedure Act, *The Official Gazette of RS*, Nos. 13/2002, 87/7 and 50/10.

40 Article 4, in paragraph 3, explicitly stipulates that the GAPA applies also to institutions that have public power to decide on administrative matters based on discretionary powers.



obligation of the authorities and institutions vested with public powers, when imposing obligations on the parties in the administrative proceedings and choosing among several measures that achieve the goal intended by the law, to apply those that are more favourable for the party (Article 5, paragraph 3, of the BiH GAPA and FBiH GAPA). The Republic of Srpska does not regulate the proportionality principle separately either. It is not stipulated under Article 6, which regulates the principle of the protection of the parties' rights and the public interest.

**The principle of accountability:** The principle of accountability is not explicitly provided for within the framework of the GAPA that regulates the general principles of administrative procedure. However, the rules relevant to this issue are derived from other applicable legal rules. Thus, Article 10 of the BiH GAPA regulates the Principle of Independence in Decision-Making, according to which the public authority conducting the proceedings decides independently, complying with the principle of legality, and the authorised official establishes independently the facts and circumstances on the basis of which he/she applies the regulations, or the general acts, in a particular case. Article 36, in paragraph 1, specifies that "the official authorised to conduct the proceedings and to decide" is the manager of the public authority or the official in the same public authority authorised by the manager to decide in the administrative matters. It is stipulated that specific actions in the course of the proceedings may be taken by another professional official under the authorisation by the manager of the administrative authority,<sup>41</sup> or that the manager or the head of the public authority may authorise another official from the public authority to issue a decision.<sup>42</sup> The same principle applies also to the administrative matters decided by an institution vested with public powers, and in that case a decision is made by the manager of that institution, or by the official authorised by the manager to do so (Article 36, paragraph 2). The signatory of the decision is specified by Article 209 of the BiH GAPA, stipulating that a decision is signed off by the official person who is authorised, pursuant to Article 36, paragraph 1, to issue the decision (the head, or the manager, of the public authority or the official authorised by him/her). If a decision is made by a collegial body, it is signed off by the chairperson of that body. The Federation of BiH and the Republic of Srpska stipulate almost identical rules. In the Federation of BiH, they are specified in Article 14 (principle of independent decision-making), Articles 29 and 32 (the official person authorised to conduct the procedure, or the

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41 Article 30 of the GAPA stipulates that in the administrative matters under the competence of the Council of Ministers of Bosnia and Herzegovina, the proceedings are conducted and prepared by the authorised person or body designated by the act by the Council of Ministers, unless otherwise provided by law or other regulation.

42 This person cannot be authorised only to issue an act deferring the execution of a decision.



chairperson of the collegial body as the person in charge of conducting the proceedings), Article 202 (signatory of the decision), while in the Republic of Srpska they are specified in Article 11 of the RS GAPA (corresponding to Article 14 of FBiH GAPA); Article 31.a. (corresponding to Article 29 of the FBiH GAPA); and Article 199 (corresponding to Article 202 of the FBiH GAPA). In accordance with the above, it is clear that none of the three laws includes explicit rules on the personal accountability of public officials for unlawful and unreasonable conduct.

**The principle of transparency:** The principle of transparency has been specified as a general principle only in the FBiH GAPA. It is regulated by Article 6, stipulating that, when acting in administrative matters, the administrative authorities and institutions vested with public powers are obliged to provide the parties in the proceedings access to the necessary information, the prescribed forms, and the administrative authority's webpage, and to provide them with other notices, advice, and professional assistance (paragraph 1). However, this right does not include the information that is classified in accordance with the regulations on the protection of personal information, or confidential information (paragraph 2). From the point of view of the administrative proceedings, the principle of transparency is reflected also in the way in which the law regulates the parties' rights to inspect the case files and to be informed about the course of the proceedings. While at the BiH state level and in the Republic of Srpska the principle of transparency is not specified within the general principles in the GAPA, it can be derived indirectly from the recognised rights of the parties, including third parties who have a legal interest, to inspect the case files and to be informed about the course of the proceedings.<sup>43</sup> The FBiH GAPA stipulates this issue in Article 72.<sup>44</sup>

**The principle of effectiveness and procedural economy:** At the BiH state level, the GAPA does not stipulate explicitly the principle of effectiveness and procedural economy. However, this issue is covered to a certain extent by the principle of procedural efficiency (Article 6). It is stipulated that administrative

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43 This issue is stipulated in Article 79 of the BiH GAPA, i.e. Article 68 of the RS GAPA. The rules of the above articles correspond in terms of their content to the rule of Article 72 of the FBiH GAPA.

44 With respect to this issue, it is stipulated that the parties have the right not only to access the case files, but also to copy, or duplicate, the files at their own expense. In addition to the parties in the proceedings, the same right is also recognised to third parties who can prove that they have a legal interest in doing so. However, this right does not include: records of deliberation and voting, official reports and draft decisions, or confidential records, if their disclosure could harm the purpose of the proceedings, or if it is contrary to the public interest or the justified interest of one of the parties or a third party. A request to access the case file does not have to be approved, but, in that case, the party, or interested third party, has the right to file a complaint. Such complaint must be decided promptly, within of 48 hours. The above rules are based on the Administrative Procedure Act that was in force in the former SFRY republics and has not been substantially revised since.

proceedings should be resolved promptly, completely and properly, including a comprehensive examination of the matter at hand. In contrast, the FBiH GAPA and the RS GAPA regulate the principle of procedural economy as one of the general principles of administrative procedures (Article 11 of the FBiH GAPA; Article 14 of the RS GAPA). Both the laws stipulate the identical rule that requires the administrative proceedings to be conducted promptly, and with as little cost as possible for the party in the proceedings, and for other participants in the proceedings. In the FBiH GAPA, this principle complements the principle of efficiency (Article 8), obligating the public authorities and institutions vested with public powers to ensure that the rights and interests of the parties in the proceedings are exercised efficiently, or prompt, complete and proper resolution of administrative matters, including their comprehensive examination. While the principle of effectiveness is not formulated as one of the general principles of administrative procedures, it is elaborated under the rule of Article 127, paragraph 3, of the FBiH GAPA, stipulating that the public official conducting the procedure must obtain *ex officio* the information about the facts available in the official records (maintained by that or another public authority, or by a public company or a public institution). However, the RS stipulates explicitly that the principle of economy has no priority over the principle of truth (Article 8 of the RS GAPA). As in the FBiH GAPA, in the Republic of Srpska, the principle of effectiveness is not stipulated explicitly, and it is covered by Article 124 of the RS GAPA, which obligates the public authorities to obtain *ex officio* the information about the facts available in the official records.

**The principle of impartiality:** The principle of impartiality points to the necessity for public officials to be objective in relation to the parties in the proceedings, as a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle is elaborated in the rules of Article 42 of the BiH GAPA, Article 35 of the FBiH GAPA, as well as Article 32 of the RS GAPA, which specify the grounds for recusal of the authorised official from the administrative proceedings. With that respect, the BiH GAPA stipulates: a specific relationship with the party to the proceedings (blood relations), participation of the official in the administrative proceedings (in any capacity), or participation of the official in the first-instance procedure. The same grounds for recusal are stipulated in the RS GAPA, and in the FBiH GAPA, with the latter (the FBiH GAPA) expanding the above list to include also the following grounds: the official is in a close personal relationship with the party or with a person authorised to represent the party; he/she has economic and business relations with the party; or he/she behaves towards the party in a discriminatory manner. All the observed legislation stipulates the recusal procedure in an almost identical way: as soon as he/she learns of any of the grounds for not taking part in handling or deciding on

a particular case, the official is obliged to suspend further involvement in the case, and to notify the head of a public authority about it.<sup>45</sup> The recusal procedure may also be initiated by the party to the proceedings, not only on the legally prescribed grounds, but also in any other circumstances that call into question the impartiality of the official (Article 44 of the BiH GAPA, Article 37 of the FBiH GAPA, and Article 34 of the RS GAPA). This general provision allows for the extension of the grounds for recusal beyond the list specified by law, giving the discretionary power to the competent authority to decide upon it.

### 3.3. KOSOVO\*

**Legal framework:** the General Administrative Procedure Act from 2016 (hereinafter: the GAPA), effective from June 2017.

**The principle of legality:** The principle of legality is regulated by Article 4 of the GAPA and requires (in paragraph 1) the public authorities to perform administrative activities in accordance with the Constitution, and the general administrative rules – the GAPA; they are applied within their scope of action and in accordance with the goal for which they have been established. Paragraph 2 stipulates that the statutory rights and the interests of the party cannot be violated by the activities of the administrative authorities unless otherwise provided by law. Administrative discretion is governed by paragraph 3 of the GAPA, providing for the following conditions under which this power may be exercised: 1. that there is a statutory discretionary power, 2. that the person exercising administrative discretion is authorised to do so by law, and that in that case he/she decides taking into account particularly the principle of proportionality, 3. that the decision is not contrary to all generally accepted scientific or technical norms and that is not contrary to the fundamental legal principles or human reason. In addition, Article 8 of the GAPA explicitly stipulates the principle of lawful and reasonable expectations – the predictability principle. This principle is included also within the principle of legality, as it strengthens the legal certainty by requiring public authorities to act in a predictable manner, respecting legitimate expectations (rule of law, the principle of legality), and previous decisions of the administrative authority in the same matter.

**The principle of proportionality:** is governed by Article 5 of the GAPA as one of the general principles of administrative procedure. Paragraph 1 of Article 5 stipulates that specific rights or legal interests of the party may

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45 In accordance Article 35 of the GAPA, the authority that decides on the recusal is the high-ranking public official managing the public authority, while the recusal of high-ranking public officials is decided by the Government.

be restricted exclusively in accordance with the principle of proportionality. Paragraph 2 provides for the conditions for the confirmation of compliance with the principle of proportionality as follows: the restriction of the party's rights or legal interests is necessary to achieve the objectives prescribed by law; the restriction is appropriate for achieving that objective; the restriction is proportionate to the desired objective (the restriction is not more extensive than is necessary, e.g. fines).

**The principle of accountability:** While it is not stipulated as a general principle of administrative procedure, the principle of accountability is derived from other GAPA legal rules. Specifically, Article 26 regulates the issue of the responsible official – it sets down the rules for the appointment of the responsible official for the administrative procedure, and refers, in this regard, to the public authority internal organisation rules, unless the law in this respect explicitly provides otherwise. The manager of a public authority designates, in accordance with the internal organisation rules, a unit responsible for each type of administrative procedures under the competence of the public authority. The head of the responsible unit may conduct the proceedings personally or may delegate it to another officer in the unit. The law stipulates explicitly that the head of the responsible unit or the official designated by him/her to conduct specific proceedings is responsible for conducting that proceedings (Article 26, paragraph 3). A collegial body may also delegate the obligation to conduct administrative proceedings and decide in the proceedings to its member, who is obliged to inform the collegial body about the outcome of the conducted proceedings (paragraph 4). Sub-delegation is expressly forbidden (Article 27 of the GAPA), which means that the official designated in accordance with these rules cannot transfer that authority to another officer. The responsible official conducts the administrative proceedings, decides on the matter, signs off the decision he/she has adopted, and informs the party about it. This rule sets the legal basis for the personal accountability of public officials (their disciplinary accountability).

**The principle of transparency:** This principle is regulated by Article 9 of the GAPA, which in paragraph 1 sets out the obligation of public authorities to act in a transparent manner. Moreover, on the basis of the GAPA itself (paragraph 2 of Article 9), a public authority guarantees the right of the party to be informed in the course of the proceedings about the state of their case, by appropriate means, and in accordance with the law. The party may be denied such information expressly to protect personal, business or professional information, which is protected by the relevant laws (paragraph 3). However, this article does not stipulate the right of third parties to be informed about the actions of public authorities. This right could be derived

indirectly from Article 11, regulating the information and active assistance principle (which, as defined in the law, is not limited to the right of the party as a participant in the proceedings to access the information relating to that proceedings, and includes also third parties). Specifically, paragraph 3 of that article stipulates that the authority must provide to the interested persons and the parties to the proceedings the information relevant for the conduct of the administrative proceedings. However, that is insufficient.

**The principle of effectiveness and procedural economy:** Article 10 of the Kosovo\* GAPA formulates this principle as the principle of non-formality and efficiency of administrative procedure. The non-formal nature of the procedure is regulated by paragraph 1 of that article, which stipulates that the administrative procedure is not subject to any particular form, unless it is expressly provided otherwise by law. Paragraph 2 stipulates that the proceedings must be conducted as efficiently as possible (as promptly as possible, with the minimum possible cost), the only limitation being not to jeopardise that that is necessary for the legitimate and appropriate outcome of the administrative procedure. In this case, the Law does not provide sufficient guarantees for the effectiveness of the proceedings (appropriate and complete resolution of the administrative matter on the basis of the properly and fully established factual situation and proper application of material law), favouring efficiency, or economy. That is not a good solution as some complex cases require a more careful procedure and are more time intensive. The limitation of the principle of economy by referring to non-jeopardising that that is necessary for a legitimate and appropriate outcome of the proceedings is rather too arbitrary and gives room for abuse in the interpretation of the principle in specific situations.

