**CEDEM**
Centar za demokratiju i ljudska prava
Center for Democracy and Human Rights

# TRANSITION IN MONTENEGRO

**-Party and partitocracy tendencies-**
**-Obstacles of establishing TV- public service-**
**-Reform of the public administration-**
**-Anti-corruption-**
**-Obstacles to free enterprise-**

***Report No. 23 ( September 2004 )***

23

## On This Report

One of the main strategic objectives of the CEDEM is to monitor and analyse the transition process in Montenegro and state its opinion thereof on the basis of analysis as presented in public reports and thereupon influence public opinion. After the parliamentary elections in Montenegro held in May 1998, the CEDEM decided to observe Montenegrin transition, besides other elements of Montenegrin society, in terms of the legislation (the process of passing laws and the parliamentary proceedings), media and privatisation analysis. Since then, we have published reports titled *"Transition in Montenegro: Legislation, Media and Privatisation*". In 1999, 2000, 2001, 2002 and 2003 we published four quarterly reports respectively, and the last one of four always represents a kind of conclusion about the trends in the previous year. The same project is being modified and widened in the year 2004.In regard to the previous period we shall be dealing with more issues with somewhat changed content.

Since they cover an alive and uncertain process, the reports are greatly conditioned by the time and circumstances. They contain evaluations of events and processes the way we see them, striving to be as objective as possible.

Report No. 23 has been made by the CEDEM analytical team: *Veselin Pavicevic, Ph.D.*, Professor at the School of Law in Podgorica , *Drasko Djuranovic*, editor-in-chief of the weekly paper "Monitor" ,*Milan Markovic*,Ph.D.,Professor at the Faculty of Law in Podgorica, *Dragan Prlja*,Dr and *Rade Bojovic*, legal councillor. The coordinator in charge of the project and of the analytical team is *Srdjan Darmanovic, Dr.*, the CEDEM's director.

The Project "*Transition in Montenegro:Party and partitocracy tendencies,Obstacles of establishing TV -public service,Refprm of the public administration,Anticorruption and Obstacles to free enterprise"* has this year, too, been supported by the famous American non-government organization *National Endowment for Democracy* (NED) from Washington, D.C. Apart from gratitude for support, the CEDEM wants to express its high appreciation of the fact that the four - year cooperation with the NED, initiated at this project, continues and widens.

Podgorica,September 2004

# PARTIES AND PARTITOCRACY TENDENCIES

Ph. D. Veselin Pavićević

## BREAKDOWN OF BOYCOTT COALITION
### - Breakdown or redefining of parliament de-legitimization strategy -

Political autumn in Montenegro was marked by announcement and then actual return of part of the opposition into the Parliament. Fifteen month of absence was ended when two (SNP- Socialist People's Party and SNS- Serbian People's Party) out of four pro-Serbian parliamentarian parties decided (temporarily for now) to give up parliamentarian boycott as "winning strategy" within opposition strategy to fight actual regime. Once leading pro-independents party LSCG (Liberal Union of Montenegro) intends to join them. Political public has heard different explanations for this move. If we put aside more or less unsuccessful attempts to rationalize boycott decision (return of TV broadcasts of parliamentarian sessions) the question arises whether this return represents a comeback to basic program principles of Montenegrin parliamentarian parties, among which the most important ones are establishment of foundations of representative democracy institutions. Or in other words, after the "admission" and understanding that boycott strategy hasn't resulted in anticipated effects, how realistic can be expectations that in realization of their legitimate goals, in the future, political parties in Montenegro will be abiding exclusively by democratic standards?

It is not easy to answer this question especially if one has in mind certain facts and circumstances.

Decision on cessation of parliamentary boycott was not result of internal will of responsible party structures but rather consequence of intensive and systematic pressure of relevant international factors.

This goes primarily for SNP and SNS who, after several months of confrontations with partners with whom they created "Boycott Coalition",[1] accepted cooperation with international factors as possibility to reduce the consequences of obvious de-legitimization process of previous strategy. This fact is clearly illustrated by following indicators of public mood:

***Public support to opposition parties' boycott of the Parliament:***

[1] Decision on boycott of Parliament and all of its working bodies was announced May 27th 2003. At the same time opposition has vowed to continue with its activities by "non-parliamentarian means, together and in organized manner". By signing *Declaration on common action* (July 22nd 2003) opposition parties had determined strategic action directions and among them was even **formalization of obligation to permanently leave the Parliament**. Promoter, and the most zealous advocate of this idea was NS (People's Party) and closest to it was LSCG. Instead of TV broadcasts as precondition for return into the Parliament, the whole issue of institutional activity of opposition was opened. After that, the public had the opportunity to find out that original reason was not the only, exclusive, and final motive for boycott. Even when the final intention was made public- change of power through extraordinary elections, the strongest request of the opposition was the resignation of Prime Minister, which is also the leader of strongest party. Opposition gave various reasons for this demand. At a time, it was alleged involvement of the Prime Minister in illegal cigarette smuggling and afterward his alleged involvement in well –known case of sex trafficking.

| Time of the survey: | Position % | | |
|---|---|---|---|
| | Yes | No | Can't access |
| June 2003 | 45.4 | 38.2 | 16.4 |
| September 2003. | 27.0 | 44.8 | 28.2 |
| December 2003. | 24.3 | 42.5 | 33.2 |
| April 2004. | 26.1 | 47.3 | 26.6 |
| June 2004. | 27.4 | 41.7 | 30.9 |
| October 2004. | 15.1 | 51.3 | 33.6 |

Survey results also points to significant fall of rating for parties within this new coalition. SNP, SNS, LSCG and NS, according to CEDEM's October survey of political public opinion, enjoyed firm support of 22,9% of citizens prepared to participate in eventual extraordinary elections. Having in mind that these parties, at the elections held in October 2002, have von 43,7% of votes, we may conclude that trend of public opinion is worrisome for them.

Of course, parliament boycott strategy and reduction of support to parties that boycotted parliament do not represent the only and exclusive causality of this occurrence. However, the fact that Parliament is "the strongest propaganda instrument" once again gained on significance especially at parties that ceased or will cease stubborn strategy of parliamentarian boycott.

Although facing consequences of parliamentarian boycott, some parties who announced their return into Parliament, at the same time continued with practice of non-institutional pressures not only on governing regime but on the founding structures of modern democratic order as well. One of such methods of action is formally linked with so called NGO **Assembly of People's Assemblies**, which in fact represents nothing else but political branch of Serbian Orthodox Church in Montenegro, and its leaders, at the same time represent radical wing of the strongest pro-Serbian party in Montenegro- SNP. This, by program and principles, clerical and populist, and by civilization standards backward social group, represents clear danger for stability of established social order and its institutions. This political group announced that by the Christmas 2005, it would hold, "people's assemblies" in all Montenegrin *counties and tribes*, where citizens would vote on issue of Montenegrin state status. In the announcement of this organization it is stressed that "on this people's assemblies, which are will be organized and work in the most democratic fashion, several tens of thousand people will determine upon the most important issues- state status, Serbian Orthodox Church, language, history and culture ".[2]

Formal disassociation of SNP from this announced People's Assemblies actions, should be taken with reserve. First of all, because this pro-Serbian party, as well as other pro-Serbian parties, is counting on support of this electorate- electorate that has been permanently socialized on values articulated by this NGO[3] and by Serbian Orthodox Church. Thus, partial and temporary disassociation of these, and similar, announced non-institutional activities, should be seen as desirable position regarding international political

[2] *Vijesti*, October 23rd 2004,

[3] Results of the survey on topic of social identities that CEDEM conducted during September 2004, points to an under average connection of pro-Serbian parties' supporters for tribe and clan. For example regarding position "very important belonging to tribe and clan" this group expresses in relative relation of 65.1% what is 15.8% more than average at public opinion in general. Situation is similar regarding level of linkage for nation, expressed by 71.4% of these parties' supporters and that is 13.3% higher than average compared to general public.

factors and democratic public. It should not be expected that SNP will, in considerable future, renounce support of those whose social identity is significantly determined by religious and national exclusivity. Unlike SNP, other pro-Serbian parties in Montenegro do not show any constrain regarding political activism of anybody relying on religious and national homogenization.

Therefore, when speaking about pro-Serbian parties regarding their position and role within development of democratic order in Montenegro, findings of CEDEM's analysts based on empirical researches still remains actual.

