TAIEX Case-based Peer Review Mission on Countering organised crime and corruption

Mission timeframe: 30 May to 3 June 2022

Authors of the report:

Disclaimer

The views articulated and expressed in this report are purely those of the author and may not in any circumstances be regarded as stating an official position of the European Commission.

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2. Introduction

2.1. Mission's Objective

The aim of the Peer Review Mission was to follow up on the main set of recommendations from that were issued in the course of 2019, following a previous mission carried out in experts' deployment to Podgorica in June 2019. Once more, the assessment has been based on a thorough review of a number of recently finalised cases of high-level corruption and organised crime, including money laundering. The experts made an analysis focused on two main areas of concern: the confiscation of proceeds of crime and the use of special investigative measures. This report presents the outcome of the mission and the peer-to-peer exchanges, as well as the further review of the cases conducted by the four experts

2.2. Methodology of the Evaluation

The method used to conduct the assessment was based on the outcome of several meetings and interviews held with the relevant local authorities, as well as on background documentations provided by the European Commission or handed over on the spot or e-mailed afterwards by local interlocutors, following targeted requests by the experts. In addition to background information provided in written form and in person briefing with international experts and EU Delegation staff, experts were tasked to review a total of nine criminal cases. Experts were provided the opportunity to engage with investigators, prosecutors and judges involved in these cases, among others from the following institutions in Montenegro: representatives of the Police Directorate (including FIU), representatives of the Special Prosecutor's Office, representatives of the judiciary. Representatives from the Ministries of Justice and of the Interior of Montenegro also attended the experts' exchanges.

3. Executive Summary

Since the previous round of case-based peer-reviews[1], the Montenegrin authorities took certain initiatives to make the necessary progress and to implement a number of recommendations. However, the majority of these initiatives have yet to be finalised. In any case, these initiatives have not yet led to any concrete results.

On the other hand, and this is concerning, there appears to be no progress in some essential areas, necessary for the proper functioning of the judicial system. This leads to the conclusion that, despite all the efforts made, the judicial system is not fully functioning at the moment.

It is quite clear that at all levels, i.e., at police, prosecutor's and court level, a major effort is needed to bring the required people and resources up to an acceptable level. Human resources in all positions are lacking. At all levels, there is also a clear lack of premises and equipment to function (in an efficient manner). An overall investment in infrastructure should be one of the key priorities.

Apart from the above-mentioned issues, the Special Prosecution Office's competence is relatively broad at the moment, which results in the Special Prosecution Office (SPO) regularly handling also less complex cases, for which such a specialised SPO should not be intended. This has of course an impact on the level of both institutional and individual specialisation, which is rather low. A problem that also exists with regard to the special department of the High Court in Podgorica.

As such, the interinstitutional cooperation is reported to be excellent and very professional. Nevertheless, a clear transparent prioritisation in managing cases, which is not in place at the moment, would be very helpful to be more efficient. The Police is lacking a case handling and case management system, a solid track record of cases as well as interoperable databases. Police has no direct access to relevant key national databases i.e., cadastral service, bank account registers, citizen register. On the other hand, the transfer of the FIU to the Police Department has proven positive, consolidating its role within the law enforcement institutional setup, and is now part of relevant international organisations and has sufficient staffing and equipment at its disposal.

What is lacking in general, is a systematic proactive approach related to certain crime phenomena. Special Investigative Measures (SIMs) are in place, the police has all tools at their disposal and the constitutional issues that had led to the suspension of some surveillance measures are solved.

Financial Investigations in Montenegro require a significant increase of technology, staffing and qualification. At the moment, the law enforcement cannot respond to large scale financial analyses in transnational economic crime cases.

[1] Deployment in Podgorica previously took place in June 2019

Equivalent to the financial investigations, the IT-Forensic capacities in SPU need a substantial increase in staffing and technology.

Regarding the direct link between financial investigations and confiscation, a complete review of the existing approach by the Montenegrin authorities is necessary. Financial investigations are only aimed at tracing assets and are started in general way too late. In addition, the approach is too passive. Modern and pro-active techniques, such as the monitoring of bank accounts, but also other methods such as house searches (in order to find documents) or interception of telecommunications, are not used. Also, the fact that there does not seem to be investigations carried out outside of the country (in a more systematic way) has a negative impact on the results.

Although efforts are being done trying to achieve results in the field of confiscation, results remain very low. Legislation on extended confiscation is not in line with European standards. It must be mentioned that overall, the poor quality of the legislation, is one of the most frequently heard complaints of the practitioners in Montenegro. There were said to be several loopholes, ambiguities and incompleteness in the legislation.