**The principle of impartiality:** This principle is stipulated explicitly as the principle of administrative procedure (Article 7), and it is elaborated by the provisions on the recusal of public officials (Articles 29–31). Thus, in principle, (Article 7, paragraphs 1 and 2), a public authority, or an official, must act objectively and impartially, and must not be influenced by any professional, family, friends', political interests or other political pressures. The grounds for recusal of public officials are specified in Article 29 of the GAPA, which in paragraph 1 provides for a general prohibition for a public official to be involved in the administrative proceedings if he/she has a direct or indirect personal interest in the subject matter at hand. Sub-paragraphs 1.1. to 1.10. list the situations that particularly point to this (1.1.he/she is related to the party, the private representative or advocate of the party to any degree of lineal consanguinity, or to the fourth degree of collateral consanguinity, or he/she is a spouse or a relative up to the second degree, irrespective of whether the marriage has been dissolved or not; 1.2. his/her spouse, cohabitant or

relatives up to the second degree, have a direct or indirect personal interest in the matter at hand; 1.3. he/she is the party, the private representative or advocate of the party, or he/she is a debtor or a joint debtor to the party, or he/she was heard as a witness or an expert, or he/she participated as the adviser or advocate of the party; 1.4. he/she or the persons referred to in sub-paragraph 1.2. above have a direct or indirect interest in the case that is similar to the case at hand; 1.5. the persons referred to in sub-paragraph 1.2. above participated as experts, witnesses, legal advisors or attorneys in regard to the matter at hand; 1.6. he/she or any person referred to in sub-paragraph 1.2. above is in a judicial process with the parties; 1.7. he/she is a member of or the superior authority deciding on an appeal against a decision brought by him/her personally or by the persons referred to in subparagraph 1.2. above; 1.8. he/she or the persons referred to in subparagraph 1.2. above have received from the parties to the administrative proceedings gifts or services at prices significantly lower than the market value before or after the beginning of the proceedings at hand; 1.9. he/she is involved in a guardianship, adoptive, or foster relationship with the party, the private representative or advocate of the party; 1.10. in any other situation that is expressly stipulated by law or that might call in question his/her impartiality.

The recusal procedure is regulated by Article 30 of the GAPA, including the rule that any official who suspects that he/she might be in any situation referred to in Article 29 (or who suspects that another official might be in such a situation) should immediately recuse himself/herself from the administrative procedure and notify his/her superior about the recusal, or notify his/her superiors about any suspicion of an impediment involving another official. The recusal of an official person may also be requested by the party to the proceedings on any grounds referred to in Article 29. The final decision on recusal is made by the competent superior authority (Article 31).

### 3.4. MACEDONIA

**Legal framework:** The main source of administrative procedural law in the Republic of Macedonia is the General Administrative Procedure Act from 2015<sup>46</sup> (hereinafter: the GAPA), which has been in effect since 1 July 2016.

**The principle of legality:** The principle of legality is regulated by Article 5 of the GAPA, which provides for the obligation of the public authorities<sup>47</sup>

46 General Administrative Procedure Act, *Official Gazette of the Republic of Macedonia*, No.124/15.

47 The term “public authorities” is new, and it was introduced by the 2015 General Administrative Procedure, which applies to all authorities and organisations that conduct administrative proceedings and decide in these proceedings. These include, first of all,

to act in accordance with the Constitution of the Republic of Macedonia, its legislation, and ratified international treaties (paragraph 1). Paragraph 2 of the same article provides explicitly that a public authority is obliged to ensure legal consistency, or to implement the law in the same way in the administrative matters that are based on identical or similar factual situations. When deciding on the basis of discretionary powers, the public authority should act within the limits of the law that has granted it such powers, and in accordance with the purpose for which such powers have been granted, and is obliged to justify such decisions (paragraph 3).

**The principle of proportionality:** The principle of proportionality is governed by Article 6 of the GAPA, and this is a new principle that has replaced the Principle of Protecting the Rights of Parties and the Protection of the Public Interest, contained in the previous GAPA. The essence of this principle is the obligation of the public authority to enable the parties to the administrative proceedings to exercise and protect their rights and legal interests without any excessive limitation, without jeopardising the public interest (Article 6, paragraph 1). In addition, when the party to the proceedings or other participant in the proceedings is imposed obligations in accordance with the law, the public authority must apply the legal measure that is the least severe for the party, or other participant in the proceedings, provided that that measure can achieve the intended legal objective (paragraph 2). It is understood that this general rule refers to the situation when a decision can be implemented in different ways, through different measures.

**The principle of accountability:** While the principle of accountability is not explicitly regulated in the part of the GAPA that regulates the general principles of administrative procedures, it is reflected in the principle of the delegation of powers in Article 13 of the GAPA. The Law seeks to limit the role of political appointees, directors, mayors, rectors, deans, directors of institutes and the chairpersons of other management bodies in public institutions to decide on administrative matters. Accordingly, each public authority should establish a special department or sector to manage specific

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ministries, public administration authorities, organisations established by law, other state authorities, legal and natural persons entrusted with the public competencies, as well as municipal authorities, the city of Skopje authorities, and generally the City of Skopje (local government authorities) when, acting in their legal capacity, they act, decide on (adopt individual administrative acts) and undertake other administrative activities in the administrative matters. The GAPA applies also to situations when a public authority carries out its duties from the administrative law through other unilateral administrative actions, which are not covered by the administrative act but relate to the citizens' rights, obligations or legal interests. Also, the GAPA needs to provide legal protection in the delivery of services of general interest (e.g. telecommunications, electricity, water supply, etc.), to ensure that the privatisation of the delivery of public services does not impair the legal protection of the users of these services. B. Davitkovski, *et al.*, "New General Administrative Procedure Act in the Republic of Macedonia and its Applicability", *Legal Life* 10/2016, p. 269.



types of administrative procedures, and the head of that sector or department, or the authorised official, would be primarily a professional and competent official (and not an office holder), and as such they would be authorised to conduct administrative proceedings and to decide in administrative matters. This principle is operationalised in the rules of Article 24 of the GAPA where it refers to the authorised official. It is stipulated that a public authority should act through an authorised official, who is designated by a separate law or secondary regulation. If such authorised official has not been appointed, a head of a public authority should adopt an organisational act designating the organisational unit responsible for each type of administrative activities and its competences.<sup>48</sup> The authorised official should conduct and complete the proceedings. This provides the legal basis for the personal accountability of public officials in the public authorities that decide in administrative proceedings.

**The principle of transparency:** While the principle of transparency is not specified as a separate principle in the GAPA, it is reflected in the legal rules for administrative proceedings that regulate the party's rights to inspect the case files and to be informed about the course of the proceedings. Thus, Article 42 of the GAPA stipulates that the parties to the proceeding have the right not only to inspect the case files, but also to copy or duplicate the files at their own expense. In addition to the parties to the proceedings, the same right is also recognised to all third parties who can prove that they have a legal interest in doing so (paragraph 1). The party to the proceedings, or a third party, should submit a request to inspect the case file to the public authority, which should decide on the request immediately (paragraph 2). As a rule, case files are inspected on the premises of the public authority that maintains the records, under the supervision of an official. Exceptionally, subject to a special approval, they may be inspected in the offices of another public authority or in a diplomatic/consular mission of the Republic of Macedonia abroad (paragraph 3). In accordance with Article 42, paragraph 4, of the GAPA, with respect to files kept in electronic form, the public authority is obliged to provide all technical assistance to allow such files to be inspected or copied. The approval for the duplication of files in electronic form is issued by the public authority, in accordance with the provisions of the Electronic Government Act. Article 43 stipulates that the right to inspect the case file may be limited only by a separate law, with the aim of protecting other legal interests established by law. In accordance with the above, it can be concluded that the GAPA of the Republic of Macedonia contains adequate rules that protect the principle of transparency in accordance with the international standards.

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48 B. Davitkovski *et al.*, p. 271.



**The principle of effectiveness and procedural economy:** The GAPA of the Republic of Macedonia, in Article 7, regulates the principle of procedural economy as one of the general principles of administrative procedures. The rule requires that the administrative proceedings are conducted expediently and with as little cost as possible for the parties to the proceedings, as well as for other participants in the proceedings. The principle of economy complements the principle of efficiency, which obliges the public authorities to ensure full respect of the parties' rights and legal interests, as well as a complete establishment of the factual situation. The contents of the principle of economy imply also that it includes the principle of effectiveness, which is explicitly confirmed and elaborated within Principle of Establishment of Material Truth (Article 10 of the GAPA), and which requires a public authority to establish all the circumstances of importance for proper establishment of the factual situation in administrative proceedings (paragraph 1). To this end, paragraph 2 of the same article obliges the public authority to obtain, examine, and collect the information available in official records *ex officio*, unless access to this information is prohibited by a separate law. The public authority may request from a party in the proceedings only the information and documents that are necessary to establish the factual situation and other relevant circumstances that are available in the official records (Article 10, paragraph 3).

**The principle of impartiality:** The principle of impartiality points to the necessity for public officials to be objective in relation to the parties to the proceedings, which is a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle has been elaborated in the rules of Article 25 of the GAPA, stipulating the following grounds for recusal of the authorised official from the administrative proceedings:

- if he/she has a direct or indirect interest in a particular case;
- if he/she is related to the party to the proceedings or its legal representative to a specified degree of kin;
- if he/she is in a guardian, adoptive parent, adoptee or foster parent relationship with the party to the proceedings or its legal representative, or proxy;
- if the official or the persons referred to in the preceding two paragraphs (subparagraphs 2 and 3 of Article 25 of the GAPA) has participated in the proceedings in the capacity of the party to the proceedings, a witness, an expert, the attorney or legal representative of the party;
- if the official or the persons referred to in subparagraphs 1 and 2 above have a direct or indirect interest in a case that is related to the case at hand;
- if court proceedings have been initiated between the party to the proceedings and the official or the persons referred to in subparagraphs 2 and 3 above;

- if the official or the persons referred to in subparagraphs 2 and 3 above are debtors or creditors of the party to the proceedings;
- if the official receives income from the party to the proceedings or is member of its management or supervisory or similar body;
- if the official or a person referred to in subparagraphs 1 and 2 above has received gifts from the party to the proceedings before or after the administrative proceedings has been initiated.

As soon as he/she learns that any of the grounds for recusal applies, the official is obliged to request immediately from his/her superior to be recused from the proceedings, and the same applies to members of a collegial public body. Any other official who finds out that there is any of the grounds for recusal is obliged to inform his/her manager about it. In addition to the official, a request for recusal may be filed also by the party to the proceedings, provided that the party specifies the reasons for doubting the impartiality of the official. The request for recusal will be decided by the manager of the public authority, or by the collegial body if the recusal request refers to a member of that body. In accordance with Article 26 of the GAPA, the request for recusal should be decided no later than during the following day upon receipt of the request, and after the request is adopted, the authorised official will be immediately recused from the proceedings, and replaced by another official. Otherwise, the accountability for unlawful conduct would be assumed by the superior (Article 26, paragraph 2). Paragraph 3 of that same article provides that the superior who decides on the recusal of an official should appoint another official to conduct the proceedings in his/her place. As a rule, that should be someone from the same public authority. If a member of a collegial body is recused, that body should continue to work without the member who has been recused (paragraph 4). In that case, the collegial body decides with the majority of votes of the attending members.

### 3.5. MONTENEGRO

**Legal framework:** The main source of administrative procedural law in the 2014 Republic of Montenegro is the General Administrative Procedure Act of 2014,<sup>49</sup> which became effective on 1 July 2017<sup>50</sup> (hereinafter: the

49 General Administrative Procedure Act, *Official Gazette of Montenegro*, No. 56/14 dated 24 December 2014, 20/15 dated 24 April 2015, Amendments to General Administrative Procedure Act, *Official Gazette of Montenegro*, No. 40/2016.

50 It was envisaged originally that the new GAPA would apply from 1 July 2016, but the Amendments to the General Administrative Procedure Act from June 2016 deferred its application until 1 July 2017.

new GAPA). Until then, the 2003 General Administrative Procedure Act<sup>51</sup> (hereinafter: the previous GAPA) was applied.

**The principle of legality:** The principle of legality is not new, and it is regulated by Article 4 of the previous GAPA, or Article 5 of the new GAPA. The main rule from the previous GAPA specifies that the public authorities acting on administrative matters should decide in compliance with law and other regulations. If the public has discretionary powers, it must decide within the scope of its powers and in accordance with the objective for which those powers have been granted. The same is stipulated by the new GAPA, but the new rule specifies that, when acting on administrative matters, the public authority is obliged to take into account all previous decisions made on identical or similar administrative matters. This amendment serves to strengthen the legal certainty of the parties to the administrative proceedings, and thus the new GAPA defines the principle of legality as “the principle of legality and predictability.” The principle of predictability is, in fact, new, and stipulates that the authority that deviates from its previous decisions on identical or similar matters must provide an adequate explanation for it (Article 5, paragraph 3 of the new GAPA). Article 5, paragraph 5, of the new GAPA, regulates the appropriate conduct of a public authority in administrative matters in which it decides exercising its discretionary powers, and specifies that it should do so within the scope of its powers and in accordance with the purpose for which those powers have been granted. Furthermore, it should act in accordance with the previous decisions made by the public authority on materially identical administrative matters.

**The principle of proportionality:** The principle of proportionality is also not new and it is regulated by Article 5 of both the previous GAPA and the new GAPA. However, the rules of these articles are different, not only in the name of the principles: the previous GAPA refers to the principle of the Protection of Citizens’ Rights and the Protection of the Public Interest. The new GAPA regulates the principle of proportionality more comprehensively, in wording that is more comprehensible for the parties to the proceedings, and stipulates that an administrative authority may restrict some of the parties’ rights only if that is proportionate to the goal to be achieved, and if it does not violate human rights and freedoms. In a situation when a public law authority imposes specific obligations onto the party to the proceedings, the authority is obliged to apply the measures that are most favourable for the party, provided that those measures can achieve the same objective.