The biggest problem of so- called *pro-Serbian option* lies in the fact that it is divided within, on big number of relatively weak political parties what results in disintegration of particular political tissue and it causes losses of political strength as a whole. Furthermore, this option does not have strong leaders within. Therefore, all key authorities of this option are politicians from Serbia (Hague indicts and renowned nationalists) as well as religious authorities.[4] However, on long-term, probably the greatest problem of pro-Serbian parties is their ideology of atavistic –tribal type and the fact that this ideology has within a kind of "remembrance" on olden days. As such, this ideology is archaic and does not allow a lot of space for ideological manipulation with voters what, as consequence, disables political parties and their leaders to create a maneuver space within which they could achieve better political results. On the contrary, practice has shown every eventual movement of parties and leaders toward more progressive and non-nationalistic options, voters of this profile punish swiftly and efficiently. Thus, within political field we have reached a banal situation in which all *leaders from this block simply must compete in their nationalism and propaganda of backward values* because that is the price of their political survival and rating. This criticism is not ideological in its character because there is simply no non-ideological analytic perspective. Every analytic perspective must be based on certain values. If, as criteria we take any civilization values, it becomes quite clear that ideological criticism we present here on behalf of pro-Serbian political tissue is justified. If we analyze ideological elements of this option, first in line must be nationalism, which is not only politically backward and disastrous for democratic society but it is also one of the main reasons that caused all the problems our region went through in period of transition. Nationalism is, naturally, accompanied by xenophobia, which as political position, is in contrast with all the trends upon which modern Europe and the world in general are established. In addition to that, supporters of pro-Serbian parties in social-psychological sense are almost ideal types of authoritarian personality accompanied with traditional myth-mania it is obvious that our descriptions are more than realistic. All these assertions were confirmed by other our researches as well.[5]

While pro-Serbian parties are building their partitocracy interests on ideology with religion and nation at it center, the remaining member of Boycott Coalition - LSCG is doing that differently. Liberals actually succeeded in demonstrating cynic statement that every social relation has its money expression. The public had opportunity to find out about the way in which, formally the highest party official and actual leader of Liberals, perceives the essence of politics, and i.e. what is party interest for one and what for the other party official. In other words, Montenegrin public has never been in position, until now, to see the bare face of partitocracy. The background of this internal party conflict (strictly financial interests) looks benign compared to rhetoric of so called liberal democrats, better known to political public for their immoderate boasting in politics and politicizing of moral. Their clash, no doubt, has reminded good history experts on events and atmosphere within chambers of Moscow hotel Lux during golden era of Comintern.

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[4] Since CEDEM, in its polls examines confidence toward Metropolitan of Serbian Orthodox Church in Montenegro, that person is constantly and convincingly occupying first place at pro-Serbian parties' supporters. In fact, not one of the leaders of those parties has ever occupied one of three first posts on rating list, measuring confidence in politicians and public figures.

[5] Se for more details in: CEDEM, "Political Public Opinion in Montenegro - April 2004", Podgorica, May 2004.

The very fraction, which came “victorious” from this conflict, has announced return to Parliament. They are doing so, after TV broadcasts of Parliament sessions are provided for, allegedly thanks to them. Nevertheless, they are deliberately ignoring the fact that their representatives were absent even when TV broadcasts were in place, what leads us to conclude, without a doubt, that reasons for cessation of Parliament boycott lies elsewhere. Primarily, they are trying, with harshness of their anti-regime rhetoric, to compensate eventual loose of supporters. That will be just another attempt to annul by words their deeds. In this moment that is the only thing, they need Parliament for.

**Conclusion:**

Breakdown of Parliament boycott strategy, as instrument for common action of opposition is one of necessary but not sufficient steps in the consolidation process of this, as well as other, institutions. Our previous statements unmistakably points to possibility that in future period we may expect opposition moves directed toward de-legitimization of existing legal-political framework. To achieve this goal opposition has much reduced choice of means compared to era of Slobodan Milošević’s regime. Primarily parties who are in favor of common state with Serbia often intentionally and consciously ignore this fact. This position obviously reflects on “mental health” of political community. Instead of narrowing the space for partitocracy games, this are remains intact. In such atmosphere any attempt to consolidate democratic process are simply waste of time. Furthermore, if you have in mind the fact that contemporary Montenegrin society hasn’t adapted yet to the new dimension which time factor has within transition process, the significance of this kind of behavior does not deserve particular comment. Simply said, while Montenegro remains in undefined –fluid statehood surrounding, its institutions, as by definition, must suffer from lack of authority.

# PUBLIC SERVICE IN MONTENEGRO

Drasko Djuranovic

## Victim of politics again

Instead of supporting the transformation into public service, international community- through OSCE office- has politicize the role of state television, sacrificing it as a guinea pie, with intention to get back the Montenegrin opposition into the parliament

Maurizio Massari, chief of OSCE Mission visited Montenegro at the middle of September. During his stay in Podgorica, high representative of international community tried to mediate between ruling coalition and opposition.

At first glance, the effort of his was quite understandable: for six months now Montenegrin opposition is absent from Parliament and that fact created an unhealthy political atmosphere. Direct, formal reason for such move by opposition was the decision of Montenegrin RTV (Radio -Television) to interrupt with constant broadcasts of Parliament sessions.

Informal but real reason: opposition tried, through demonstrations, to provoke extraordinary parliamentarian elections, and the absence of state TV in Parliament was just a reason and not the real cause of change in opposition behavior.

All this was very well known to the representative of international community. Nevertheless, during his stay in Montenegro Massari announced new European initiative, through which, in opinion of European bureaucrats, the gap between Montenegrin government and opposition could be overcome. In line with that idea, chief of OSCE Mission asked Montenegrin government to -"within legal framework find out a model and reach a decision on obligation to broadcast all sessions of Montenegrin Parliament live on TV". Therefore, mister Massari accepted the explanation that opposition boycott was exclusive result of interruption of TV broadcasts of Montenegrin Parliament sessions. Massari also put Montenegrin government into temptation – whether to accept or refuse recommendation of international factor?

Part of opposition parties accepted OSCE's position with relief. Serbian Peoples Party has already reached a decision to return to Parliament and therefore eagerly accepted Massari's initiative. Socialist Peoples Party also reacted positively on suggestion of OSCE Mission chief. Similar reaction came from Liberal Union. Against this initiative were Peoples Party and Democratic Serbian Party. These two parties stressed that TV broadcasts were not the only reason for boycott of Parliament so they can't be the only condition for these two parties to return to Montenegrin Parliament.

On the other hand, parties of the ruling coalition, after one day of silence, positively reacted on Massari's initiative. Thus, social democrat Ranko Krivokapić said that "if needed all Parliamentary sessions shall be broadcast". The presidency of Democratic Socialist Party also judged the OSCE initiative as acceptable. Spokesman of DPS, Predrag Sekulić stressed the fact that "OSCE initiative does not endanger media laws" so that his party "expects that authorized bodies who rule on this will show necessary level of sensibility towards OSCE initiative".

Thus, politics, both domestic and foreign one- once again threw a hot potato into the hands of people managing Montenegrin RTV. It turned out that key reason for lack of dialog between government and opposition is- interruption of TV broadcasts.

Several days, after parliamentarian parties have supported his initiative, chief of OSCE Mission- Massari met in Belgrade with Montenegrin RTV directors, Radovan Miljanić and Veljo Jauković and president of RTV Council Branislav Ćalić. The meeting was unofficial and according to information published by Montenegrin media it was agreed that October session of Montenegrin Parliament would be broadcasted live.

Does this means that Montenegrin RTV will assent to politicians' ultimatum and accept to broadcast all sessions of Montenegrin Parliament in future? This is very likely- pressure of domestic and foreign politicians shall hardly make the people in the Council or those in editorial team of Montenegrin RTV indifferent.

However, if we look back we can easily find the truth: Montenegrin Council has never ordered the interruption of Montenegrin Parliament sessions. There is no any such decision made by editorial team of Montenegrin RTV either. Nor do we have similar decision made by Agency for Radio-diffusion.

On the contrary. In Radio-Diffusion Law, only general recommendations were made on work of Montenegrin RTV. Thus, in article 93 of Radio-Diffusion Law is stressed: "Public radio-diffusion services produce and broadcast programs of informative, cultural, artistic, educational, scientific, entertainment, sports, and other content, with which it provides realization of citizens' rights and interests as well as other information and radio-diffusion subjects".

