

TRANSPARENCY IN DECISION- MAKING PROCESSES IN THE WESTERN BALKANS

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INTRO DUCTION

This paper presents the results of an inquiry into transparency of public decision-making in four Western Balkans countries – Serbia, Montenegro, Former Yugoslav Republic of Macedonia (FYROM) and Bosnia-Herzegovina. It was inspired by a similar study conducted by Access Info Europe and partners during 2017,¹ which found “an appalling lack of transparency of decision making across Europe, which prevents members of the public from following and participating in decision-making processes, as well as from holding public officials to account for their exercise of power”.²

This mapping of transparency in the Western Balkans countries was coordinated by GONG³ - a Croatian CSO and one of Access Info's partner organizations in the 2017 study, while the partners in selected countries involved in data gathering included CRTA⁴ from Serbia, Why Not⁵ from Bosnia-Herzegovina, Metamorphosis⁶ from FYROM, and the Center for Democratic Transition⁷ (CDT) from Montenegro.

1 Access Info Europe (2017). Mapping Transparency in Decision Making Around Europe, available at: <https://www.access-info.org/wp-content/uploads/DMT-Findings2017-1.pdf>

2 Ibid. p. 1

3 <http://gong.hr/en/>

4 <http://crt.rs/en/>

5 <http://zastone.ba/en/>

6 <http://metamorphosis.org.mk/en/>

7 <http://www.en.cdtmn.org/>

In all of the selected countries, the latest EC reports issued in April 2018 found issues related to transparency and inclusiveness of decision-making, and made recommendations to improve the situation. Thus, the Serbia report states: "**Public consultations** on proposals are often conducted formalistically and too late in the process, not enabling all interested parties to provide timely and qualitative input."⁸ (emphasis in original). For Montenegro, the report states that public consultations should be "properly conducted without unjustified restrictions on their scope".⁹ The report for Bosnia-Herzegovina found that the "legal framework for inclusive and evidence-based policy and legislative development is not fully coherent, and the legal requirements are not complemented with detailed guidelines or quality control to ensure effective implementation" resulting in the lack of systematic public consultation processes.¹⁰

Finally, for FYROM, the report recognizes efforts of the newly elected Government, stating that "transparency of decision-making has increased and proper checks and balances ... are gradually being restored."¹¹ It, however, also recognizes the volatility of the situation, emphasizing the finding of the Senior Experts' Group on systemic Rule of Law issues, making clear "that the mistakes of the past should not be repeated".¹²

8 European Commission (2018). Commission Staff Working Document - Serbia 2018 Report, p. 9, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf>

9 European Commission (2018). Commission Staff Working Document - Montenegro 2018 Report, p. 10, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-montenegro-report.pdf>

10 European Commission (2018). Commission Staff Working Document - Bosnia and Herzegovina 2018 Report, p. 6, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-bosnia-and-herzegovina-report.pdf>

11 European Commission (2018). Commission Staff Working Document - The former Yugoslav Republic of Macedonia 2018 Report, pp. 4-5, available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-the-former-yugoslav-republic-of-macedonia-report.pdf>

12 Ibid.

METHODOLOGY

Both the EU and the Western Balkans mapping exercises start from the presumption that only accurate, timely and thorough access to information held by public bodies enables meaningful citizen participation in decision-making processes, as well as scrutiny of the work of their elected and appointed officials. This is especially true and relevant for policy decisions in which particularistic interests of powerful interest groups and their lobbyists intersect with the public interest.

Thus, in terms of the methodological approach, the partner organizations in each country chose one of the decisions made by the current governments, where particularistic interests may have played a role. Hence, in Serbia, CRTA requested information about the Law on School Text Books where a particularistic interest of the publishers was recognized. The request was addressed to the Ministry of Education. Why Not in Bosnia-Herzegovina focused on the Law on Excise Duties, strongly influenced by the international community, especially the US and the EU, in the context of the credit arrangement with the IMF. Their request was submitted to both the Ministry of Finance (that drafted the bill) and the Council of Ministers (which sponsored the bill). Metamorphosis in

FYROM inquired about the amendments to the Law on the Use of Tobacco Products, where the interests of the catering industry was recognized. Their request was sent to the relevant Ministry of Economy and Ministry of Health, as well as the MP who sponsored the amendments in Parliament. In Montenegro, CDT focused on the Law on Spatial Planning, where the interests of the construction and tourist sectors were recognized. They requested information from the Ministry of Sustainable Development and Tourism.

Following the choice of a decision made, each partner submitted an access to information request to the relevant public body, requesting information on dates of possible meetings of ministers with representatives of interest groups. If/when they received positive answers, the subsequent access to information request asked for minutes of those meetings, including names of people present, duration of meetings, subjects covered and conclusions reached. In addition, the information requests asked whether interest groups submitted any type of analysis they may have conducted and whether this analysis was made public. Finally, it asked whether there was a public consultation process held and whether it included any type of analysis submitted by interest groups.

The first requests were submitted on June 25, 2018, followed by either the second access to information request or an appeal for administrative silence on July 9, 2018 in all of the countries.

In parallel to submitting access to information requests, partner organizations also conducted an inquiry into the presence and quality of proactive availability of information on chosen public decisions, by means of searching official web-pages of the relevant public bodies. In this search they sought information on (1) meetings with representatives of interest groups prior to making the decision, (2) a list of official meetings held by government representatives, (3) agendas of those meetings, (4) lists of names of people present in the meetings, (5) minutes from meetings, (6) documents submitted by interest groups and the interested public relevant to making the decision, and (7) rationale for the decision made. The official web-sites were checked in the period between June 29 and July 9, 2018.