**The principle of accountability:** While the principle of accountability is not regulated explicitly in the part of the GAPA that regulates the general principles

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51 General Administrative Procedure Act, *Official Gazette of Montenegro*, Nos. 60/03 and 32/11.

of administrative procedures, it is derived from the other relevant legal rules relating primarily to the principle of the independence of administrative proceedings, which is provided for by the previous GAPA (Article 10), as well as by the new GAPA (Article 12), but also on the basis of the rules on the delegation of powers to authorised officials specified by the new GAPA. The principle of independence in the new GAPA (and the almost identical rule in the previous GAPA) requires a public official to establish the facts and circumstances in the administrative proceedings independently, and to decide on the basis of such facts and circumstances. Specifically, the facts and circumstances that will be used as evidence should be selected on the basis of an independent assessment – conscientiously and founded on careful assessment of individual facts and the evidence as a whole. In addition, the rules on the authorised official, in Article 46 of the new GAPA (the previous GAPA does not contain such a rule) that specify that an authorised official is the person designated by a public authority's internal organisation and establishment act to conduct administrative proceedings and adopt decisions are also relevant to the principle of accountability. If the authorised official is not appointed, the decision in the administrative proceedings is made by the head of the public authority (paragraph 2), or the person authorised by him/her (paragraph 3).<sup>52</sup> The new GAPA stipulates explicitly that the public authority, before issuing a decision, has to designate in an appropriate manner the officials authorised to decide on administrative matters, and those authorised to take actions in the course of the proceedings (paragraph 4). That provides a clear legal basis for the personal accountability of public officials. A collegial body, in accordance with Article 47 of the new GAPA, decides by a majority of votes, if not otherwise prescribed by law, and may authorise its member to conduct the administrative proceedings and propose a decision. Article 22 of the new GAPA stipulates explicitly that the decision is signed off by the public official who has approved it, thus completing the rules on the principle of accountability of public officials.

**The principle of transparency:** While the principle of transparency is not specified within the general principles in the previous GAPA, it is reflected clearly in the rules on the right to inspect the case file and the right to be informed about the course of the proceedings (Article 69 of the previous GAPA). The parties to the proceeding are guaranteed by law the right to inspect, duplicate, or photocopy, the relevant case files, and a third party has the same right to do so if it can prove its legal interest. This right excludes records on deliberation and voting, and draft decisions, as well as records

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52 This is an important innovation in relation to the previous GAPA, which did not include such explicit rules and which provided for a centralised decision-making system in which decisions were made and signed off on behalf of the “administrative authority” or “collegial body”.

that are kept confidential, if their disclosure could harm the purpose of the proceedings or if it is contrary to the public interest. This regulation, however, does not specify the right of the party to the proceedings to inspect case files that are kept in electronic form. The above legal gap has been remedied in the new GAPA, which, in Article 16, prescribes this right, as well as the right of the party to the proceedings to be informed about the course of the proceedings in accordance with the law, which is specified as a principle of general administrative procedures. The principle is further elaborated in Articles 68 and 69 of the new GAPA whereby the parties to the proceedings have been granted the right to submit a request to inspect the case file in a written, verbal or electronic form; the parties are guaranteed the right to duplicate the files at their own expense, or to inspect them free of charge (paragraphs 1 and 2 of Article 68). In accordance with paragraph 3 of that same article, the parties to the proceedings can inspect the files not only on the premises where they are held, but also, in justified cases, on the premises of another authority or a diplomatic/consular mission. The right of the party to the proceedings to inspect the case files kept in electronic form is explicitly stipulated by Article 68, paragraph 4, of the new GAPA. Article 69 regulates explicitly the right of the party to the proceedings, includes third persons who have proven a legal interest in the case, to be informed about the course of the proceedings. That also strengthens the principle of transparency of administrative proceedings.

**The principle of effectiveness and procedural economy:** The principle of effectiveness and procedural economy in the new GAPA has been considerably extended compared to that in the previous GAPA.<sup>53</sup> This principle is regulated by Article 10 in the new GAPA, providing that the administrative proceedings must be conducted without any delay and with as little cost as possible, ensuring that all the facts and circumstances relevant to the successful and full protection of the rights and the legal interests of the parties to the proceedings, or other participants in the proceedings, are properly established. Based on the above, it can be concluded that the efficiency of the proceedings also relates to its effectiveness, and this is an important innovation compared to the previous GAPA, which promoted solely the principle of procedural economy. Article 13 of the new GAPA introduces a new principle of administrative proceedings – the principle of obtaining data *ex officio*. That this rule has been elevated to the level of a principle is a clear indication of the importance attached to this issue. That is justified, considering that this is probably the most important innovation of administrative procedures that will significantly contribute to their reform

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53 The principle of procedural economy in Article 13 of the previous GAPA insists that the procedure should be conducted without any delay, and in such a way not to undermine a complete and accurate establishment of the factual situation and ensuring that all the necessary evidence for the adoption of a lawful and appropriate decision is obtained.

and modernisation. Thus, when deciding in administrative proceedings, the public law authority should *ex officio* inspect, obtain, and process the information available in the official records and registers maintained by that public authority or by other competent authorities, unless access to such information is restricted by law.

**The principle of impartiality:** The principle of impartiality points to the necessity for a public official to be objective in relation to the parties to the proceedings, which is a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle is elaborated in the rules on the recusal of public officials from the proceedings, which are contained in both the previous GAPA (Article 30) and the new GAPA (Article 48).<sup>54</sup> The grounds for the recusal of a public official from the proceedings include: the public official is a party in the administrative proceedings (in any capacity), a specific relationship with the party to the proceedings (blood relations), and the participation of the public official in the first-instance proceedings. In accordance with Article 35 of the previous GAPA, the provisions on the recusal of the public official apply also to collegial bodies, and, in accordance with Article 36, to record takers. The new GAPA, in Article 48, elaborates, or extends, the grounds for the recusal of the public official (member of the collegial body, the record taker), introducing the following grounds for their recusal: if the public official has received remuneration or other income or is engaged in the management board, the supervisory board or the working or professional body of the party to the proceedings, or if the outcome of the proceedings can result in a direct benefit or harm to him/her (paragraphs 5 and 6 of Article 48). Paragraph 7 of the same article sets out the general rule under which recusal is necessary also if there are other facts that may undermine the impartiality of the authorised official, including all other contingent circumstances that cannot be anticipated by the Law. When he/she finds that any of the grounds for recusal applies, the authorised official is obliged to suspend further his/her involvement in the case. The recusal procedure can be initiated also by the party to the proceedings, under the same condition.

### 3.6. SERBIA

**Legal framework:** The main source of administrative procedural law in the Republic of Serbia is the 2016 General Administrative Procedure Act,<sup>55</sup> which came into effect on 1 June 2017 (hereinafter: the new GAPA). Until that

54 In addition to the provisions on the recusal of officials, both the previous and the new GAPAs contain the provision on the recusal of record takers, thus extending the principle of impartiality to those participants in the proceedings as well.

55 General Administrative Procedure Act, *Official Gazette of RS*, No.18/2016.

date, the 1997 General Administrative Procedure Act applied (hereinafter: the previous GAPA).<sup>56</sup>

**The principle of legality:** The principle of legality is not new, and it is regulated by Article 5 of both the previous GAPA and the new GAPA. The main rule of the previous GAPA specifies that, when acting on administrative matters, the authorities should decide in compliance with law and other regulations. If a public authority is authorised to decide at own discretion, it must decide within the scope of its powers, and in accordance with the objective for which those powers have been granted. The same is stipulated by the new GAPA, which elaborates this further, in two directions. Firstly, the new legislation requires the administrative authorities to act in accordance with other general laws as well, in addition to the GAPA; and secondly, a new rule has been introduced specifying that, when acting on administrative matters, a public authority is obliged to take into account all previous decisions made on identical or similar administrative matters. These amendments are aimed at strengthening the legal certainty of the parties in administrative proceedings, and thus the new GAPA defines the principle of legality as “the principle of legality and predictability.” The principle of predictability is, in fact, an innovation, and its essence is that the public authority must adhere to the practice it has set up and decide in all identical or similar cases in the same manner. That is confirmed also by the rule specifying that if the authority deviates from the decisions it has made previously on identical or similar administrative matters, it must justify the different conclusion adequately (Article 141, paragraph 4 of the new GAPA).<sup>57</sup> Although not explicitly stated, it is understood that the principle of legality and predictability should be applied also in the administrative proceedings in which the authority decides by exercising discretionary power. In that case, the authority must act in compliance with the law and other regulations and general acts, taking into consideration all previous decisions made in identical or similar cases.

**The principle of proportionality:** The principle of proportionality is also not new, and it is regulated in Article 6 in both the previous GAPA<sup>58</sup> and the new GAPA. However, the new GAPA regulates this rule in a more comprehensive way, and it is more comprehensible to the parties to the proceedings. It is stipulated that, when adopting decisions restricting the parties’ rights or affecting their legal interests, an administrative authority is obligated to do so in accordance with the purpose of the regulation it implements and under

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56 General Administrative Procedure Act, *Official Gazette of FRY*, Nos. 3/97 and 31/07; *Official Gazette of RS*, No. 30/10.

57 For more details see: Lj. Pljakic, “Administrative proceedings in the New General Administrative Procedure Act”, *Legal Life* 10/2016, p. 240.

58 In the previous GAPA, this principle was formulated as the Principle of Protection of Citizens’ Rights and Protection of the Public Interest.



the condition that there is no alternative action that is more favourable for the party and that could achieve the same purpose. If an administrative authority imposes an enforcement measure on the party, it must choose, between several options, that measure that is the most favourable for the party. This principle applies also to administrative enforcement proceedings in general.<sup>59</sup>

**The principle of accountability:** While the principle of accountability is not explicitly regulated in the part of the general principles part of the GAPA that regulate administrative procedures, it is derived from other relevant legal rules, primarily relating to the principle of independence of administrative proceedings, which is regulated by both the previous GAPA (Article 11) and the new GAPA (Article 12), by also by the rules on the delegation of powers to authorised officials in the new GAPA. The principle of independence in the new GAPA (and the almost identical rule in the previous GAPA) prescribes that public officials should establish the facts independently and apply the laws and regulations that regulate the administrative matter based on such facts (Article 12, paragraph 2). Article 39, paragraph 1, explicitly requires a public authority to act in administrative matters through an authorised official. Paragraph 2 of Article 39 specifies that the authorised official is a person assigned to a position that includes conducting the proceedings and deciding in administrative matters, or only the tasks of conducting administrative proceedings or undertaking specific actions in the course of such proceedings. Only if the authorised official has not been appointed, in accordance with paragraph 3 of the same article, the decision in the administrative proceedings is made by the manager of the public authority. This is an important innovation compared to the previous GAPA, which did not contain such an explicit rule. It provided for a centralised decision-making system in which decisions were made and signed off on behalf of the “administration authority” or “collegial body” (Articles 192–195 of the previous GAPA). The new GAPA stipulates explicitly that the authority, before issuing a decision, has to designate in an appropriate manner the public officials authorised to decide on administrative matters, and those authorised to take actions in the course of the proceedings (paragraph 4). That clearly provides the legal basis for the personal accountability of public officials. A collegial body, in accordance with Article 39, paragraph 5, of the new GAPA, may authorise its member to conduct the administrative proceedings and prepare a decision. Article 201 of the new GAPA stipulates explicitly that the decision should be signed off by the public official who has adopted it, and when an administrative matter is decided by a collegial body, it should be signed off by the chairperson, unless otherwise provided by law or other regulations. This completes the rules on the principle of accountability of public officials.

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59 Lj. Pljakic, p. 241.



**The principle of transparency:** The principle of transparency was not specified as a general principle in the previous GAPA, but it was clearly reflected in the rules on the inspection of case files and obtaining information about the course of administrative proceedings (Article 70 of the previous GAPA). The law guaranteed the right of the party to inspect, duplicate, or photocopy, the relevant case files, and third parties enjoyed the same right if they could prove their legal interest. This right excluded the records of deliberation and voting, official records, and draft decisions, as well as confidential records, if their disclosure would harm the purpose of the proceedings or if it was contrary to the public interest. The party that was refused a request to inspect the case files had the right to a complaint, and such complaints had to be followed up urgently (the party was able to file a complaint within 24 hours, and the complaint was to be decided within 48 hours from the date of the complaint). That regulation, however, did not address the right of the party to the proceedings to inspect the case files that were kept in electronic form. However, that legal gap has been remedied in the new GAPA which, in Article 64, elaborates and supplements the above rights of the parties to a proceeding, including other persons who prove their legal interest in doing so (Article 6). The new Law has been extended in the sense that the party to the proceedings is permitted to inspect the case files not only on the premises where they are held, but also, in justified cases, on the premises of another authority or a diplomatic/consular mission (paragraph 1). The same rule specifies that the party to the proceedings may receive a photocopy of the file, at his/her request, by post or in any other suitable way. The Law stipulates explicitly the right of the parties to inspect case files kept in electronic form, whereby the authority is obligated to ensure that the documents in electronic form can be downloaded or printed (paragraph 2). Paragraphs 3 and 4 of Article 64 of the new GAPA guarantee the protection of personal and other classified information. A provision that specifies that the fee for inspecting the case file cannot exceed the expenses incurred by the authority for the preparation and delivery of a copy of the file (paragraph 7), and the right of the party to the proceedings, another public authority, or an interested person to be informed about the course of the proceedings (paragraph 8), reinforce the principle of transparency in administrative proceedings.