Besides, the Law strictly prohibits political propaganda. "In programs of public radio-diffusion services political propaganda is not allowed except during election campaign. In virtue of this Law under political propaganda during election campaign is deemed to be announcements, spots as well as other forms of propaganda which intention is to influence electoral preference during presidential of parliamentarian elections", stresses the article 96 of Radio-Diffusion Law.

Obligations of Montenegrin RTV are defined more precisely in document "Program principles and professional standards of public radio-diffusion services, Montenegrin Radio and Montenegrin Television". Afore document was adopted by Council of Montenegrin RTV.

Thus, in chapter on reporting from parliament, is mentioned that Montenegrin Radio and Television must "comprehensively and in detail follow Montenegrin parliamentary life". The reports must provide unbiased picture of Parliament activities, and this means that journalists and editors of public electronic media must "present the whole spectrum of positions on certain subject in balanced way".

Besides, the conditions, when live broadcast of Parliament sessions is applied, are very precisely given. Because of extreme importance of some Parliament sessions, Montenegrin Radio and Television are obligated to transmit on one of their channels, parliamentary sessions when on agenda we have: 1) Adoption of Constitution 2) Constitute of Parliament and election of Chairman of the Parliament 3) Election of Prime Minister 4) Election and dissolution of Government 5) Government confidence debate 6) Speeches by the President and Prime Minister in the Parliament and following discussion 7) Adoption of Spatial Plan, Budget, and Annual Balance Sheet 8) Adoption of system laws upon which Parliament decides by majority of votes 9) Formal Parliament sessions.

According to these, very precise recommendations of the Council, editorial team of Montenegrin RTV has reached a decision to interrupt live broadcasts of all parliamentarian sessions. However, editorial team decided that those sessions in which important decisions (all particular cases are stated in Program Principles of Montenegrin RTV) are part their agenda should be broadcast live.

In theory, that means broadcast of at least 75% of parliamentarian sessions. In practice, the editorial team respected this regulation: during 2004, some 80% of parliamentarian sessions were broadcast, with respect of adopted criteria, which are prescribed by the Montenegrin RTV Council.

Now these principles are being tested: political parties, both governmental and opposition ones, under patronage of international community, will obviously insist on position that state Radio and Television transmits all sessions of Montenegrin Parliament.

In the coming days, Montenegrin RTV Council and Montenegrin RTV editorial team will be challenged. Should they respect all those rules, which they adopted and which, at the time, Council of Europe judged as "good step forward for Montenegro but also for surroundings"? On the other hand, should they step back from rules and agree to political ultimatum?

The fact remains that nowhere- neither in Law on Radio-Diffusion, nor in "Program Principles and Professional Standards of Montenegrin RTV"- the broadcast of all Montenegrin Parliament session is FORBIDDEN. Thus, if Montenegrin RTV Council decides so- editorial team can issue order to broadcast all sessions of Parliament.

All political structures both in Montenegro and abroad would be probably satisfied with such solution. At the same time, the political crises that started with opposition boycott of the Parliament would be ended. Therefore, it is expectable that state TV and Radio, starting at the end of this year and continuing for foreseeable future, will broadcast all sessions of Montenegrin Parliament.

Still, in this way the attention of the public would be distracted from some other problems that very few people in Montenegro now really want to pay attention to.

The managerial team of Montenegrin RTV- team of directors, editorial team, Council, and Administrative Committee- have been facing numerous problems of company in transition, in past year or so: problems regarding lack of funds, adequate staff but at the same time with surplus of employees. In addition, political parties, both ruling and opposition ones, constantly tried to influence editorial policy.

It seems that people within Montenegrin RTV have seriously taken the matter in their own hands and started dealing with problems. Directors' team, together with Administrative Committee of the company, has made a new organizational scheme of Montenegrin RTV, which will serve for new jobs disposition scheme. According to CEDEM's findings, the new organizational scheme will mark the start of technical surplus dismissal. More precisely, Montenegrin RTV will have 200 employees less. First estimates shows that this much of surplus employees currently work in Montenegrin RTV.

This move will surely stir up spirits within Montenegrin RTV, so managerial team will need all the help it can get in order to realize relaxation of the company budget. First of all: state intervention is necessary to help solve social problems of technological staff surplus within Montenegrin RTV. Without this intervention, it will be hard to expect stabilization or more significant changes within state run electronic media.

Part of the solution to this problem is improvement in quality of broadcasted program. Without increased budget and engagement of new, educated, and expert staff, it is impossible to expect in foreseeable future improvement of quality. On the contrary, state and political structures in Montenegro seems to have left Montenegrin RTV on the no men's land. Problem of TV subscription is not been solved yet, Montenegrin Government has reduced funds for financing of this company and there are no signs that financing of Montenegrin RTV can be provided from some other sources.

If all this wasn't enough we have international community who instead of supporting the transformation into public service- through OSCE office- have politicize the role of state TV, sacrificing it as guinea pie with intention to get Montenegrin opposition into the Parliament.

This kind of compromise, that Montenegrin government has agreed to does not guarantee better future for Montenegrin RTV nor does it guarantee faster transformation of that state run media into the public service.

## Recommendations

The most important step in reform of state run television and radio was independent editorial conception. Judging according to current program, the editorial team of Montenegrin RTV- supported by all the structures within that media company- successfully started building an image of independent, professional media company.

Of course, thee were editorial mistakes and there will be probably even in the future. Still, it is important to notice: mistakes were not the result of political pressure or orders given from the top government officials. This estrangement from ideology, coming out of political shade – that is qualitatively new image of Montenegrin RTV and this fact gives hope that transformation into public service is possible.

Therefore, the last action of international community- agreement with Montenegrin political elite on live broadcasts of parliamentary sessions- can be seen as direct pressure on independent editorial conception of Montenegrin RTV.

It would be much more efficient if international community would take another direction. If OSCE, through its sources, have offered establishment of special channel that would be activated in days when Parliament is in session or when we have electoral campaign. In this way part of Montenegrin RTV budget for informative program would be spared. At the same time, we would have solutions as in Western Europe. For example: Italian state TV, RAI, does not broadcast live Parliament sessions, but RAI has special parliamentary channel.

This solution demands much bigger costs and also greater international donation, but at the same time, it is also a great unburden of two “normal” TV channels. Still, in this way we wouldn’t be breaching provisions of Law on Radio-Diffusion (articles 93-96), we would enable independent editorial conception and Montenegrin RTV would be on road of real transition into the public service.

Prof.dr Milan Markovic

# ABOUT THE NECESSITY FOR PERMANENT ADVANCED TRAINING OF PUBLIC EMPLOYEES AND ABOUT POSITION AND IMPORTANCE OF STAFF- MANAGEMENT BODIES WITHIN PUBLIC ADMINISTRATION

## *INTRODUCTION*

One of the key roles in transformation of Montenegrin public administration must and should be played by its public employees and officials. Current problems and future challenges might become an opportunity for innovative projects if public administrators start undertaking morally responsible and proactive actions toward promoting public interest. "Within actions taken so far, in modernization and reorganization of administration the emphasis was on changes of organizational structure, coordination system, change of certain administrative sectors status, horizontal and vertical connecting, internal relations, relations with political surroundings and citizens, and quite sporadically and insufficiently with fact that ultimate reach of these changes depend on staff".[1]

In an uncertain surrounding where "both poor and rich alike stand on the starting line of shakily different race toward the future" (A.Tophler), administration needs different employees, those capable of learning, using their own and experiences of other people, entrepreneurial and innovative etc. Constant changes in turbulent surroundings "demand" flexible administration whose employees shall educate themselves in continuity, remove mistakes in their work, communicate with citizens more successfully, and provide more quality services… International criteria regarding selection, advancement, and work of public employees should be fully implemented in Montenegrin administration.

### The importance of permanent education and training of public employees

It is known that "duration" of once acquired knowledge is becoming shorter and that we have tendency of further reduction of that duration period so we need to refresh and continuously take care of our knowledge. Therefore, we must introduce learning into the systems of public administration institutions, which must be continuous, as we must acknowledge the unpleasant truth that if knowledge is not renewed it is becoming outdated.