Finally, the partners also analysed relevant legislation in order to ascertain (1) whether the legislation explicitly states limitations regarding access to information related to public decision-making, (2) whether it proscribes the public interest test, (3) whether it proscribes the obligation to keep records in the form of minutes for all meetings where political decisions are made, (4) whether there is an obligation to proactively publish minutes from such meetings and (5), whether there is an obligation to publish lobbying activities and/or documents submitted by lobbyists/interested public in the course of decision-making.

RESULTS

In terms of the implementation of access to information legislation, it should be noted that all bodies, except for the Macedonian Ministry of Health responded within the legal framework, as presented in Table 1 below. However, the responses were formalistic in nature, not providing much substantial information. Thus, for example, the Bosnia-Herzegovina Council of Ministers responded that the President of the Council meets regularly with representatives of the international community, the business sector and political actors, without providing any specifics.

Similarly, the Montenegrin ministry responded that the requested information is available at the official web-page. However, the web-page quoted did not contain the information requested. In FYROM, the Ministry of Economy responded it held no such information, while the MP could not quote the dates of all meetings held, nor provide any additional information requested in the second FoI request. The Serbian Ministry of Education was the only one that provided exact dates of meetings; however, information requested in the second FoI request was not available.

Table 1: Responses to FoI requests per country and relevant body

PUBLIC BODY	RESPONSES TO FOI REQUESTS			
	Bosnia-Herzegovina	Montenegro	Serbia	FYROM
Council of Ministers	YES			
Ministry of Finance	YES			
Ministry of Sustainable Development and Tourism		YES		
Ministry of Education			YES	
Ministry of Economy				YES
Ministry of Health				NO
MP sponsoring the bill				YES

Hence, the results of the FoI requests sent show that in none of the selected countries citizens have access to any information related to the meetings of officials with interest groups. More specifically, only in Serbia is there any record of the meeting; however, minutes containing information about people present, issues discussed or conclusions reached are not available at all. Neither is there any information regarding possible analyses or argumentation of the interest groups.

When it comes to public consultations regarding selected decisions, these were held in all of the countries except for Bosnia-Herzegovina. However, since in none of the countries the positions of interest groups were part of the consultations process, and given the lack of information described above, this mapping seems to corroborate the latest EC reports stating the formalistic rather than meaningful nature of public consultation processes. This finding is strengthened by the fact that none of the decisions adopted in the four countries was accompanied by their rationales, as revealed by the proactive publication inquiry.

The results of the proactive publication are even more disconcerting. Namely, of the seven indicators sought in this part of the mapping exercise, none were made proactively available in any of the countries.

No proactive information on official meetings of government representatives are available. Citizens have no insight into meetings with interest groups prior to decision-making, including basic information about agendas, people present, minutes of meetings or documents submitted. This is not surprising though, given that in Bosnia-Herzegovina and FYROM is there no proscribed obligation to keep records of meetings. In Serbia there is an Ordinance¹³ proscribing this obligation while in Montenegro there is an obligation to keep minutes of Government sessions and those of governmental working bodies.¹⁴ However, this rule does not apply to individual ministries or lower levels of government. Furthermore, the legislation does not provide for an obligation to proactively publish the minutes of those meetings.

Finally, all but Serbian legislation contain limitations regarding access to information related to political decision-making, while public interest tests are proscribed in all but the Macedonian legislation. When it comes specifically to lobbying activities, the Montenegrin Act on Lobbying proscribes in Article 34 an obligation of the person lobbied to prepare an official note, as does the one in FYROM. Bosnia-Herzegovina and Serbia have no such obligations.

13 Ordinance on the Categories of Registration Material with Keeping Dates (Official Gazette of the Republic of Serbia 44/93)

14 Rules of Procedure of the Government of the Republic of Montenegro (Official Gazzette of Montenegro 3/2012 and 51/2015)

CONCLUSION

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While one cannot generalize on the basis of four decision-making processes observed during this mapping exercise, it does nonetheless indicate serious problems related to decision-making in the four selected countries, in terms of opportunities to perform proper checks and balances of policy decisions where particularistic interests of powerful interest groups might play a role.

The overall lack of any kind of substantial information regarding meetings of public officials and interest groups' representatives is indicative of two types of problems. Firstly, in countries where administrative cultures suffer from a legacy of secrecy accompanied by legislative optimism, there is a clear need to legally proscribe obligations regarding specific types of information to be produced (e.g. minutes of meetings) and documents to be made available proactively and/or following FoI requests. While this recommendation entails amending the FoI acts in all of the selected countries, these types of amendments, accompanied by rigorous implementation oversight might in the long-run prove beneficial to raising the overall low levels of democratic political cultures among political elites and bureaucracies in the Western Balkans. On the other hand, political elites and their bureaucrats are merely reflections of societies in which they operate. Thus, the second

problem that needs to be addressed is the level of political culture of the citizenry, who need to become more aware of their own responsibilities as active citizens, demanding true, thorough and timely information about decisions affecting their everyday lives, such as prices of text books or amendments to spatial plans, or indeed, the terms of the IMF loans. Only by working on these two issues in parallel can one expect the increase of trust in political institutions and better overall legislation.

In this process, the EU has a significant role to play; the accession process and especially the pre-accession financing in all of the Western Balkans countries needs to be clearly linked to the track-records of aspiring countries not only in adopting, but rigorously implementing reforms and newly adopted legislation. And last, but not least, the EU institutions should be showing by example how the lack of adherence to democratic principles and European values carries strong negative political and financial consequences to member states. Lacking such examples, the Western Balkans political elites as well as those in back-sliding member-states have no incentives to truly reform, leaving their citizens prone to influence of populist politicians disintegrating the very fabric of the idea of the European Union.



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