**The principle of effectiveness and procedural economy:** The principle of effectiveness and procedural economy has been considerably extended in the new GAPA, compared to the previous one.<sup>60</sup> This principle is regulated

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60 The principle of effectiveness referred to in Article 7 of the previous GAPA insists on the success and quality of deciding in administrative matters, while the principle of economy referred to in Article 14 calls for the proceedings without any delays and with as little cost as possible. Both these principles are covered, i.e. corrected by paragraphs 1 and 2 of Article 9 of the new GAPA.

by Article 9 of the new GAPA and it came into effect on 8 June 2016.<sup>61</sup> It stipulates that the public authority conducting administrative proceedings is obligated to do so in a way that enables the parties to the proceedings to exercise their rights successfully and comprehensively, without delaying the proceedings, and with as little cost as possible (Article 9, paragraphs 1 and 2, of the new GAPA). Paragraph 3 introduces the most important innovation to administrative proceedings in relation to the previous GAPA: the rule by which a public authority is obliged to obtain *ex officio* the information and facts necessary for decision-making that are available in the official records, or to retrieve and process this information. The parties to the proceedings may be requested to present only information that is necessary for identification, and the documents to support the facts that are not available in the official records. The principle of effectiveness and procedural economy is further elaborated in Article 103 of the new GAPA,<sup>62</sup> which stipulates explicitly that the public authority should obtain *ex officio* the information and facts that are available in official records and that, if such records are kept by another authority, that authority is obliged to provide the requested information free of charge within 15 days, unless other time limit has been specified. In accordance with Article 207 of the new GAPA, an authorised official who does not obtain *ex officio* the facts relevant to the conduct of the proceedings that are available in the official records has committed an offense and may be appropriately penalised.<sup>63</sup>

**The principle of impartiality:** The principle of impartiality points to the necessity for public officials to be objective in relation to the parties to the proceedings, which is a necessary condition to allow them to make a lawful decision, protecting the public interest. This principle is elaborated in the rules on the recusal of public officials from administrative proceedings in both the previous GAPA (Article 32) and the new GAPA (Article 40). The grounds for recusal of a public official from the proceedings include: the public official in the administrative proceedings is in a specific relationship with the party to the proceedings (blood relations), he/she is a party to the proceedings (in any capacity), or he/she participated in the first-instance proceedings. In addition to these grounds, the new GAPA, in Article 40, stipulates that an authorised official must be recused from the proceedings if he/she has received remuneration or other income from the party to the proceedings, or is engaged in the management board, the supervisory board or the working or professional body of the party to the proceedings, or if the outcome of the

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61 This principle applies not only to the GAPA, as the general procedural law, but also to specific administrative proceedings.

62 Article 103 of the new GAPA came to effect on the same day as Article 9 (8 June 2016).

63 Lj. Pljakic, p. 242. A fine is stipulated for an authorised official in the amount of RSD 5.000 to 50.000.

proceedings may result in a direct benefit or harm to him/her (paragraphs 6 and 7 of Article 40). Paragraph 8 sets out the general rule under which recusal is necessary: if there are other facts that undermine the impartiality of the authorised official, including all other contingent circumstances that cannot be anticipated by the Law. An authorised official is obliged to suspend further involvement in a case when he/she finds that one of the grounds for recusal applies, or when the recusal procedure is initiated by the party to the proceedings, under the same condition.<sup>64</sup> The rules on the recusal of an official also apply to experts and record takers who participate in the proceedings. Their recusal is decided by the official conducting the proceedings.

## 4. KEY ISSUES RELATING TO THE IMPLEMENTATION OF THE EXISTING REGULATIONS AND WAYS TO OVERCOME THEM

### 4.1. THE PRINCIPLE OF LEGALITY

In the most basic sense, the principle of legality requires that administrative procedures are conducted in accordance with the Constitution, laws and the secondary legislation. Naturally, this principle presupposes that laws are properly applied. The legislation governing administrative procedures in the Western Balkan countries demonstrate certain shortcomings that challenge the full application of the legality principle.

That is true in most of the countries that have been analysed.<sup>65</sup> The existence of numerous special rules for special administrative proceedings that depart from the general administrative rules and procedures cause practical problems. In addition, in most of the countries, the administrative procedure rules are excessive and include numerous (technical) details that could be transferred to secondary legislation. Due to such shortcomings, the administrative procedure rules are not sufficiently systematic and lack sufficient standardisation. As a result, their practical application tends to be

64 The recusal of an official is decided by the head of the authority, i.e. other authorised body, and if this is not the case, then the second-instance or supervisory body. The recusal of a collegial body is decided by the chairperson of that body, and the recusal of the chairperson is decided by the collegial body (Article 41).

65 This particularly relates to general administrative procedure statutes that have not been considerably revised over the past five years (Serbia, the BiH entities – Federation and the Republic of Srpska, Montenegro), despite the fact that the circumstances under which these regulations are applied have changed considerably.

difficult, since a public official may not always be sure which regulation or rule to apply in a specific situation.

That situation has an adverse effect on the public officials' professional integrity, since they will not always be able to meet the professional standards of public service: to perform their duties in accordance with law, competently, efficiently, impartially, and in the interest of the citizen. In order for public officials to perform their duties in accordance with legal standards, they need to strengthen their individual capacities and develop their professional skills. Even though the fulfilment of these demands may be seen as an individual duty and the responsibility of each individual public official, bearing in mind the importance of this issue for integrity and the public interest, it has to be regulated and resolved in a systemic manner. The measures that may be taken to this end are numerous, such as the development of a guide specifying the relevant procedures, or of a code of conduct, or similar acts aimed at strengthening the professional integrity of public officials.<sup>66</sup> Trainings, workshops and the similar education courses are also a good tool.

The purpose of such practical guides, a code of conduct and proper training is to communicate clearly to public officials the demands and expected standards related to his/her work. That is indispensable because they act from the position of public power. It is important to ensure that every public official clearly understands what is expected of him/her, what are the main goals of his/her work, and what (personal and professional) competences he/she should have to achieve these goals. In addition, it is important for public officials to be aware of the possibilities for professional development that are available to him/her.

All public officials should be encouraged to ask themselves and actually answer the following questions: What should I expect, and what should others expect from my professional engagement? What are the priorities for my work in the coming period and how may I contribute to their realisation? What do I aspire for in my professional career (what are my goals) and what should I do in the coming period to achieve this? Have I advanced in the performance of my job and have I come closer to the realisation of goals I have set in this respect? Do I find it difficult to accept new tasks, particularly those that require me to develop new knowledge and skills? How can I overcome such difficulties? Which fields of work (tasks) should I focus on in order to advance my professional competence? What kind of support or what kind of professional training do I need in the coming period to upgrade my

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66 A number of acts on the implementation of regulations (opinions of line ministries, manuals for application of a law, recommendations, guidelines, instructions, etc.) can be quite valuable in that respect. This can largely mitigate the ambiguities of legal norms and contribute to the harmonisation of administrative practice, which is in the interest of legal certainty.

skills and make progress in accordance with the set goals (aspirations)? Do I support my co-workers in their professional development, do they support me, and how is that support expressed? Etc.

By asking themselves and answering questions like those listed above, public officials would become more aware of the fact that they are personally responsible for the (un)successful performance of their tasks and the achievement of the specified goals. As a result, they have to accept that it is their personal obligation and responsibility to be fully informed of all the legal changes, emerging issues and problems in fields that are relevant for their work, and that they are personally responsible for their own professional development and that it is necessary for them to acquire the necessary skills for the successful performance of entrusted duties and tasks.

The above questions should also be the subject of constructive discussion (workshops, trainings, and similar education courses) that should initially take place at the initiative of the competent person (manager), in accordance with a previously established plan. It is important for such discussions to take place regularly, not just once or a few times a year, as a box-ticking exercise. However, they need not always be formally organised; it is even better if these kinds of questions are raised in informal conversations as well, whenever and wherever possible, since this is a way of continuously demonstrating to the public officials that their efforts to perform their duties and roles to the best of their abilities are recognised and adequately rewarded. Finally, meetings and discussions are an opportunity to get feedback from the public officials about the measures that have been taken.

Skilful facilitation of such discussions (workshops, trainings) encourages public officials to improve continuously their performance. Moreover, this is of crucial importance for the success of any public institution. It is necessary to use all available skills to communicate to public officials the meaning of the questions that have been asked in a way that makes them fully understand and internalise it. Otherwise, there is a danger of public officials showing resistance towards the efforts directed at strengthening of their professional capacities, which they could see as unnecessary or even erratic “imposition” of procedures and an “imposition” of discussions about these issues. Experience shows that, in practice, many public officials – especially those belonging to the older generation – consider that they have fulfilled all the requirements of a certain post and role in the public service by having completed their formal education. As a result, they may be slow and inefficient to adapt to the changes that are necessary in order to modernise public service, in line with the current internationally recognised standards applied around the world. If such prejudice is not counteracted, it is not realistic to expect the required progress in this area. In other words,

all trainings, workshops, procedures, guidelines, etc, would be seen as mere box-ticking exercises, and would not be applied adequately or at all in practice.

Given the above arguments, the responsibility for professional development and advancement of the quality of public officials' work should, to some degree, also be assumed by the state, by actively supporting the measures taken to achieve that goal, including through co-financing such measures and evaluating the performance of those who organise and implement them.

## 4.2. THE PRINCIPLE OF PROPORTIONALITY

The principle of proportionality, as a principle of administrative procedures, demands that public officials should take only those measures that are appropriate and necessary in the particular proceedings. In other words, when it is necessary to restrict a right or a legal interest of a person, the public official may do so only provided that the purpose of such a restriction cannot be reached in any other way, that is, by actions that would restrict or affect the party's rights or interest in the least possible extent. In cases where a public official orders the party to accept an obligation, the principle of proportionality obliges the public servant to select, among a number of measures, that that is the most beneficial to the party.

This principle is particularly important in cases where discretionary powers are exercised in the administrative procedures, that is, in cases where public officials may choose between several options, all of which are lawful. Discretionary power is necessary in administrative procedures and cannot be fully excluded, but it should be minimised. It should not be too wide, as is the case when public officials have no clear restrictions for its application.

However, the above objections can be made with regard to the majority of regulations on administrative procedures in the analysed countries. Almost all current regulations in these countries envisage that a decision made that is based on discretionary power must be made within the scope of that power and must be in line with the goals for which such power has been granted. Officials frequently face no other restrictions, other than the implication that he or she must also abide by the relevant principles of administrative procedure. Only the new GAPAs of Serbia and Montenegro, which are still not effective, envisage the demand for the public officials to adhere to the established administrative practice when exercising discretionary powers in decision-making. That is a good solution, as it supports legal certainty.

In order to lawfully exercise discretionary powers, public officials must be aware of the fact that their primary duty and role is to serve, or to protect, the public interest. Discretionary powers are not vested in public officials so that they may make arbitrary or impulsive decisions. Quite to the contrary – discretionary powers have a certain purpose, and if that purpose is not completely clear and beyond doubt in the concrete case, then the public official needs to take into account the text of the entire law and pass a decision in the spirit of the law. If that is not fully clear or applicable in the concrete situation either, the public official must (which is his/her duty in any case) pass a decision in accordance with what the public interest mandates. This means that he/she must be ready to pass unpopular decisions, if that is required.

In practical terms, this means that the public official should, without exception, observe the rule that a decision that is to be adopted by exercising discretionary power should always be adopted by the authorised official. In such cases, the authorised official is obliged to apply all the envisaged administrative procedures, which includes the procedures established by law, secondary legislation, and the relevant guidelines (if any), and also to take into account all relevant circumstances (legal and factual situation). In addition to acting in accordance with the principle of legality, public officials are also obliged to observe the principle of objectivity and impartiality, and the principle of equality before the law, which requires public officials to refrain from any form of discrimination. The decision passed by the public official must be in accordance with the principle of proportionality and he/she is obliged to pass the decision within the specified (reasonable) time limit, in accordance with the principle of efficiency. Finally, the public official must provide the party with a complete answer (the decision must be adequately justified) in a manner that is clear, complete, and easy to understand.<sup>67</sup>

### 4.3. THE PRINCIPLE OF ACCOUNTABILITY

**The personal accountability** of the public officials applying administrative procedures is not regulated explicitly in most of the administrative procedure acts in the analysed countries. Therefore, there is no adequate legal grounds to hold them accountable for unlawful or inappropriate actions. The decision-making system remains centralised, and most decisions are taken at high institutional levels (the terms used are: “administrative authority” or “collegiate

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67 If public officials are unsure what to do, they can always ask themselves the following questions, which can help them in decision-making: Is it all right for me to take this activity? Is this activity legal or ethical? Would I be proud to communicate this activity to someone I respect? Does this activity contribute to the reputation of my institution as an institution of integrity?



body”). The decisions are signed off by the authorised person, on behalf of the administrative authority, while the public official who conducted the proceedings and who drafted the decision bears no responsibility for his/her work.<sup>68</sup> Moreover, the administrative procedures in most of these countries do not envisage adequate data protection mechanisms (formal or actual), which jeopardises the public officials’ integrity and creates a favourable environment for information trading. Even though administrative proceedings are not confidential in principle (unless expressly prescribed in the specified manner), public officials must be aware that facts that are available to them for performing public office may be confidential and that they are obliged to treat them responsibly. This implies their obligation not to communicate the information from specific proceedings in which they are involved as officials if that would violate the privacy of the parties. It also implies the obligation not to disclose any information that might harm the public interest.