Thus, we have **the need for permanent education** as *conditio sine qua non* of successful activity of public administration. We define this education as network of activities and events directed toward raising the adaptability regarding surroundings, through development of individual capabilities of persons trained to solve actual and future organizational problems. The very educational process is based on scientific principles and creative practice.[2]

Process of permanent education, as method of acquiring additional knowledge, enables realization of ever more complex work assignments, reduces the time necessary for acquiring experience, raises work productivity etc. This additional education demands continuous and systematic employees' efforts on their self-perfection. Just to repeat, this education is planed as permanent process and it applies on those

employees who already work in administrative institutions and who fulfill basic requirements regarding their jobs within the administration.[3]

1 J.Kregar, E.Pusić, I.Šimonović, Staff in the Administration, in book of Ivanićević et al, Administration and the Society, Zagreb, 1986, page 339

2 D.Kavran, Organization, staff, management (Management Science), Belgrade, 1991, page 53-54.

A new way of thinking is present, within the administration and within other public sectors, which is based on permanent and no classical education and this fact enables essential transformation and efficient changes of the administration.

The importance of training that lasts from the beginning to the end of professional career, from first job (apprenticeship) to "training for retirement", is impressive because, just as in ordinary company even in public administration institution, competitive advantage comes not from capability to hire better staff from competition but from superior capability to develop staff capabilities.[4]

Thanks to training, the administrative employee improves its individual capabilities, reaches spiritual maturity, contributes to better quality and quantity of services provided by administrative body, improves its motivation, contributes to work that is more expert, achieves greater self- realization, an so on. In short, it becomes the master of its trade, and as Scot Peck says, "there is no greater pleasure than to be an expert, to really know what you are doing".

Public service includes various forms, which are different from other sectors of the service: this means different training. All that means different life: dedication to interests of the state and nation; political neutrality, special respect for legality in decision making process and equal treatment of all citizens; special level of integrity, etc. This means different career because the conditions in public services differ from other sectors of the society, and these conditions are regulated by special norms.[5]

Public employees must constantly complement their existing and acquire new expert knowledge. Only with this new knowledge they can legally, efficiently, and professionally perform their tasks and jobs in administration both from management aspect and aspect of communication with citizens and organizations, using modern technical devices etc. This could even be the way for administration to become less boring and more interesting, so that administration does not represent: "technical studies of boring people who are doing boring jobs".[6]

Advanced study of public employees an appointees in Montenegro, because of already explained significance, is regulated by special chapter (VIII) of the Law on Public Employees and Appointees ("Official Gazette of Montenegro", no. 27/o4), where advanced study, position of interns and award of fellowships, is regulated by norms (articles 93-96).

Activity of PARIM Project team working on project of administrative reform in Montenegro (financed by European Union- European Agency for Reconstruction) is concentrated on development of expert knowledge of public employees.

Besides development of new, adaptation of existing and implementation of adopted legal proposals, which are harmonized with EU standards (component 1), Training Program of pubic employees represents second basic component of PARIM Project.

Second component of PARIM Project includes two key sub-components, and these are:

1. Development and implementation of young public employees Training Program – YPP; and

2. Providing preconditions for training and work of the institution for permanent training of public employees.

Basic goal of YPP Program is to enable certain number of young employees, through financial and technical help, to acquire new knowledge and new skills that will help them organize their work within their organizational units, in more efficient and effective manner, and to pass that knowledge and skills onto their colleagues. Specific goals of this Program relates to organization of training courses for young employees in countries of European Union where they would be trained in accordance with needs of public bodies in which they work, as well as organization of their training in Montenegro.

3 See: Lovro Šturm, About the system of Additional Education of Administrative Employees in Slovenia (bases and concepts of possible new regulation), Belgrade Law School Annals, Belgrade, no. 1-2, 1977, page 131-142

4 Also and D.H.Master, To success through konowledge build up, «Manager of XXI century», Budva, 1994, page 179.

5 F.F.Ridley, Civil Service and Democracy: Questions in Refoming the Civil Service in Eastern and Central Europe, Third Annual Conference Issues in Public Administration and Managment, Bled, March, 1995.

The reason, for realization of special sub-component related to establishment of institution for permanent training of public employees in Montenegro, comes from the need to continue with training of public employees even after the YPP Program is realized. Activities, which will be undertaken within PARIM project regarding this sub-component, shall be directed toward providing the bases for establishment of Institution that will have the key role in creating and implementing the training program of public employees, as well as cooperation coordination with foreign institutions for training of public administrative staff.[7]

After conducted analysis regarding the need for training of young employees (YPP)[8], which pointed out to specific needs of every public body for improvement within their special working units (sectors, departments, etc), and having in mind limited financial capabilities for advanced studies of employees in institutions for permanent advanced studies within EU member states, PARIM Project team had to make selection of potential candidates that will take part in YPP.

After the selection / where following criteria were applied:

1. Demonstrated need of public administration body for specific knowledge within certain area,
2. University level of registered candidate,
3. Adequate level of foreign language knowledge by the candidate,
4. Communication and leadership skills of the candidate,
5. Candidate’s motivation and interest to continue its career in public administration/

from total of 146 registered applicants for YPP program, currently working in Montenegrin public administration , 15 candidates were chosen – all of them under 30 years of age.

Advanced study, which some employees had completed in the meantime, is conducted at renowned institutions in EU countries (Glasgow University, Law School in Amsterdam, Center for European Integration in Bon, European College in Bruges, Institute for European Politics in Berlin, Urban Institute in Ljubljana, University of Applied Sciences in Bremen…) what will enable Montenegrin employees to develop new skills and improve their knowledge in areas that are of great importance for Montenegrin

administration, such as: studies in field of European affairs (one employee of the Foreign Affairs Ministry is departing in September of 2003, for post-graduate studies in European College in Bruges, and she is the first candidate from Montenegro with possibility to study on this College, which is one of the best institutions for advance studies in the field of European Affairs); EU Foreign Politics, eco tourism, spatial planning, prevention of money laundering…

It should be also noted that PARIM Project team aiming to improve employees' capabilities, has realized number of seminars, conferences, and round tables in Montenegro, trying to inform both expert and wider public with process of administrative reform. At the same time, for certain number of employees there has been programs for improvement of their English language skills in cooperation with Oxford Center, which, after finished courses and successfully passed tests issues English language certificates.

**Staff management body**

In order to develop modern system of human resources management within public administration, the new Law on Public Employees and Appointees ("Official Gazette of Montenegro" no. 27/04), in line with

6 L.Rubin, Public Administration and Political Change – Introduction Political Science Review, Vol. 14, No 4, 1993; quotation V.Vasović, State and anti-bureaucratic-adminstrative revolution, Legal and Social Sciences Archive, Belgrade, no. 1-3, 1996, page 58

7 Informer-booklet (publisher Ministry of Justice), no. 1, July, August, September 2003,

adopted European standards, introduces a number of novelties, among which even staff management body, which is supposed to represent central part of new staff organizational system.

Staff management body, according to the letter of the Law (article 115), specifically performs following duties:

- Monitors implementation of the Law, and regulations that were adopted according to the Law,
- Gives its opinion on acts regulating staff disposition,
- Conducts public tenders and electoral procedures,
- Runs central staff registry and registry of intemal job market,
- Conducts tasks related to internal job market,
- Develops proposals for advanced studies and other development programs for staff,
- Provides expert assistance to Government regarding staff management,
- Assists governmental bodies in realization of staff policies, training, and staff development,
- Performs other activities in area of public employees system development, in accordance with the Law.

Thus, Staff Management Body[9], should perform activities related to staff management, and as such it represents central body of the new public employees system. This body is not responsible only maintenance of the system but for its development as well. Its function runs horizontally through entire public administration and in the same way it receives feedback, from entire public administration, which concentrates in Staff Management Body. The result of this information flow is central staff registry that should be ran by the Body and which represents basis for internal job market, but also information base for all procedures regarding the position of single public employee (data on employee's work place and career moves, appointments, advancements, and rank, education level, functional and special skills, advanced studies, and examinations, length of service…).

According to the Law on Public Employees and Appointees, which prescribes establishment of staff management body, Administration for Staff is established (see article 18, paragraph 10, and article 28 and 47 paragraph 1 of Provision on Organization and Work of Public Administration "Official Gazette of Montenegro" no. 38/04) with its specific status and field of work.