The administrative procedures legislation of the analysed countries should include provisions on public officials’ personal accountability for their work and for any disclosure of confidential data, as would serve as a formal guarantee that this issue will indeed be raised and resolved. However, it is even more important that the public officials themselves develop a sense of personal accountability for the results and quality of their work. Specifically, they must be aware that the public service requires officials to be impartial, to continue their life-long professional development, and to comply with the ethical principles and act in a transparent and responsible manner.<sup>69</sup>

The rules on personal accountability of public officials are necessary since they act from the position of public power and, ultimately, it is them who implement public policies. In doing so, they not only have the power to decide on individual rights, obligations and interests of natural and legal persons, but also to decide on the most important social issues, such as the use of public resources and the respect of the fundamental human rights and freedoms. The damage that might be caused by their irresponsible conduct and behaviour is immeasurable, even though it is not always apparent at first sight. Such damage reflects particularly in lack of integrity and growing

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68 Conversely, the Macedonian GAPA, the new Serbian GAPA, and the new Montenegrin GAPA (which are still not applied) introduce the principle of autonomy in decision-making, and envisage the delegation of powers to the authorised official in order to reduce the powers of politically appointed officials in the procedure where individual rights and obligations and legal interests of natural and legal persons are the subject of decision. However, the experience in terms of the implementation of this rule in practice in Macedonia has shown that the principle of delegation is not applied to a sufficient extent, which is explained by the fact that the officials are reluctant to forgo their powers.

69 For instance, the data from the 2016 Montenegro Administrative Court Performance Report, p. 8, indicates that approximately 50% of actions before the Administrative court are sustained, <http://sudovi.me/uscg/izvjestaji-o-radul/>).



corruption, which undermines the citizens' trust in public institutions, which may be difficult to rebuild.

Strengthening of personal and professional integrity implies primarily education/training on ethical standards for proper performance of public office, and particularly the promotion of moral values, conduct, and expectations, as well as accountability building. In addition to that, personal accountability can be developed by introducing procedures and disciplinary measures.

Education of public officials should be conceived in a way that will help develop an understanding of the need to foster the public good and to protect the public interest, and to explain the potential damages that can be caused by the abuse of public service. In this respect, the most important tool should be the codes of ethics – the rules for proper conduct that point to individual responsibilities and proper actions by an individual, a group or an organisation.<sup>70</sup> Taking appropriate codes of ethics at the level of individual institutions (administrative authority, publicly-owned company, public institution, etc.) as a starting point, it is desirable and in some cases even recommendable to develop integrity plans that would be tailored to the specific needs of those organisational units.

The essence of codes of ethics, or integrity plans and other similar acts, is to guide, direct and standardise the conduct of public officials in the workplace. In addition to that function, they have a control function as well, since they establish and publicly announce the limits of acceptable conduct that the public officials must not overstep. Most codes, or integrity plans, are formally binding and envisage disciplinary sanctions for noncompliance with the prescribed rules.

With respect to their contents, these acts, as a general rule, promote the following principles: serving the public interest (reinforced by an explanation of the relationship between the public and the private role of public officials); respecting the Constitution, primary and secondary legislation (focusing on the proper application of discretionary powers as a source of ethical dilemmas); performing public duties in accordance with the highest standards of personal integrity; and strengthening the ethical capacities of the public institutions.

Codes of ethics, integrity plans and other types of similar acts, cannot be productive if their content is limited to a list of slogans and nice, or

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70 The importance of such codes is supported by the fact that the Committee of Ministers of the Council of Europe adopted, in 2000, the Model Code of Conduct for Public Officials, with the aim to set the standards of integrity and conduct of public officials in the European area, but also to inform the general public on what to expect from public officials. See: Model Code of Conduct for Public Officials, Appendix to Recommendation No. R (2000) 10, 11 May 2000, The Committee of Ministers of the Council of Europe, [www.coe.int/t/dghl/monitoring/greco/documents/Rec\(2000\)10\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Rec(2000)10_EN.pdf).

desired, principles. In that case they can actually even incentivise various abuses, since they can be used as a cover for such actions. To ensure their implementation in practice, these acts need to be formally binding. However, that alone would not be sufficient if the officials are not encouraged to adopt the values and principles promoted and protected in these acts. With that respect, the codes can be accompanied by adequate trainings, workshops, education courses, etc.

Finally, to ensure full implementation of codes of ethics and integrity plans and their integrity strengthening effects, adequate checks need to be made. These checks should include the following questions: Is there a dedicated policy for the promotion of integrity that includes integrity checks in place (e.g. background checks, mandatory financial status and asset disclosure, integrity testing, post-employment restrictions, codes of ethics, continued education and counselling, etc.)? Are there dedicated entities competent for integrity promotion and corruption prevention? Are there codes of ethics in place and when they were introduced, who drafted and adopted them? What is their legal status, are they binding, and do they specify sanctions for the code violations? Are the codes of ethics applied in practice, and if so, are there reports on the code violations and imposed sanctions, for example, for the past five years?<sup>71</sup>

#### 4.4. THE PRINCIPLE OF TRANSPARENCY

The principle of transparency mandates that the administrative activity should be open and transparent, since this is a crucial precondition for the protection of the rights of the parties to administrative proceedings. A large number of instruments that can be used to operationalize this principle, and those that are particularly relevant to the public officials' integrity and respect of the rights of citizens involved in administrative procedures include: the obligation to provide adequate justification for the decisions made in the course of administrative proceedings, the right of the parties to inspect the case file, and the right to adequate legal remedy.

If the principle of transparency is not adequately prescribed and applied, that complicates or even prevents efficient control of the administrative performance. The administrative procedure regulations in the analysed countries do not show any major shortcomings related to the request to explain adequately the decisions made in the course of these proceedings. However, some criticism may be raised with regard to the provisions specifying the manner in which the party may inspect the case file, as well as the party's right to have access to legal remedies.

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71 For more details see: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round5/Greco\(2016\)19%20en%20Questionnaire%20Fifth%20Evaluation%20Round.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round5/Greco(2016)19%20en%20Questionnaire%20Fifth%20Evaluation%20Round.pdf).

When it comes to the party's right to inspect the case file, while most legislation regulates this issue,<sup>72</sup> the gaps relate to the fact that these provisions are not necessarily suited to the modern means of communication, that is, they do not include the party's right to inspect documents kept in electronic form. If this right is not guaranteed by law, that creates even room for potential abuse in providing access to this right. Considering that in practice information and documents are increasingly kept in electronic form, it is obvious that this issue needs to be formally regulated.<sup>73</sup> In the meantime, this gap could be bridged through the development of manuals for the application of the administrative procedure regulations or relevant guidelines that would specify expressly that the party's right to inspect the case file applies also to the records kept in new forms. To ensure the application of that rule in practice, electronic files should be kept and accessed in the standard software applications to maximise the circle of users. The principle of transparency does not apply to confidential information nor information classified as secret in accordance with the relevant regulations.

In most of the regulations that date further back, the legal remedy system is inadequate – this is primarily reflected in the fact that they do not envisage the party's right to waive the right to appeal after the decision has been adopted, and the party has to wait until the expiry of the time limit for an appeal (normally fifteen days) to do so. During that time, the party could suffer damages that are not always recoverable.

Transparency of administrative proceedings is important for integrity as it encourages public officials to be loyal and obliges them to report any irregularities or abuse that they have observed. That contributes also to integrity strengthening in the institutions they work in or represent, but also in the society as a whole.

#### 4.5. THE PRINCIPLE OF EFFECTIVENESS AND OF PROCEDURAL ECONOMY

The principle of effectiveness in administrative proceedings means that, when preparing and making decisions, public officials have to ensure that the parties' rights and interests are decided on successfully and duly (completely). In a large number of cases, this principle is met when the procedure is conducted

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72 While the Kosovar and Albanian GAPAs do not contain explicit provisions on this issue, that does not mean that in these countries the party to the proceedings cannot inspect the case files. However, the lack of formal guarantees creates room for potential abuse.

73 Recently adopted regulations are an exception in this respect – the Macedonian GAPA (Article 42), the new Serbian GAPA (Article 62) and the new Montenegrin GAPA (Article 68). The latter two are still not applied.

in an efficient manner, but efficiency is not and cannot be the absolute imperative, since prompt adoption of a decision may be the condition for a successful exercise of the rights and legal interests of the party in one case, but this may not be true in another case, if the circumstances of the case require a more time-consuming procedure in order to ensure that a proper decision is reached and that the proceedings is successful.<sup>74</sup> However, one rule that is of critical importance to the principle of effectiveness is that requiring a public authority to inspect, collect and process *ex officio* all relevant data on the facts that are available in the official records. This rule is now present in most of the current GAPAs of the observed countries.

However, concluding administrative proceedings within an appropriate (reasonable) time limit that is suitable to the circumstances of the specific case must be imperative since any needless (unjustified) delay in administrative proceedings can open room for potential abuse. Consequently, it is important that the administrative procedure regulations specify the appropriate timeframes whenever that is possible, and to leave the issue of timeframe open only for those procedural actions for which it is not appropriate to preset the timeframe for their completion, as it needs to be flexible to adapt to the specific circumstances. Only such regulation strengthens the integrity of the officials who apply these regulations.

In most of the analysed countries, the administrative procedure legislation does not meet the above requirements. Consequently, administrative proceedings are inefficient, take too much time and are too expensive. The problem of inadequately set time limits is reflected also in the too short validity period of some certifications and other documents issued in the course of administrative proceedings, which creates bottlenecks, opens room for corruption, and undermines integrity.

In practice, this problem could be overcome by developing relevant manuals on proper application of administrative procedures or instructions, or guidelines, etc. (including instructions by line ministries), elaborating more specifically the issue of procedural timelines. When setting time limits for specific actions in these legal acts, it is necessary to ensure that they are in line with what has been proven as appropriate in specific situations in practice, so that the time limits would be consistent, and in line with the need to ensure legal certainty.

A special case of noncompliance with the time limits that undermines the principle of effectiveness is the situation known as “administrative silence”: when the public body fails to respond to the party’s request within the

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74 V. D. Milkov, *Administrative Law II, Administrative Activity*, Faculty of Law in Novi Sad, Novi Sad 2016, p. 80.

prescribed time limit (as a rule, in the analysed countries, that period is one to two months). In that case, modern administrative procedure law tends to assume that the party's request was thus granted. This is important for the public officials' professional integrity. If all requests of the parties were to be uncritically granted (which would happen if administrative silence implied that the request was granted), that would often be damaging to the public interest.

However, in most of the countries, the GAPAs envisage that if a request is not decided on within the prescribed time limit, it is assumed that the request was denied. In that situation, the problem of administrative silence should be resolved by strengthening the personal and professional integrity of public officials, ensuring that they perform their tasks professionally, responsibly, transparently, and in accordance with the ethical standards. The strengthening of the public officials' integrity was already elaborated on in the section dealing with the principle of accountability (and obligation), and hence this discussion will not be repeated here.

#### 4.6. THE PRINCIPLE OF IMPARTIALITY

The principle of impartiality obliges public officials to be impartial in relation with the parties in administrative proceedings but also to be independent from external influences in their work and in the decision-making. This is one of the key preconditions for lawful and correct decision-making because a biased public official may be tempted to adopt decisions that favour illegitimate private interests rather than the public interest. All the administrative procedure regulations in the analysed countries set rules that elaborate the principle of impartiality, and they include, as a rule, the provisions on the recusal of public officials from the administrative proceedings. However, the grounds for such recusal are not the same in all the countries, and the differences include mostly the differences between the old and the new (reformed) administrative procedure regulations.

Thus, in Serbia, Montenegro and the BiH entity – the Republic of Srpska, the rules for recusal of public officials from the proceedings are insufficient, because the grounds for recusal are reduced to four criteria: the public official is already involved in the proceeding in another capacity (as the party, co-authorised person, witness, expert witness, proxy or legal representative of the party); the public official is related to a party in the proceedings to a certain degree of kin; the public official is adoptive parent, adoptive child, guardian or foster parent to the party in the proceedings; the public official participated in the first-instance proceedings or in the adoption of the first-instance decision. The main shortcoming of the above national regulations is that they are

inadequate in the modern-day life and business situations, in as much as that they do not include persons who are in a business relation with the party in the administrative proceedings or who could directly benefit from or suffer damages caused by the outcome of the administrative proceedings. These shortcomings have been fully or partially eliminated in the regulations of Macedonia, Federation of BiH, Kosovo\* and Albania, as well as in the new Serbian and Montenegrin regulations that have yet to take effect.

Each public official should be recognise independently situations that may compromise his/her impartiality in administrative proceedings even when such situations are not expressly prescribed by law as grounds for recusal. Fundamentally, that is a question of their personal integrity. However, public officials could be assisted in recognising grounds for recusal from a particular case or administrative proceeding by relevant guidelines or manuals on the proper application of the regulations, which would provide instructions on the proper conduct in the event there are grounds for recusal, indicating the authority they can approach with a request for the issue to be clarified. Appropriate education courses (trainings, workshops) for professional integrity strengthening may also be helpful to achieve that goal. In addition, expressly prescribing that a public official who fails to recuse himself/herself from the administrative proceedings when there were statutory grounds for doing so will be held accountable would add to the above.<sup>75</sup>

#### 4.7. INTEGRITY CHALLENGES IN THE IMPLEMENTATION OF NEW GENERAL ADMINISTRATIVE PROCEDURE ACTS

Most of the observed countries still implement conceptually obsolete legislation on general administrative procedures, which does not respect the current administrative procedure requirements and standards in modern democracies. The new, reformed GAPAs are currently implemented only in the Republic of Macedonia and in Albania, while in the Republic of Serbia and the Republic of Montenegro the implementation of the new legislation has been postponed on several occasions.

Bearing in mind that the new administrative proceedings facilitate to a great extent the legal position of individuals and business entities in these proceedings, and that the role of public officials in the proceedings has fundamentally changed, the question arises as to whether any and what integrity challenges can be expected in the course of their implementation. According to the experience in the application of the new legislation in the

<sup>75</sup> In all the countries analysed only the Kosovo\* GAPA expressly prescribes disciplinary accountability of an official who fails to recuse himself/herself from the procedure where there are absolute grounds for recusal (Article 34).

Republic of Macedonia and the Republic of Albania, the major challenge appears to be the requirement that public officials should change the awareness about the importance and purpose of the proceedings that are conducted in accordance with the GAPA. This primarily refers to the necessity to ensure fair treatment of the parties to the proceedings, respecting all their rights and obligations, and recognising that the party has not entered into the administrative proceedings to allow the public official to receive his/her salary, quite the opposite: the public official should instruct the party how to exercise its rights and legal interests as easily as possible.<sup>76</sup>

The practice in terms of the implementation of the new GAPA in Macedonia has shown that public officials are not sufficiently prepared for the a of the new rules, and that they often go through the motions, or apply inertly the old regulations without paying enough attention to weather a certain stage in the administrative proceedings is subject to the new rules.<sup>77</sup>

The application of the new principles of administrative procedures, particularly the principle of the delegation of powers and the principle of proportionality, presents a special challenge. More specifically, office holders are reluctant and unwilling to renounce their competencies, and if one bears in mind that they are the ones who should adopt the job classification act, they can clearly ignore the new rules of conduct without any major problems. Regarding the principle of proportionality, it has been noted also that it is almost not applied at all, and that the parties are fined for violations of that principle, because that is one of the effective ways to fill the budget.<sup>78</sup>

## 5. GOOD PRACTICE EXAMPLES IN OVERCOMING THE CHALLENGES IN THE IMPLEMENTATION OF NEW ADMINISTRATIVE PROCEDURE REGULATIONS

The professional integrity of public officials is at a satisfactory level when they work competently and in accordance with the ethical principles. Professional integrity is a precondition for the public service to be perceived as a reliable and trustworthy partner by the citizens and businesses alike.

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76 V. Lj. Pljakic, "Administrative Proceedings in the New General Administrative Procedure Act", *Legal Life*, 10/2016, pp. 248–249.

77 B. Davitkovski *et al.*, "New General Administrative Procedure Act in the Republic of Macedonia and its Applicability", *Legal Life* 10/2016, p. 281.

78 B. Davitkovski *et al.*, p. 282.



However, in most of the analysed countries, a considerable number of public officials do not have adequate knowledge or skills. They often actively resist change and are sceptical towards the possible benefits that such change might bring.<sup>79</sup> To overcome these obstacles, it is necessary to organise and deliver continuous training focused on improving the professional competences of public officials. In addition to professional development, due attention must be paid also to obtaining, or developing necessary skills, particularly an updated knowledge in the field of information and communication technologies.<sup>80</sup>

Good practice examples in training for public officials in the field of administrative procedures include:

1. *General Administrative Procedure Guidelines*, Human Resource Administration of Montenegro, Podgorica, 2006<sup>81</sup>
2. *Training: Legislative Process Management and Administrative Acts*, Human Resource Management Service of the Republic of Serbia<sup>82</sup>
3. Human Resource Administrative of Montenegro: Programme of Professional Improvement of Public Officials and State Employees – Module *Public Administration and System of Functioning of Public Authorities*

Public officials who are not motivated or willing to undergo continued education, and to change the routine methods of work they have grown accustomed to, will hardly achieve today's expected level of professional competence. To strengthen their professional integrity, they have to accept – and internalise – certain ethical values to supplement their professional competences and skills. However, in almost all of the analysed countries, the improvements in this respect are very slow. That leads to a conclusion that the approach towards raising their awareness and strengthening their ethical capacities has not been continuous and comprehensive.

All public officials must be aware that they serve the public interest, that they are personally responsible for their choices, and that their obligation is to adopt decisions that are as favourable for the parties in an administrative procedure, and the community, as the law permits. That is also what best serves society as a whole. That is why their duty is to adhere to certain principles when deciding in concrete cases. The principles of the General

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79 See: S. Karavdic Kocevic, K. Milanovic, "Seven Miles Step in Public Administration Reform – New General Administrative Procedure Act", *Polis* 11/2016, p. 23.

80 It is unbelievable yet true that some public officials still do not use computers because they do not how to use them and are not willing to learn. *Ibid.*

81 General Administrative Procedure Guidelines, available at: <http://www.uzk.co.me/stari/publikacije/dokumenti/10%20Opsti%20upravni%20postupak.pdf>.

82 Training: Legislative Process Management and Administrative Acts, available at: [http://www.suk.gov.rs/sr\\_latn/strucno\\_usavrsavanje/obuka\\_program.dot?id\\_obuke=1718](http://www.suk.gov.rs/sr_latn/strucno_usavrsavanje/obuka_program.dot?id_obuke=1718).



Administrative Procedure Acts provide good guiding principles in that respect, as they guarantee legal certainty, set standards for the protection of the rights of individuals, and safeguard the public interest. In addition, these acts positively affect the personal behaviour of public officials, as they prohibit specific actions, while promoting others.

However, laws in themselves are not sufficient; there is still a need for codes of ethics, guides, guidelines, instructions, and other similar legal acts. For example, honesty as a personal trait is regulated by codes of ethics and moral standards, not solely by statutes. However, honesty as a personal trait is a necessary precondition for observing and applying the general administrative procedures, since it is hardly possible to adhere to the principles of legality, proportionality, accountability, transparency, effectiveness and economy of proceedings, and impartiality if a public official applying those principles is not honest.<sup>83</sup> This is why the general administrative procedure acts and codes of ethics are complementary. That is why such codes of ethics are now common across Europe, as their contribution to the proper implementation of administrative procedures has been recognised.

Good practice examples in the field of ethical conduct by public officials include:

1. Public Sector HR Challenges in France, 2016, p. 6<sup>84</sup>

## 2. The French civil service

### 2.3. Rights and obligations of civil servants (2/2)

- Among common **obligations**:
  - ✓ **Dignity, impartiality, integrity**, prohibition of conflicts of interests
  - ✓ Professional activity **entirely dedicated** to the tasks assigned
  - ✓ Hierarchical **obedience**
  - ✓ Professional **secrecy**, duty of **reserve, neutrality** and secularism
  - ✓ **Information** of the Public
- Among common **rights**:
  - ✓ Freedom of **opinion** on philosophical, political, belief or trade union matters
  - ✓ **Non-discrimination**, prohibition of sexual or moral harassment
  - ✓ Functional juridical protection
  - ✓ **Participation** rights — Right to **strike**

83 In addition to honesty, other universal values are also embedded in the principles and rules of the General Administrative Procedure Act – e.g. competence, trustworthiness, cooperativeness and engagement, courage and perseverance.

84 Public Sector HR Challenges in France, available at: [http://www.thensg.gov.za/wp-content/uploads/2016/09/DGAFP\\_Presentation-HR-challenges\\_20160926\\_Display.pdf](http://www.thensg.gov.za/wp-content/uploads/2016/09/DGAFP_Presentation-HR-challenges_20160926_Display.pdf).

2. In South Australia, the Government has adopted a document entitled South Australian Public Sector Values and Behaviours Framework,<sup>85</sup> which promotes courtesy, competence, trust, respect, cooperation and engagement, honesty and integrity, courage and perseverance, sustainability.
3. The English guide “The 7 Principles of Public Life”<sup>86</sup> promotes the following principles of public administration work, which are important for integrity and also represent a standard set of principles of general administrative procedures in Europe: selflessness, integrity, objectivity, accountability, openness, honesty and truthfulness.
4. Guidelines on Compliance with the Provisions of the Ethics in Public Office Acts in Ireland.<sup>87</sup> These Guidelines provide step-by-step instructions for public officials on meeting the requirements of the procedures they apply. In addition, for any ambiguity regarding the action to be taken in the procedure, they clearly indicate the advisory body that public officials may approach to clarify any doubt about the application of the procedures in a particular case. Instructions and guidelines in guides, as well as advice they receive from the competent advisory body, are binding for public officials, unless they directly oppose the enforceable regulations.
5. The Finnish Guidebook for Public Officials (Values in the Daily Job – Public Official Ethics)<sup>88</sup> promotes the principles of efficiency, transparency, competence, trust, courtesy, impartiality and independence, equality, accountability.
6. A good practice example of capacity and professional integrity building: Competency Management in the Belgian Federal Government.<sup>89</sup>
7. A good practice example of simplification of administrative procedures: Quality of Public Administration, A Toolbox for Practitioners, European Commission 2015.<sup>90</sup> This publication promotes the most important ethical principles and values: the duty of a public official to act in the public interest; that a public officials should imagine himself/herself in the role of an individual party in the administrative proceeding when deciding on its rights and interests,

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85 Public Sector Values and Behaviours Framework, available at: <http://publicsector.sa.gov.au/wp-content/uploads/20150710-Public-Sector-Values-and-Behaviours-Framework.pdf>.

86 The 7 Principles of Public Life, available at: <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2#selflessness>.

87 Guidelines on Compliance with the Provisions of the Ethics in Public Office Acts in Ireland, available at: <http://www.sipo.gov.ie/en/Guidelines/Guidelines-for-Public-Servants/Public-Servants-Guidelines-10th-Edition-Updated-Nov-2015-1.pdf>.

88 Values in the Daily Job – Public Official Ethics, available at: <http://workspace.unpan.org/sites/internet/documents/UNPAN91843.pdf>.

89 Competency Management in the Belgian Federal Government, available at: <https://soc.kuleuven.be/io/onderzoek/project/files/hrm27-country-report-belgium.pdf>.

90 Quality of Public Administration, A Toolbox for Practitioners, European Commission 2015, available at <http://ec.europa.eu/esf/main.jsp?catId=575&langId=en>, p. 82.

because it will best understand what procedures should be applied in order to make the decision in the best interests of the party and, at the same time, in the public interest. The most important ethical values of public officials are: the application of the principles of legality, integrity, impartiality and independence, transparency in work, treating the parties in the proceedings professionally and with respect, and efficiency in work.<sup>91</sup>

## 6. TRAINING EXERCISES<sup>92</sup>

### EXERCISE 1 (the principle of legality)

#### Facts:

The party has acquired a right through a decision dated February 15, 2002.

However, a new law was subsequently passed (conflicting with the old law), and in accordance with that law, a past ruling is not in conformity with the new law. The new law (its transitional and final provisions) do not regulate the rulings passed before its adoption.

In order to protect the acquired rights, the first-instance body may use the (extraordinary) legal remedy of revoking and changing the ruling at party's request or with party's consent.

The party has not filed a request and does not consent to the change of the ruling.

#### Question:

1. How to act in that case?
2. Does the new law derogate the old one?

#### Note:

- The statutory time limits for changing final and finally binding rulings have expired.
- The first-instance body cannot conduct a new administrative procedure until the above act is changed. Otherwise, there would be two valid rulings on the same right that are different in scope and content.

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91 Quality of Public Administration, A Toolbox for Practitioners, European Commission 2015, p. 18.

92 Taken from: Education of Administrative Proceedings Managers and Inspectors in BiH (EuropeAid/132930/C/SER/BA), Training materials including model forms for practical application, March 2016.

## EXERCISE 2 (the principle of legality)

### Facts:

The party has filed a property claim to regain possession of an apartment (apartment restitution) to the Commission for Real Property Claims of Displaced Persons and Refugees pursuant to the Law on Transfer and Settlement of Property Claims (Official Gazette of the BIH Federation, No. 6/04, 22/04 and 59/05).

The same authority had already acted on the claim and passed a negative ruling. Unsatisfied, the party has filed a new claim.

### Question:

1. How should the competent administrative authority act on the repeated claim?
2. Can the administrative authority dismiss the claim on the grounds of ne bis in idem?
3. Is the administrative authority under the obligation to conduct administrative proceedings and decide on the merits of the party's claim?

### Note:

Excerpt for Judgment of the BIH Supreme Court No. 070-0-Uvp-07-000471 of 30 October 2009: The property claim for the repossession of the apartment submitted to the Commission for Real Property Claims of Displaced Persons and Refugees, which should be decided by administrative authorities in accordance with the Law on Transfer and Settlement of Property Claims, cannot be dismissed solely on the grounds that the administrative authority has already issued a ruling on the request of the party submitted to that authority, and the administrative authority is obliged to conduct administrative proceedings and decide on the merits of the party's claim.

## EXERCISE 3 (the principle of legality – predictability)

### Facts:

A party files a motion for renewal of proceedings based on the knowledge that different decisions have been passed in other similar cases.

The party legitimately expects that the administration shall act in the same way in similar cases, which gives the party a degree of certainty related to the administrations' actions.

This “new” information gives the party legal grounds to file the motion for renewal of administrative proceedings.

**Question:**

1. Should the renewal of administrative proceedings be granted?
2. What are the grounds for renewal?
3. Are there grounds to deny the motion, and if so, what are they?
4. What is a “new fact”?

**Note:**

Excerpt from Judgment of the BIH Supreme Court No. U-4373/01 of 03 June 2004: The knowledge of the party that in other similar cases it was decided differently does not present a new fact that would allow for the renewal of administrative proceedings.

### **EXERCISE 4 (the principle of legality, the principle of efficiency)**

***Waiving the right to appeal***

**Facts:**

After the first instance ruling was adopted, the party has waived the right to appeal (by a statement made on the record, or a special submission, etc.). After that, the party files an appeal to the first-instance authority within the time limit for appeal.