## RECOMMENDATIONS

Investments in human resources in Montenegrin administration represent the most important factor in its development. In this way, we prevent development of conservative trends and rigid and unimaginative administration and on the other hand, we enable organizational renewal or administrative revitalization, what in fact means that administrative organizations are facing with necessary changes that would enable them to become or remain capable to 'stay alive', to adjust to new conditions, to solve problems, learn from experience, and to move toward greater organizational maturity[10]. Just like Alain Touranie, we think that societies are not determined by the way they function, but with their capabilities to transform[11]. There is where the skill of individual organization and organization of the society as a whole lies.

Without massive process of permanent education of public employees, followed by use of contemporary learning methods and means, there want be real administrative reform. We would still have insufficiently efficient, effective, and responsible administration, and that is contrary to ever-growing trend of faster movement of goods, services, and free market, where administration is becoming a service of economy and citizens.

8 In September of 2002, education Program of young public employees (YPP) has started.

9 Compare: M.Marković, G.Trpin, New legal regulation of the public employees and appointees system in Montenegro, Publication no. 2 of the Conference on Administrative Reform in Montenegro, Podgorica, October 2003, page 53-68.

Every administrative body should, in continuity, **analyze the need for education** of their employees. The essence of application of numerous methods, techniques in this field- Training needs assessment; TNA technique) which is "one of the most exploited areas of staff function, and even work organization in today's developed countries"- comes to simple fact of determining precisely tasks and duties of single employee, skills and knowledge necessary for their realization, compare necessary knowledge with knowledge of particular employee and based on established difference develop training plan and program, i.e. education with work (D.Kavran). At the same time Managerial skills analysis: MSA technique should be conducted. They represent the elite administrative employees, they must be good managers, and they must cover the entire territory of Montenegro.

Expert quality of personnel working in Administration for Staff must be at extremely high level, because it is obvious that this body must become a generator of new ideas and knowledge in area of administrative reform, but also a guarantee of high level of objectivity in selection of administrative staff.

Based on Law on Public Employees and Appointees, following bylaws should be adopted as soon as possible:

- Provision on conditions and procedure regarding realization of internal announcement,
- Provision on method and procedure of employees and appointees probation period appraisal,
- Provision on types of acknowledgments and their award procedure,
- Provision for determining capability assessment of public employee, i.e. appointee,
- Provision defining work program and method of taking expert exam.

- We need new learning methods, new skills… Employees must understand democratic values and processes, because now the client is the one in the center of the attention, and not the state or its employees. New theories and new methods can't be introduced through old fashion- classroom learning- stile. We need new approaches and new training strategies. Besides University, some colleges, we need institutional framework: "network of organizations consisting of faculties and schools, with special institute… within the center of new educational and training system".[12]

Within the process of permanent advanced studies of public employees, old and young alike, we need continuous cooperation with tested experts in the country and abroad, as well as with renowned scientific- technical institutions from regional and international organizations. In addition to that, organization of various workshops, round tables, seminars, and symposiums must be synchronized within Montenegro, in order to prevent often and unnecessary parallel training, which takes money and time, and we would also have an insight into complete process of permanent education of administration.

Right and duty of employee on advanced study, should be proportional to its salary and working conditions- something that would strongly bind the employee to administration (it wouldn't leave for private companies) and all of this would contribute to better quality and work results within our public administration.

Montenegrin administrative bodies, just like those in developed world, through multiple programs that change their content depending on educational needs, should implement the most modern methods, such as simulations, managerial games, programmed training such as distance learning etc. Mobility and changeability of training methods and techniques within administration suits and serves to its reorganization as administration reformers must move quickly while they have the resources and while the attention is upon them, before the opponents find time to consolidate and sabotage and while the other events don't pile up and change the focus of interest.[13]

12 See: D.Kavran, Reform of Public Administration and Institution Development, Legal Life, Belgrade, no. 7-8, 2004, page 77-92.

13 Compare, Gerald E.Caiden, Administrative Reform Comes of Age, Berlin – New York, 1991, page 314.

Dr Dragan Prlja

# FREE ACCESS TO INFORMATION AS PART OF ANTI-CORRUPTION SYSTEM IN MONTENEGRO

## INTRODUCTION

Free access to information, as part of common right on access to information, *does not exist in Montenegro yet*. Montenegrin Constitution does not guarantee this right, although some of its provisions provide good bases for adoption of law, which would establish such right.

Existing situation in Montenegro, regarding free access to information, is characterized by arbitrary behavior of executive power bodies and very often by depravation of information, high level of discretion authority when determining what can or can't be declared, and very often abuse of the state secrete institution, business interests, and protection of privacy rights. In this way, citizens are prevented from finding out information about government bodies' performances, and government is in position to manipulate with information and very often to charge them through various corruptive activities.

Without Law on Free Access to Information and its efficient application, it is impossible to ensure public responsibility, i.e. the real method of monitoring and supervising activity of executive power. If the public is not adequately informed about activities of executive power, and that depends exclusively from the level of information accessibility to press and wider public, than such executive power cannot be viewed as sufficiently responsible and trustworthy.

The basic goal of adopting the Law on Free Access to Information is to make the information, owned by the executive power, accessible to public and individuals which that information affects. By adoption of this regulation, the citizens shall obtain legal right on access to Government documents, without having to prove the existence of special interest for doing so, while the burden of proving, in cases when some government body refuses to provide the information, lies on that particular government body.

The oldest legislature, which had regulated free access to information, is Swedish legislature from year 1776, and current Law on Freedom of Press is integral part of Swedish Constitution. At the beginning of 1970s, the legislature related to free access to information was defined in Norway, Denmark, Finland, and then in other countries of developed world. In many countries throughout the world, for over thirty years now, with purpose to protect public interest, the citizens have legally guaranteed, "right to know". In today Europe, all countries, with exception of Serbia, Montenegro, and Macedonia, have laws on free access to information.

Common features of the regulations related to free access to information are:

1. They provide the citizens the right to obtain information, and access the documents that were created during the work of executive bodies, obtain the copy of the document and also precisely defined deadline in which the executive power must replay upon their demands,
2. They precisely define exceptions of this rule, i.e. the cases in which access to information can be denied but with explanation regarding the reasons that caused this denial (very restricted number of cases),
3) They precisely regulate protection of privacy and right on correction of incorrect data,
4) They regulate the right on complaint in case when information or document are denied,
5) They ensure that conflict regarding free access to information is solved by neutral, third party (most laws are enabling two levels of complaint procedure, and on second level the authority may lie with independent ombudsman or court body),

6) They encompasses even the local governments, companies whose majority owner is the state, private companies contracting with the government,
7) They are harmonizing criminal code related to protection of information sources for journalists and regulate the proper punishments for slander,
8) They regulate issues related to keeping proper archives, and declaring the lists containing the types of documents kept by specific state bodies, under the control of Public Archive.

## BACKGROUND OF ADOPTION OF LAW ON FREE ACCESS TO INFORMATION IN MONTENEGRO

Adoption of almost every anti-corruption law in Montenegro has quite a long background. The case with Law on Free Access to Information is no different.
The first step, as customary when speaking about anti-corruption laws, was taken by NGOs. The Program for free access to information, in cooperation with Council of Europe, Center for Independent Investigative Journalism from Rumania, and Center for Transition from Podgorica, had organized on December 21-22nd 2001, seminar on topic "Access to information- the key for democratic and transparent Government". At this meeting, the Model of Law on Access to Information was presented. Expert team of the Program for free access to information prepared this model and this represented just the first step of long standing efforts to introduce this kind of law into Montenegrin legislature.
In November 2002, Montenegrin Bureau for Information, Montenegrin Ministry of Justice, and Montenegrin Ministry of Internal Affairs, in accordance with Montenegrin Government Program for year 2002, and in cooperation with representatives of NGO sector: Montenegrin association of Young Journalists, NGO "Program for free access to information- Montenegro", Center for Transition, Montenegrin Helsinki Committee for Human Rights, and Association of Independent Electronic Media of Montenegro, in accordance with Work Plan of Montenegrin work-group for media at Stability Pact for Southeast Europe, have signed Common Initiative for drafting the Law on Free Access to Information. Based on this initiative working-group was formed to prepare the draft of Law on Free Access to Information. Signatories of Common Initiative have agreed that draft of Law on Free Access to Information must be harmonized with international community standards. It was also agreed that during development of draft of Law on Free Access to Information active cooperation would be established with European Union, Council of Europe, OESC, European Agency for Reconstruction, European Media Institute, Organization "Article 19", and other international and domestic organizations and institutions, which express an interest for this process in Montenegro. The first draft of Law on Free Access to Information was done in January 2003, only to be changed in accordance with suggestions coming from international organizations, NGOs, and state bodies. The last version of draft of Law on Free Access to Information was presented in September 2004. It is expected that working- group will prepare the final draft of Law on Free Access to Information and send it for adoption to Montenegrin Government by the end of year 2004.