**Question:**

1. Is the authority under the obligation to act on the appeal or should it dismiss the appeal? On what grounds?
2. Can the party waive the right to appeal at all?
  - a. No (this is a constitutional right and the party should have sufficient time to consider what to do and whether to file the appeal).
  - b. The party may waive the right to appeal but the waiver cannot subsequently be revoked.
  - c. The party may waive the right to appeal and the waiver can be subsequently revoked (as is the case with the rules on revoking the motion).

**Notes:**

**1. Croatian GAPA, NN 47/09:**

***The right of appeal and withdrawal from appeals***

Article 106

(1) A party may waive its right of appeal in writing or orally on the records from the day of receipt of the first-instance decision until the day of expiry of the time limit for lodging appeals.

(2) Waiver of the right of appeal in matters with several parties produces legal effect only when all parties waive their right of appeal.

(3) A party may withdraw from an appeal before delivery of the decision on the appeal.

(4) When a party withdraws from a lodged appeal, proceedings upon the appeal shall be terminated by a decision.

**(5) Waiver of or withdrawal from appeals may not be revoked.**

**2. Republic of Srpska GAPA, Official Gazette of RS/02,07,10** – does not include a norm on the issue/administrative practice!

**3. Serbian GAPA:**

***Waiving the right to appeal***

Article 156

A party may waive the right to appeal from the moment it was informed of the ruling until the expiry of the time limit for appeal.

Waiver of the right to appeal **cannot be revoked**.

Only if all the parties and the person whose motion to be recognised the capacity of a party in first-instance proceedings has been denied waive the right to appeal. The ruling becomes final and enforceable.

**EXERCISE 5 (the principle of proportionality)**

**Facts:**

A party filed a request for free access to information of public importance to the Ministry of the Interior regarding the spending of the Ministry's budget

funds. The Ministry of the Interior denied the request, referring to the confidentiality of information and the protection of national security.

The party has filed a complaint to the Commissioner for Free Access to Information, who annulled the decision of the Ministry of the Interior and ordered that the requested information be provided to the party.

**Question:**

1. Has the Commissioner for Free Access to Information made the right decision?
2. Has the principle of proportionality been respected in the decision of the Ministry and in the Commissioner's decision?





*Aleksandra Rabrenovic*  
*Jelena Kostic*  
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# **Open Dilemma: How to React to Illegal Orders From a Superior?\***

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Public sector employees are required to respect the work discipline and perform their professional duties and delegated tasks and assignments, conscientiously and diligently. Conscientious conduct implies that they should comply with laws and secondary regulations in their work, and carry out their duties professionally and in the public interest.

As the public administration is a hierarchical organisation, public sector employees have to follow the instructions of their superiors. In carrying out their duties, they are also required to comply with the rules of conduct specified in the Code of Conduct, if there is one.<sup>1</sup> If, however, they refuse to follow the instructions and do not comply with the Code of Conduct, they may be subject to disciplinary sanctions and, in extreme cases, lose their job. As a result, public sector employees need to prove that any such refusal to follow instructions is justified by some exceptional and professionally unacceptable circumstances. A clear-cut situation in which an employee should not follow the instructions is when he/she is instructed to act against the legal requirements valid in a given case or against the Code of Conduct rules.

In more general terms: when is a refusal to follow orders from a superior justified? It is justified in the case when a public sector employee receives an instruction or an order from the superior to act in a manner that is irrational, unethical, contrary to law or the public interest. These situations can cause an ethical dilemma as there is a contradiction between two opposite requirements: 1) to act contrary to the law, rules and regulations,

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\* We are very grateful to Mr. Francisco Cardona for his valuable input into this chapter.

1 Some categories of civil servants, such as, for example, specific professions (employees in internal affairs authorities) may be subject to special rules of conduct, given the nature of their work.

and the moral values that public servants are obliged to follow, and 2) to respect and act in accordance with instructions given by their superior. Such a situation may force a public sector employee to choose either to stand up against the superior's wrongful instructions and risk resentment or retaliatory reactions, or to follow up loyally the superior's orders, even if they are wrong or even illegal.

These situations may occur in all areas of the public sphere. Illegal superior orders are particularly common in the areas most vulnerable to corruption, such as procurement, recruitment, etc. Another situation that is even more difficult to handle is when the superior's instruction is in line with the law, which may allow discretionary decisions, but is still immoral or clearly against more universal standards such as, for example, the fundamental human rights. Finally, a law may simply be wrong, for example, by including discriminatory provisions. In that case, there is a conflict between acting in accordance with the law and in accordance with universally accepted ethical standards.

Should public sector employees comply with laws or regulations that are illegal? Is an illegal law conceptually possible? Which are the conceptual foundations to refuse compliance with illegal orders or illegal laws?

## CONCEPTUAL FRAMEWORK: MINDLESS OBEDIENCE IS PERILOUS FOR SOCIETY

Before going into the practical discussion, we may want to consider the human nature and how people tend to react to obedience, through a conceptual framework based on power relationships. The psychological Milgram experiments conducted by the American psychologist Stanley Milgram between 1960 and 1963, concurrent to the Eichmann trial in Jerusalem (and replicated with consistent results several times since including by Polish researchers in 2016 –17), show a strong propensity of ordinary and decent human beings to obey superior orders even if those orders imply unjustly harming someone else (i.e. committing a crime).<sup>2</sup> In the experiment, the experiment leaders instructed participants to obey an authority figure who ordered them to perform acts conflicting with their personal conscience and

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2 "Conducting the Milgram Experiment in Poland, Psychologists Show People Still Obey", available at: <http://www.spsp.org/news-center/press-releases/milgram-poland-obey>.

moral values. The experiment found that a very high proportion of people were prepared to obey, albeit unwillingly, even if apparently causing serious injury and distress to others. It also showed that only a small proportion of adults are prepared to resist heroically. Milgram first described his research in 1963, in an article published in the *Journal of Abnormal and Social Psychology*,<sup>3</sup> and later discussed his findings in greater depth in his 1974 book, *Obedience to Authority: An Experimental View*.<sup>4</sup>

Milgram summarised the experiment in his 1973 article, *The Perils of Obedience*, writing:

“The legal and philosophic aspects of obedience are of enormous importance, but they say very little about how most people behave in concrete situations. I set up a simple experiment at Yale University to test how much pain an ordinary citizen would inflict on another person simply because he was ordered to by an experimental scientist. Stark authority was pitted against the subjects’ [participants’] strongest moral imperatives against hurting others, and, with the subjects’ [participants’] ears ringing with the screams of the victims, authority won more often than not. The extreme willingness of adults to go to almost any lengths on the command of an authority constitutes the chief finding of the study and the fact most urgently demanding explanation. Ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process. Moreover, even when the destructive effects of their work become patently clear, and they are asked to carry out actions incompatible with fundamental standards of morality, relatively few people have the resources needed to resist authority”.<sup>5</sup>

The same line of thought may be found in some key works of Balkan contemporary literature such as the 2004 *They Would Never Hurt a Fly: War Criminals on Trial in The Hague* by Slavenka Drakulic, where the Croatian journalist in the novel gives an account, resembling the “banality of evil”, as coined by Hanna Arendt, on the personalities of the war criminals from the former Yugoslavia on trial in The Hague.

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3 S. Milgram, “Behavioral Study of Obedience”, *Journal of Abnormal and Social Psychology*, 4/1963, pp. 371–378.

4 S. Milgram, *Obedience to Authority: An Experimental View*, Harpercollins, 1974.

5 S. Milgram, “The Perils of Obedience”, *Harper’s Magazine*, December 1973. Available, *inter alia*, at [https://is.muni.cz/el/1423/podzim2012/PSY268/um/35745578/Milgram\\_-\\_perils\\_of\\_obediance.pdf](https://is.muni.cz/el/1423/podzim2012/PSY268/um/35745578/Milgram_-_perils_of_obediance.pdf).

To protect public sector employees' ability to resist situations where they receive an illegal or unethical order from their superior has been the object of numerous philosophical research from the classical Greek philosophers such as Plato and Aristotle, Roman authors such as Cicero, and all the way to the Western Middle Ages through Albert the Great (1200–1280) and Thomas of Aquinas (1225–1274). Their basic idea was that natural law had precedence over positive law or, in other words, that human rationality should prevail over the whims of a ruler. These ideas gained special importance during the Nuremberg War Crime Trials, when a large number of indicted war criminals, in their defence, invoked compliance with “superior orders” as the excuse for their actions.<sup>6</sup>

In the Nuremberg trials and in the aftermath of Germany's reunification in 1990, the line of German case law known as the *Mauerschützenprozesse* reiterated the principle that following orders is not a sufficient legal excuse to avoid personal criminal liability. This legal doctrine is also to be found in the Adolf Eichmann trial in Jerusalem (1961). The justification of this doctrine is based on the philosophy of law. It comes, as already mentioned, from the notion of natural law (from Aristotle, Albert the Great and Aquinas) and, since the Nuremberg trials, from the Gustav Radbruch formula, which in a nutshell reads: an extremely unjust law is not law. Therefore, such a law is not binding for anyone.

Later on, that doctrine evolved into an all pervasive human rights movement. The UN Universal Declaration of Human Rights (UNUDHR) includes the notion of human dignity in the equation: Courts now use the concept of dignity to give a meaning to rights, to connect rights, to extend rights, to create new rights, and to weigh rights against each other.<sup>7</sup> Dignity has become a tool through which courts define, order and extend rights.

From this standpoint, the human right to dignity confers the right of a public sector employee to refuse to comply with instructions that go against his/her conscience, moral values or ethical convictions. In the same vein, from the perspective of causing no harm to others or to the public interest, an employee has the obligation to refuse compliance with instructions that go against his/her conscience, moral values or ethical convictions. This

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6 During these trials, which were conducted in accordance with the rules of the London Charter of the International Military Tribunal, it was found that superior order does not relieve officers from criminal irresponsibility, but that it may be a ground for reduction of sentence. L. C. Green, *Superior Orders in National and International Law*, A. W. Sijthoff International Publishing Co., Leiden 1976.

7 See Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights”, *The European Journal of International Law*, 4/2008, pp. 655–724. Available at: <http://www.ejil.org/pdfs/19/4/1658.pdf>.

understanding is nowadays part and parcel of widely accepted Western philosophical values.

## HOW DO THESE PHILOSOPHICAL FOUNDATIONS TRANSLATE INTO CIVIL SERVICE LAWS?

The philosophical foundations and historical experiences discussed above provide the conceptual framework for how to judge exceptions from the obligation to follow superior orders. These exceptions are, with some variations, a part of almost all national civil service legislations in the Balkans.<sup>8</sup> The legislation that governs the status of public sector employees (as a broader category of employees, which, in addition to civil servants, includes employees who work in public services, such as health, education, culture, etc.) is still, unfortunately, not well developed in most countries of the Western Balkans. For this reason, this section will focus only on civil servants.

The civil service legislation in the Western Balkan countries provides that in carrying out his/her duties, a civil servant must comply with the instructions and orders of the superior.<sup>9</sup> However, if a superior order is illegal (or in breach of the Code of Conduct), or ethically questionable, the civil servant is obliged to warn the superior, and may request from the superior a written order for the required action or decision.<sup>10</sup> If the superior issues a written order, the civil servant is obliged to act in accordance with it, unless that would constitute a criminal offense.<sup>11</sup>

Some jurisdictions prescribe additional legal protection for civil servants, requiring a civil servant to report all details of the case to another person in the institution (person in charge of the HRM in the Kosovo\* institutions, or the head of the authority in Montenegro),<sup>12</sup> or to the authority in charge for supervision of public administration authorities (in Serbia and in the BiH

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8 The only exception is the Macedonian Civil Servants Law that does not include the provisions on this matter.

9 Article 61 of the Kosovo\* Civil Servants Law; Article 63, Paragraph 1, of the Montenegrin Civil Servants Law.

10 Article 43 of the Albanian Civil Servants Law, Article 62 of the Kosovo\* Civil Servants Law, Article 63 of the Montenegrin Civil Servants Law.

11 Article 63, Paragraph 3 of the Montenegrin Civil Servants Law, Article 18, Paragraph 2 of the Serbian Civil Servants Law.

12 Article 14 of the FBiH Civil Servants Law; Article 15, Paragraph 2 of the Montenegrin Civil Servants Code of Conduct, *Official Gazette of Montenegro*, No. 20/2012.

entity Republic of Srpska),<sup>13</sup> the competent judicial authority (Kosovo\*), or to the “competent authority” (BiH and FBiH level).<sup>14</sup>

A written order by the superior excludes the civil servant’s material and disciplinary liability, but it does not exclude his/her criminal liability. The Montenegrin Civil Servants Law prescribes that a civil servant is absolved from the material and disciplinary liability if he/she has caused damage or committed a disciplinary offense by acting on a written order of the superior. However, if the civil servant’s conduct constitutes a crime as described in the penal code, he/she is still held criminal liable. This provision is in line with the principle of subjective, individual criminal responsibility, according to which everyone is fully responsible for their own actions. Accordingly, if a civil servant believes that by acting in a specific case he/she might commit a crime, he/she is obliged to refrain from such a conduct.

## FROM RULES TO PRACTICE

Although the civil service legislation clearly specifies the rules of conduct for acting on superior orders, they are not always easy to implement in practice. While the legislation contains the basic provisions on how to respond to orders by managers/superiors, it is vague and ambiguous on how to handle particular situations in real-life situations.