## DRAFT OF LAW ON FREE ACCESS TO INFORMATION

The draft of the Law on Free Access to Information, even after two years of efforts by working-group has not taken the shape of official proposal of Montenegrin Government, but it is good to point out to some characteristics of actual text of draft Law, which has been presented at two-day regional seminar on topic- freedom of information- held on September 9th 2004, in Budva. Seminar was organized by organization "Article 19", Montenegrin Helsinki Committee and Initiative for Open Society Justice.

The draft of Law on Free Access to information contains 31 articles.
In the first part, under common title- General provisions, article 1 declares the right on free access to information, which is in possession or under control of authorities, to domestic and foreign companies and individuals. Article 2 defines principles upon which the right on free access to information is based: constitutionality and legality, freedom to access information, equality of claim submitters, equality of conditions under which the information is obtained, transparency, public and responsible manner of work of authorities, and urgency of the procedure. The same article guarantees the level of principles and standards anticipated by international documents related to human rights and freedoms. Article 3 defines four notions "accession right", "information", "government bodies", and "authorized government body".
The second part of Draft of the Law on Free Access to Information contains articles, which defines accession right, obligations of government bodies, exceptions, and public announcement of information. Article 4 defines, that there is no obligation for claim submitter to explain legal or any other interest or to name the reasons for requesting certain information. Article 5 determines the obligation of government bodies to enable the claim submitter the access to requested information in manner and form suitable to its needs, unless we are dealing with exceptions. Article 6 defines obligation of authorities to declare information related to description, structure, functions, obligations, and financing of government bodies as well as details regarding all services, which government bodies are providing to citizens. Article 7 determines the obligation of governmental bodies to keep records on types o information it possess or controls, and to make this record available for inspection to whomever might be interested. Article 9 has defined ten cases when access to information can be partially or completely restricted. These are the cases when we are dealing with: defense and state security, diplomatic and other relations with foreign countries and international organizations, financial and monetary policy and governmental bodies economic interests, citizens' health and protection of the environment, intellectual property, prevention, discovery, and fight against crime, protection of interests related to justice administration, protection of privacy and economic interests of companies and individuals, protection of the content of materials that are being worked on, and protection of business data that are being submitted to authorities in confidentiality. This article restricts the access to information even in case if their announcement could cause damage that exceed public interests for making those information public. Article 10 defines that exceptions from previous article won't be possible if we are dealing with: material breach or disrespect of the law, existence of crime, wrongly passed sentence, abuse of authority or unconscientiously performance of official duty, unauthorized use of public funds, or danger for health or safety of individuals, population or environment. Article 11 determines the obligation of authorized government body to instruct the submitter of the claim, within period of 18 days after the claim is received, about the source and time of publication of information if it was published in last 3 years. This article also determines the obligation of authorized government body to enable claim submitter the access to information that was previously publicly announced, if the information is altered or amended in the meantime.
Third part, titled Procedure of Access to Information, encompasses articles that are regulating submission of claims, decision -making process upon those claims, ways and forms of access to information, re-direction of claims and procedure expenditures. Article 12 defines that submission for access to information is submitted to authorized government body in written form, directly, by E-mail, or by post. Article 13 determines that claim must contain: minimum data about the subject, method and form of access to requested information or part of it, name, last name, address, i.e. residence of the claim submitter or its agent or representative. This article defines that, exceptionally, the claim submitter can be even anonymous person. Article 14 establishes the obligation of authorized body to ask for removal of shortages but also to provide instructions if the claim is incomprehensible or incomplete. Article 15 determines the deadline of 8

days from the day the claim is received, in which the decision upon the claim must be made and access to information allowed. This article also defines exception from urgency procedure because of protection of life and freedom of persons when the decision must be made immediately, i.e. at latest within 48 hours. If the government body is not capable to respect the deadline it must immediately, and within 8 days at latest, inform in writing the claim submitter about the delay. Paragraph 4 of the article gives right to authorized body to extend the deadline to 15 days if the quantity of requested information is huge, and decision on quantity of information must be written in the conclusion of the explanation for extension. This decision can be challenged in court as administrative dispute. Article 16 determines that if authorized body misses the deadline to inform the claim submitter that would equal to refusal of the claim and then administrative dispute can be brought. Article 17 determines that authorized body reaches the decision in written form and that this decision determines the manner and form of access to requested information or its part as well as procedure expenditures. Article 18 defines that access consists of: direct insight within offices of authorized body, by photocopying or copying the information or part of it, submission of translation of information or its part. Authorized body is allowed to erase part of the information in accordance with foreseen situations, but even then, it must put remark on the information that erasure had taken place and in what form, and erasure must be conducted in way not to damage or destroy the original and integral information. Article 19 defines the obligation of government body to which the claim is addressed, to re-direct that claim to authorize body within eight days, and to inform about this action the claim submitter. In case when government body can't determine who is authorized for that information it will reach the decision to reject the claim on the ground of incompetence and this decision can be challenged at court as administrative dispute. Article 20 determines that time limits for authorized body are starting from the day the archive of that body receives the claim. Article 21 forbids to government body to demand any additional conditions for publication of information or its part. Article 22 determines that claim submitter covers procedure expenses and that authorized body can charge only realistic expenses for photocopying, and that method and procedure of establishing the costs will be regulated by administrative state body in charge of culture. Article 23 determines the obligation for authorized body to make appropriate amendment and corrections free of charge, in case when information is incomplete or inaccurate.

Fourth part of draft of the Law on Free Access to Information determines legal means, i.e. determines possibility to file a complaint and to protect persons who are pointing out to abuses. Article 24 determines that one can start legal proceedings at court against the decision of authorized body, and this dispute must be ended within 15 days from the day the complaint is filed at court. Article 25 determines that employee, who points out to abuses and irregularities in performance of public duties, and who inform about that authorized government body, Commission for Establishing the Existence of Conflict of Interests, and public, about the influence or illegal doings, which is conducted contrary to public interest or files a report to authorized body, *can't be taken responsible*.

Fifth part of draft of the Law on Free Access to Information comprises of punitive provisions. Article 26 determines fines for person who prevents or obstructs access to information or its part, or deliberately destroys the information that is in possession or under control of government bodies, and it is also foreseen the punishment of responsible person within that body if it does not solve the request for access to information or its part, within legally binding period, or if it does not re-direct that claim to another authorized body in accordance with provisions of this Law.

Sixth part of the draft of Law on Free Access to Information comprises of transitional and final provisions. Article 27 determines that on issues, which are not defined by this Law, provisions regulating administrative procedure and administrative disputes shall apply. Article 28 determines that bylaws necessary for realization of this Law must be adopted within 60 days from the moment the Law goes into effect. Article 29

determines the obligation of government bodies to adjust their regulations with provisions of Law on Free Access to Information, within 90 days from the day the Law goes into effect. Article 30 determines that already started procedure for obtaining information shall be finalized according to newly adopted Law. Article 31 defines that Law on Free Access to Information shall go into effect on the eight day since it was announced in "Official Gazette of Montenegro".

RECOMMENDATIONS

The Law on Free Access to Information represents one of the most important anti-corruption laws and therefore its adoption is necessary as soon as possible, in order to achieve sufficient level of transparency and system- effect in fight against corruption in Montenegro. Adoption of Law on Free Access to Information would establish concrete obligations of the government, precise list of exceptions, foresees appropriate procedure, and ensures possibility to use legal remedies. In this way we will provide greater level of government responsibility, i.e. greater level of control of its work, disable manipulation with public opinion, enforce individual citizens' rights, and enable their participation and influence on he way government bodies work.
In order that Montenegro, within its anti-corruption legislative, would realize the system of free access to information it is necessary as follows:

- That Montenegrin Government urgently adopts proposal of the Law on Free Access to Information so that Montenegro wouldn't be the last country in Europe without such law,
- That Montenegrin Government adopts the Law on Free Access to Information in form in which it is proposed, because removal of certain articles or their changing may render the Law senseless (Serbian Government during year 2003, has adopted the proposal of Law on Free Access to Information of Public Interest, but it had sent it to the Serbian Parliament only at the beginning of September 2004, and it had removed provisions regarding protection of insider, i.e. "whistle blower", and it also denied the possibility of complaint if the information is denied by Serbian Parliament, Serbian Government, Serbian president, Serbian Constitutional Court, Serbian Supreme Court, and State Attorney),
- That, after Montenegrin Government adopts proposal of Law on Free Access to Information, opinions of relevant international organizations, NGOs, and expert public, are given regarding the quality of the proposal,
- That Government's proposal is urgently submitted to Montenegrin Parliament for adoption,
- That MPs' clubs are informed about the significance and content of the Law on Free Access to Information prior to vote in the Parliament,
- That Montenegrin Parliament adopts the Law on Free Access to Information as soon as possible,
- That after adoption of Law on Free Access to Information, necessary bylaws are prepared and adopted within legally binding period,
- To organize public campaign so that general public would be informed about provisions of Law on Free Access to Information, and about necessity for its consistent and efficient application, and
- To provide material and technical conditions for efficient monitoring of implementation of Law on Free Access to Information, by the government bodies, civil society, and international organizations.

Rade Bojovic

# Legal status of foreign investments in Montenegro

## I Regulative

Process of establishment of independent economic system in Montenegro encompassed even the adoption of new Law on Foreign Investments.[6] By this regulation, which has the character of *lex specialis* the similar legal act that was applied so far, as part of federal economic legislature, was actually derogated.[7] In the meantime, with adoption of Constitutional Chart[8] and establishment of state union of Serbia and Montenegro, the area of foreign investments went under jurisdiction of the member states, so the Montenegrin Law from year 2000, was actually enforced. New constitutional circumstances brought about the establishment of National Agency for Promotion of Foreign Investments[9] that further confirmed Montenegrin orientation toward attracting foreign investments, because without them, dynamic recovery of domestic economy was not likely.[10]

Analyzing the legal framework for foreign investments in Montenegro, it is important to emphasize that, besides the Law on Foreign Investments, as key regulation, there are other regulations directly affecting the legal status of foreign investments. Thus, we have different solutions from incentive to de-stimulating ones. In addition to that, besides regulations that directly define the status of foreign investor, the other legal regulative, which treats the business in Montenegro as a whole, is also very important. In this aspect, foreign entrepreneurs are on equal terms with domestic businesspersons and they share the same destiny, which is result of actual system- position of business in Montenegro.[11]

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[6] Law on Foreign Investments was adopted at the end of year 2000, (Official Gazette of Montenegro no. 52/2000).

[7] Article 77 of Yugoslav Constitution the status of foreign investors was under jurisdiction Montenegrin-Serbian federation at the time.

[8] Article 11 of Constitutional Chart prescribes that Union has jurisdiction given to her by the Chart. These jurisdictions, unlike the previous constitutional solution, do not encompass foreign investments.

[9] Decision on establishment of Montenegrin Agency for Promotion of Foreign Investments (Official Gazette of Montenegro no. 33/2004).

[10] One of the basic macroeconomic problems in Montenegro is low level of foreign investments. Thus, in period from 1993, to 2000 there was only 200 millions $ of foreign investments in Montenegro. In the meantime, in last three years direct foreign investments were around 120 millions euros/ biggest part was related to contracts in area of privatization/ and that is far below realistic needs of Montenegrin economy. Furthermore, plans of actual Government, so far, in area of foreign investments / Agenda of Economic Reforms/ turned out to be unrealistic. For now we have confirmation that economic policy in area of attracting foreign investments needs serious changes because achieved results are far below necessary level and they are mostly linked to sale of the most profitable parts of state economy. All this points to obvious problems in attracting foreign investors.

[11] Number of legal acts regulates business activity in Montenegro starting from status-legal issues /Company Law, Investment Funds Law, Company Insolvency Law/, through package of tax laws /Company Income Tax Law, Income Tax Law, VAT Law, Property Tax Law, Tax on Turnover of Property Law etc./, regulations in area of doing business with foreign subjects /Custom Law, Foreign Trade Law, Free Zones Law/, work relations /Work Law, General Collective Contract, Law n employment and work of foreigners/, ownership-legal relations /Law on basis of property-legal relations, Law on fiduciary transfer of ownership right, Law on pawn as a mean of claim guarantee, Mortgage Law/, etc. Complete business legislature, partially harmonized with international standards, but still contains different solutions and some of them represent a barrier for faster business development.

Current Law on Foreign Investments is quite liberal regarding status, activity, and rights of foreign investors. For example, foreign investor can use various forms of free investment /founding its own or mixed company, investing in Montenegrin companies etc/ and except two exceptions the investor is not limited regarding percentage in company ownership.[12] It is obvious that legislator had chosen an open model for foreign investments, eliminating any kind of ideological or conservative solutions. However, although all key aspects of foreign investments are adjusted to open market standards it is visible that the Law does not offer any special domicile benefits to foreign investors. Simply, the legislator left the issue of eventual favoring of foreign investors compared to domestic ones, to some other regulations. Without detailed elaboration of foreseen legal solutions (we will deal with them in the next chapter), we may conclude that key law in area of foreign investments is formulated in such way that enables foreign investors an open access to domestic market.

As far as other laws are concerned that are directly linked to legal status of foreign investors let us mention the Company Law[13], Custom Law[14] and Law on Basis of Property-Legal Relations – adopted during late SFR Yugoslavia[15], which is applied, in the spirit of Constitutional Chart /article 23/ as the law of the member state. Company Law allows foreign investor to directly do business in Montenegro using the possibility to register a part of foreign company in Montenegro.[16] This legal form is suitable for foreigners who wish to expand part of their business to Montenegro using the model "business link" of already existing foreign company. On the other hand, foreigners have the same status as domestic entrepreneurs regarding establishment of proper companies in Montenegro. Foreign company, or individual can register company of proper legal status /partnership company, limited liability company, company with limited responsibility, and stock company/. In practice, the foreigners usually opt for so called capital companies/ companies with limited responsibility and stock companies/, which represent international business standard because they are mainly familiar with their legal status. Still in most of the cases foreigner opt for companies with limited responsibility as the most simple and flexible legal form, which does not demand significant investments at the start.[17]

Custom Law is relevant for foreign investors because of the clause, which enables custom fees exemption when importing goods, which is treated as founding deposit.[18] For example when foreign investor imports equipment that represents his deposit in company situated in Montenegro /in accordance with Law on foreign investments and Company Law/, he does not pay custom fees for that equipment. This solution

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[12] These are the cases when foreign investments are limited regarding businesses of production and trade with weapons, and business in so called forbidden areas/ border areas, national parks etc/. In these cases, the foreigner can "go into" business only with domestic individuals but his share within the company cannot go over 49%. In addition, these investments are not possible without special permission issued by the authorized ministry.

[13] Company Law was adopted at the beginning of 2002. At the moment, based on this Law, we have over 20 000 different business forms in Montenegro and 8 000 of that number are companies, while the rest are entrepreneurs.

[14] Within policy of completing Montenegrin economic sovereignty- Custom Law was adopted in 2002, and since then changed three times.

[15] Law on Basis of Property-Legal Relations was adopted in 1980 and since then changed twice, – 1990, and 1996.

[16] Article 80 of the Company Law foresees that foreign companies can establish part of their business in Montenegro and through it they can perform all activities for which they are registered. In this case foreign investors can directly d business in Montenegro without the need to form new company. However, the practice has shown that great deal of foreigners prefer to establish a company /usually company with limited responsibility/.

[17] Company with limited responsibility can be established with starting capital of only 1 euro.

[18] Article 184 paragraph 16 of the Montenegrin Custom Law.

benefits the investors, as they ca import new equipment, necessary for their business in Montenegro. This solution also represents an incentive for entry of new technologies in Montenegro and emphasizes the importance of modernization of technical potentials in domestic economy. Nevertheless, it should be noted that serious mistake, regarding stimulating equipment import as foreign investment, was done regarding the fiscal treatment of this equipment. To be more precise, the new VAT Law does not provide any tax relief /we are dealing here with 17% tax rate/ so the custom fee exemption in circumstances of, more or less low custom fees[19] does not represent sufficient stimuli for foreign investors. In addition, this inflexible fiscal solution directly influences on reduction of interest for import of equipment as foreign investment and thus represents an obvious legal barrier.