In such situations, described at the beginning of this chapter, civil servants face two main dilemmas. The first one relates to the fear of the superior’s resentment and negative reactions, which may result in getting unfavourable performance assessments, lack of promotion, and even loss of job, in response to the civil servant’s refusal to follow his/her superior’s order or instruction. The second dilemma is reflected in the fear of criminal liability, and therefore the loss of job, if he/she does comply with the superior’s order or instruction.

Let us imagine a situation when the superior has given an illegal order. An HRM Officer has received an instruction from the superior that, during the selection process, the highest point score should be given to a candidate in the competition who is not the best candidate. Or, to give another example:

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13 Article 18, Paragraph 3 of the Serbian Civil Servants Law; Article 21, Paragraph 4 of the Republic of Srpska Civil Servants Law.

14 Article 62, Paragraph 2 of the Kosovo\* Civil Servants Law; Article 17 of BiH Institutions Civil Servants Law.

a Procurement Officer has received an instruction to select the bidder whose bid is not the best bid in terms of price and quality.

In accordance with the existing legal framework, in such situations, the civil servants should first warn the superior that the order is unlawful or against the institution's procedures and ethical standards. To be able to do that, the civil servant should first make sure that he/she is fully acquainted with all relevant legislation, regulations and rules (including codes of ethics) that apply to the particular situation, in order to be certain about the case – before he/she alerts the superior(s) that the instruction is illegal and improper. In such a situation, expertise and knowledge in the subject matter are the civil servant's "best allies" and the first line of defence. In the cases mentioned above (the HRM and procurement officers), the civil servant may present the provisions of the civil service legislation or procurement legislation and related penal provisions to his/her superior. What sometimes happens in practice is that, when faced with the existing legislation and regulations and the consequences of non-compliance, the superior withdraws his/her instructions.

If, however, the manager – in spite of the civil servant's professional advice and oral warning – insists that his/her instructions should be implemented, the civil servant can take one or more of the following steps. The first one, in line with the civil service legislation, is to request a written order from the superior, which would provide the civil servant with a written evidence of the superior's improper orders. However, the problem is that it is rather unlikely that the manager will issue a written order. That imposes an additional dilemma on the civil servant, because without a written trail he/she is not protected from the disciplinary or misdemeanour liability in case he/she does follow the instructions. For that reason, it is important for the civil servant that he/she makes a written and dated statement of what was requested from him/her by himself/herself and keeps it in his/her records to be used in potential disciplinary or other proceedings. Another useful measure in this situation would be to report the case and request an opinion on how to proceed from his/her trade union or inspection officer, and/or an outside independent body, such as the Ombudsman,<sup>15</sup> Anti-Corruption Agency, Supreme Audit Institution, or another relevant authority.

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15 See the case of a Sarajevo professor who has successfully challenged the management of his faculty with the assistance of the Ombudsman. See: A. Hanusic, *Judicial Protection from Discrimination of Bosnia and Herzegovina, Analysis of Legislative Solutions and Practice in Light of the First Cases in this Field*, Analitika, 2013. Available at: [http://www.analitika.ba/sites/default/files/publikacije/analitika\\_-\\_report-\\_judicial\\_protection\\_from\\_discrimination\\_4june2013\\_eng.pdf](http://www.analitika.ba/sites/default/files/publikacije/analitika_-_report-_judicial_protection_from_discrimination_4june2013_eng.pdf), p. 14.

## **An example of a behaviour of a civil servant who received illegal instructions from his superior**

A civil servant in one of the Balkan countries was requested to put on hold all on-going recruitment and selection procedures due to the announced parliamentary elections. He was told by his superior that the head of an institution is not permitted to make new civil service appointments in the course of and until the end of the parliamentary elections. As the Civil Service Law in the respective country did not envisage a suspension of appointments during the parliamentary election period, the civil servant warned his superior that his instruction was not in line with the existing legislation. He also made a written note of the superior's instruction and kept it in his HR file. Furthermore, in order to clarify the situation, the civil servant requested an opinion from an independent outside body, which confirmed the civil servant's view that there was no obstacle in proceeding with the recruitment and selection procedures.

The case, however, did not rest there. After the confirmation from the outside body had been received, a disciplinary procedure was initiated against the civil servant. In the course of the proceedings, however, it was determined that the civil servant did not violate the work discipline and the provisions of the Civil Service Law, and disciplinary charges were dropped.

A civil servant should consider, in particular, whether fulfilling the order of his/her superior would constitute a criminal offense in accordance with the national legislation. If the action or decision in question contains any element of a criminal offense, such as, for example, the broadly defined criminal offence of "abuse of office" or "embezzlement" in some jurisdictions, the civil servant should not only refrain from the requested behaviour, but also notify the head of the authority or the appropriate judicial institution about the incident. In both previous examples, if the civil servants follow the manager's order, they could be subject to criminal prosecution.

## **HOW TO ADDRESS IMPROPER ORDERS FROM THE INSTITUTIONAL POINT OF VIEW?**

The issue of illegal superior orders should be addressed as an institutional rather than individual problem in all public sector institutions. The implementation of the principle of legality, the fundamental loyalty of the public sector employees to the legal order of the country, and the respect for human rights are institutional commitments of any public administration ruled by law and democratic values. That requires the an adequate institutional framework in place, which would guarantee their observance.

To ensure that public sector employees are able to abide by the rule of law, avoid disciplinary liability, and provide adequate evidence in case of



potential disciplinary or legal proceedings, it is recommended that the senior management of a public sector institution adopts written guidelines that would regulate the situation of acting upon illegal orders. Such guidelines would provide detailed instructions on how to act in specific situations when there is a justified reason to react in order to avoid illegal actions or decisions. This would reduce the severity of the dilemmas caused by illegal orders for all participants in public administration (managers, subordinates, and external or internal controllers of the public behaviour). Although such guidelines would not have a legal nature, a public institution could oblige all its employees to abide by them.

Written guidelines on the issue of improper orders could address, for example, the following issues:

1. If he/she considers that acting in accordance with the instruction or order by his/her superior would be in breach of regulations or the ethical values, a public sector employee is obliged to request that the instruction or the order is submitted in writing, indicating who ordered him/her to act in such manner and when (provided that the civil servant is obliged to keep written records of the conversation, indicating the date when he/she spoke to the manager). In the meanwhile, the instruction or order should be put on hold and not implemented. A copy of the written instruction should be forwarded simultaneously to the HR department (if it exists) and to the senior management of the institution, along with the comments or critical observations by the incumbent employee.
2. Guidelines should establish a short timeline for the response of the immediate superior or the senior manager of the institution to the public employee's request. Once such a request has been submitted, it should be acted upon without delay. The response should be based on the facts in the situation and the rules and regulations prescribed by the law, and not simply refer to hierarchical authority as the reason to abide by the superior's instruction or order. The reason is that instructions to subordinates need to be rational, i.e., based on facts and human reason. What is questioned is the rationality or legality of the given instruction or order, and the issue is whether it is illegal or unethical or not. A superior should not expect mindless obedience from a subordinate, as the human dignity of subordinates should be protected.
3. Guidelines should spell out the obligation of the public sector employee to prepare written records, including the written requests and written instructions (if submitted by the manager). The records should contain the signature of the person who prepared the records, in addition to the date and a detailed description of the specific situation, indicating the reasons for refusing to act in accordance with the superior's instruction or order.

A question may be raised whether a public sector employee is obliged to inform the senior management about his/her refusal to act. In these situations, it would be reasonable that the employee informs his/her immediate superior's superior about the situation in writing. This would allow timely implementation of appropriate measures by the senior manager towards the lower-level management that has acted illegally in carrying out their duties and powers. In addition, in some situations, the immediate superior may refer to an order of the senior management, which may be false, and thus informing the senior management directly would ensure that the head of the institution is notified about the new situation. Given the fact that he/she is responsible for the legality of the institution's operations, there are good reasons why he/she should act.

An additional problem that may become visible in practice is insufficient knowledge of the law among public sector employees, especially the criminal code provisions or the fundamentals of human rights. It is possible that a public sector employee is not aware that his/her conduct is illegal and/or constitutes a criminal offense, or that it might constitute a violation of human rights. In order to overcome this problem, it is necessary to ensure continuous education and training of public sector employees, including police officers and military personnel, on democratic values, human rights, ethics, accountability mechanisms, and whistleblowing.

Another useful institutional approach to the issue of illegal instructions, including ethically questionable requirements by hierarchical superiors, would be to create a counsel or internal complaints mechanism, which could be established within the Human Resource Management departments, where they exist. The role of such a unit would be to provide advice and guidance, in addition to representing a competent eyewitness in case of a future legal conflict between the institution and the employee in question. Complaints units may also act as a checks and balances instrument to deter a superior from giving illegal or ethically questionable instructions to subordinates. Additionally, the legislation should also foresee, as in the case of retaliation on whistle-blowers, a sort of a sanction mechanism for managers who knowingly give illegal instructions or orders.

To create additional institutional synergies in tackling the issue of improper superior orders, public sector employees should be enabled to use additional checks and balances mechanisms, or control mechanisms, such as internal audit and/or whistle-blower protection. Internal auditors could potentially have an important role in identifying illegal superior orders. The role of internal auditors is to advise the senior management on how to eliminate or reduce risks of illegal and improper behaviour, including corruption and other

criminal offenses, at the level of the institution.<sup>16</sup> After the risk assessment, auditors usually proposes the adoption or modification of guidelines for public sector employees on specific matters, predominantly of a financial nature. However, as their primary role is to assist in assessing risk factors at the institutional level, internal auditors could take the initiative and request the preparation of guidelines on how to act in case of improper orders, as outlined above, especially when instructions to carry out a specific action may result in a criminal offense.<sup>17</sup>

In practice, if the internal auditor notices in the course of his/her work that a public sector employee has acted illegally or committed a criminal offense, he/she is obliged to inform the senior management about it. In addition to the report, internal audit is required to document all allegations in their report, which should include any written trail of improper superior orders, and which can later be used as evidence before the competent authorities in disciplinary or criminal proceedings.<sup>18</sup>

Finally, improper superior instructions could also be addressed through whistle-blower protection mechanisms, where they exist. Whistle-blower protection has some unique features and applies to a much wider array of issues, in addition to improper superior orders. It encourages public sector employees to inform about and give warnings of all irregularities that take place in their organisations or in their relationships with external partners, and it has proven to be a successful model for reducing losses in the state budget in some countries.<sup>19</sup> The whistle-blower institute should be tailored specifically to handle illegal or unethical orders and instructions as well.

Public sector employees are in a unique position to discover fraud and corruption within their institutions. To act as whistle-blowers, however, they need to know that the whistle-blower role is protected. The role of whistle-blowers is important for strengthening accountability, countering corruption, and fostering transparency. However, whistle-blowers could be at risk of consequences of their warnings such as bullying, discrimination, and harassment. Therefore, the existence of sound legal protection mechanisms, embedded in statutes, is of vital importance for the prevention of retaliation against whistle-blowers.<sup>20</sup>

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16 Standard 1210.A2.

17 In accordance with Standard 2060 on the potential of the occurrence of criminal offenses at the organisation level, internal auditors are under obligation to notify the senior management.

18 Standard 2330.

19 Thus, according to Transparency International, in the 2002–2012 period, the South Korea Anti-Corruption and Civil Rights Commissioner had seized USD 50 million based on reports filed by whistleblowers.

20 Whistleblower protection has been given special attention in the documents developed within OECD and the Council of Europe, as well as by Transparency International. Cf: Protection of Whistleblowers – Study on Whistleblower protection frameworks,

Some Western Balkan countries have recently introduced whistle-blower protection in their legislation.<sup>21</sup> It should be noted, however, that these countries are still at the early stages of implementation of the statutory whistle-blower protection. Consequently, whistle-blowers may still be exposed to various forms of retaliation and abuse. However, that should not discourage public sector employees to act with integrity in order to protect the rule of law and their personal and institutional ethical values.

## CONCLUSION

On the basis of the brief analysis of improper superior orders in this chapter, we may conclude that although it may be seen as quite peculiar, this issue is encountered rather often in a public sector employee's career in the Balkans. Despite that, very little attention has been paid to it by policy-makers and international and national institutions specialised in integrity building. A public sector employee is often left completely alone with an important integrity dilemma – whether to follow his/her superior's instructions or act in accordance with the law and his/her conscience. Therefore, the authors hope that this final chapter of the publication will provide some basic guidelines for public sector employees on how to act in such situations. In addition, there is a need also to initiate and stimulate a wider debate on how to establish a sound institutional framework for handling illegal or unethical orders and instructions in the public sector, and put an end to the difficult dilemmas they represent for public servants who are exposed to them. The ultimate goal should be to eradicate illegal and unethical orders and instructions. Building a solid integrity shield in the public sector will be the key to achieving that goal.

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compendium of best practices and guiding principles for legislation, 2012, <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>; Recommendation CM/Rec (2014)7 of the Committee of Ministers to member States on the protection of whistleblowers; Protection of whistleblowers: a brief guide for implementing a national framework, 2016; International Principles for Whistleblowers Legislation – best practices for laws to protect whistleblowers and support whistleblowing in the public interest, 2013, Transparency International, [http://www.transparency-se.org/Whistleblower-Principles\\_final\\_web.pdf](http://www.transparency-se.org/Whistleblower-Principles_final_web.pdf).

21 Albania has adopted the Law on the Protection of Whistleblowers in 2014, Bosnia and Herzegovina in 2013, Kosovo\* in 2011, Macedonia in 2014, Montenegro in 2014, and Serbia in 2014.

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