Unlike favorable treatment regarding the Custom Law, foreign investor finds obstacles in antedated but still valid Law on Bases of Property-Legal Relations. Within this Law in chapter VI, some ten provisions define the rights of foreign companies and individuals regarding the right to own property- movable or real estate- in Montenegro. These are key legal solutions that define the right of foreigners to own property/ movable or real estate/ in Montenegro. Within this Law, which by the way should be adequately changed, there are number of provisions, which are either antedated /*Ultra posse nemo obligatur – impossible does not obligate*/, or treat the status of foreign investor in an conservative manner. For example, this Law prescribes that foreigner as individual can exclusively own property over condominium apartment, while foreign individuals or companies who do business in Montenegro, under the principle of reciprocity, have right to buy real estate property in Montenegro. The Law excludes the possibility for foreign entrepreneur to acquire property over real estate/ land, buildings/ unless he conducts a business in Montenegro, just as it disables foreign companies to directly buy real estate in Montenegro. The Law also contains several inapplicable provisions relating to the role of /now non existing/ federal ministries regarding affirmation or reciprocity principle when signing sales contract of real estates /ministry of justice/, that is regarding enforcement of legally signed business /opinion of the trade Ministry about the necessity to posses real estate property for certain business/. In any case we are dealing here with antedated and conservative legal act, which should be harmonized with international standards in this area, as soon as possible, and simultaneously be adjusted to the needs for attracting the foreign capital.

Finally, there is no doubt that regardless of significant openness of domestic regulative the system-position of foreign investments is still not sufficiently harmonized with needs of rapid economic development of Montenegro. Elimination of controversial and non-stimulating solutions, as well as affirmation of acceptable incentives for foreign investors, should be the next legal step within systematic treatment of foreign investments.

## II Position of foreign investor

The Low on Foreign Investments regulates relations of essential significance for position of foreign investors within domestic legal system. Thus, the Law regulates following aspects: notion of investor and foreign investment, forms of foreign investments, rights, obligations and protection of foreign investor, types of contracts in area of foreign investments, obligations of the state regarding the affirmation of foreign investments and resolution of disputes related to foreign investments.

[19] Average custom rate in Montenegro is about 7%.

1. Notion of investor and foreign investment

Foreign investor is deemed to be: foreign company located abroad, foreign individual, citizen of state union of Serbia and Montenegro with residence in foreign country for more than a year, company in which foreign capital surpasses 25% as well as company established by foreign individual in Montenegro.[20] Specific feature of such a legal solution lies in the fact that notion of foreign investor is not linked only to foreign citizens and companies but it is widened to encompass the citizens of Serbia and Montenegro. It is obvious that idea behind this solution lies in the desire of the legislator to attract the capital, which domestic individuals have earned abroad and to make them invest that capital in Montenegro. However, the problem with this idea lies in the fact that position of the foreign investors within the system is not significantly stimulated, something we already mentioned in previous chapter.

As far as the type of foreign investment is concerned, foreign investor can invest money, goods, services, ownership rights, and papers of value. By the way, foreign investor decides upon the amount of investment himself but he has to respect limits determined by the Company Law.[21]

2. Forms of foreign investments

Foreign investor in Montenegro can choose among several business options, such as: a) establishment of proper company; b) investment in existing Montenegrin company; c) obligatory mixed investment in special cases[22]; d) establishment and investment in non-company areas /banks, insurance companies, free zones, non-profit sector, etc/; e) contractual investment which includes modern business arrangements /leasing, franchising, management etc/; d) concession investments /Build, operate and transfer/. All anticipated investments, from corporative to contractual, obviously represent wide range of choices for foreign investors, so we may say that from this aspect Montenegrin market is open for various modalities of foreign investments.

3. Rights, obligations, and protection of the foreign investor

In number of provisions,[23] the Law defines detailed legal status of foreign investor, and this status includes key issues of interest for foreign investors. Foreign investor has right to: manage with its company or to participate in management with mixed company, to transfer the ownership, to recover its deposit in case of company liquidation or breaking of contract, to freely dispose with made profit /right on repatriation or reinvestment of capital/, to use tax relives, freely makes money payments and uses all guaranteed benefits within the business system in Montenegro /protection of intellectual property etc/. Foreign investor also has right, in case there is a change in area of foreign investments, to retain legal position of more benefit to him, and this possibility provides legal security to foreign investors. Regarding business obligations and protection of business position as a whole, the same regulations regulating entrepreneurial activities in Montenegro apply also to foreign investors.

4. Contracts on foreign investments

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[20] Article 2 of the Law on Foreign Investments.

[21] So for example for establishment of company with limited responsibility you need minimal capital of 1 euro, while for establishment of stock company you need 25.000 euros, while for other forms of business starting capital is left at free will of the business founder.

[22] We are dealing here with obligation of mixed investments with domicile persons in specific business relating to production and trade with fire arms and so called prohibited areas /national parks and etc/. In these cases, the foreign investor can't posses more than 49% of the company capital.

[23] Articles 14-31 of the Law on Foreign Investments.

When making investments, foreign investors conclude appropriate contracts/or decisions in case of single-person companies/ of corporative nature based on which companies are established or investment made into existing ones. These contracts regulate all important issues of significance for realization of selected business.[24]

5. Promotion of foreign investment

All contacts concluded by foreign investors are registered at Agency authorized for promotion of foreign investments.[25] The aim of this registry is to provide precise insight in scope and quality of foreign investments realized in Montenegro, so that authorized Agency could publicly promote the profile and reach of foreign investments. So far, although the Law on Foreign Investments is applied for four years now, the existing Agency for Restructuring of Economy and Foreign Investments usually ignored legal obligation to promote foreign investments.[26] Even the official web-site of this Agency does not provide information on foreign investments in Montenegro, but only recommends to potential investors investment in number of various business projects. Anyway, this aspect of the Law was totally neglected so far and this fits into customary bad statistical policy in Montenegro.

6. Resolution f disputes

Foreign investors can solve their disputes (which may be related to investments) at authorized Montenegrin courts, except if the investments contract /decision/ foresees domestic or foreign arbitration. Executive decision of arbitration is realized by authorized court. In this way, the issue of disputes is regulated alternatively so that foreign investor can arrange optimal legal position.

## III Recommendations

Evaluating legal framework for foreign investments in Montenegro and having in mind the need for growth of foreign investments we are making the following recommendations:

General recommendation

- It would be necessary to make proper legal revision in area of foreign investments with goal to develop stimulating and competitive conditions for foreign investors and this would also include the adoption of new and improved Law on Foreign Investments.

Specific recommendations

[24] For example, the contract of company establishment must have provisions regulating following issues: company name and address, the name of foreign investor, company business, type and amount of founding capital, rights, obligations, and responsibilities of founder, conditions and way of profit distribution and risk bearing, authorities of company agent, protection of the environment, duration of the contract, as well as solutions harmonized with the Company Law or with other regulations.

[25] Recently, by the decision of Montenegrin Government, a special Montenegrin Agency for Promotion of Foreign Investments was established. Nevertheless, so far these activities, at least nominally, were performed by the Agency for Economy Restructuring and Foreign Investments.

[26] Agency has published, from time to time, some general information about the value of foreign investments in Montenegro but without detailed data n structure and profile of those investments.

- It is necessary to eliminate existing obstacles and confusion regarding real rights in Montenegro and thus, in accordance with open market standards define position of foreign investors in area of property-legal relations;
- It is necessary to provide foreign investors with appropriate tax relieves in area of fiscal regulations, which regulates turnover of new equipment- as foreign investment but also in part related to annual profit taxation;
- It is necessary to activate the Agency for Promotion of Foreign Investments as soon as possible, not just for the sake of informing wider and expert public but especially because of affirmation of strategic developmental concept of foreign investments in Montenegro and eventual additional forms of foreign investors' protection;
- It is important to develop economic policy, which would be focused on free and stimulating treatment of all foreign investors, so that Montenegro, in ever-growing international competition, could become as attractive destination for foreign capital as possible.