One of the major issues in dealing with corruption and organised crime cases within the judicial system of Montenegro is the regulation of plea-bargaining and especially its use in practice. As in all neighboring countries, plea-bargaining is an institution introduced in the legislation. But compared to those countries, in Montenegro the instrument is overused.

The difficulties in enforcing the current legislation, but especially the above-mentioned problems concerning the lack of (human) resources, are the basis for a judicial system that is very weak or does not function at all, which is of great concern. This results in an excessive use of plea agreements by the prosecution, with a high rate of acceptance in court, even systematically with penalties below the legal minimum. In some cases, the confiscation of assets can be taken into account, which is a positive aspect, but the general penal policy in the agreements is simply too lenient. It is very clear that the reason why plea agreements are concluded at all costs by the public prosecutor's office, is simply that there is no alternative. Without a plea agreement, criminal cases always get blocked in court, which leads to an unbalanced judicial system.

4. Findings

4.1. Measures taken to follow up on the main recommendations from the 2019 peer-review mission

It is clear that the recommendations from 2019 have been only partially addressed by the Montenegrin authorities. Some recommendations, which are essential, especially for the functioning of the judicial system, remain unimplemented.

- **The recommendations that have been implemented**, and where the efforts made by the Montenegrin authorities should be seen as particularly positive, are the following:

- Establish an expert group existing of judges, prosecutors and experts to follow up on possible legal problems, and make suggestions for amendments (if needed), but also to bring in the necessary expertise on all possible topics related to the fight against corruption and organised crime.
- Improve the knowledge of judges and prosecutors of the concept of money laundering and more specifically about the link with the predicate offence in line with EU jurisprudence. Exchange of experience, organizing a study visit, case-based discussions between colleagues, establishing a network of national experts
- Undertake the required steps for obtaining EGMONT membership by granting that both the Law-AMLTF and by the Law on Internal Affair as well as other legal instruments fully ensure independence and autonomy of the newly established police-FIU.
- Install a nationwide data base of jurisprudence
- Have contact points from the Prosecution Office for certain offences in the police

- **The recommendations where there has been progress**, but further efforts are needed to reach acceptable level, are the following:

  - Develop a mandatory and integrated special training programme for Prosecutors and Judges dealing (or going to deal) with organised crime, high-level corruption, money – laundering and financial investigations
  - Focus within the investigations more on the proceeds of crime and the calculation of these proceeds in a much wider perspective
  - Conduct financial investigations on a more dynamic way and in the earliest stage of the investigation
  - Amend substantive, procedural and organizational provisions in legislations covering asset confiscation at all levels of authorities
  - Make the work of the Prosecutorial offices and judiciary be more transparent.
  - Familiarise judges with indirect evidence
  - Initiate more proactive investigations.

- **The recommendations which currently remain unimplemented,** are the following:

  - Solve the problem of the housing as well as the working conditions and the budget of the Special State Prosecution Offices and High Court
  - Make sure the SPO works through more specialized units
  - Amend the Law on the Special State Prosecution in order to make sure only well-experienced candidates with high skills and a relevant experience in investigating more complex crimes will be appointed
  - Develop a mandatory and integrated special training programme for Prosecutors and Judges dealing (or going to deal) with organised crime, high-level corruption, money – laundering and financial investigations
  - Establish measures to keep a case manageable and work with investigative plans
  - Amend the legislation on Plea Bargaining
  - Implement legislation about the dismissal of criminal complaints (article 271 of CPC)
  - Establish a detailed track record of the whole chain of investigation as well as on cases of money laundering.
  - Rethink the prevailing practice of sentencing, especially in the second instance, in order to constantly move towards higher sentences
  - Set criteria for measurement of performance of prosecutors conducting financial investigations and asset confiscation
  - Ensure an effective response from the relevant institutions to any interference, harassment or pressure is strongly recommended.

4.2. Assessment on the ability to successfully address high level corruption, organised crime and money laundering mainly focused on the use of special investigative measures and confiscation of assets

A/ THE PRE-TRIAL PHASE

1. The capacity of law enforcement agencies and the Prosecution Offices to fight organised crime, corruption and money laundering

1.1. Police

The Police sector relevant for this mission is the sector for fight against crime. It consists of 12 Departments. Namely the department for the suppression of General Crime, Economic Crime, Prevention and suppression of Drug Abuse, Crimes of smuggling and trafficking in human beings and illegal migration, for special investigative methods, Criminal Intelligence Division, International Police Operational Cooperation, Serious Crimes, Combatting Drug Smuggling, Witness protection section, Special Operational Support section and the Special Police Unit (SPU).

Based on the current *internal job systematization as part of the Government decree on organization and systematization* 269 positions are assigned to the Fight against Crime sector. 32 Positions are assigned to the SPU.

The SPU as stipulated in article 26 of the Law on Special Prosecutor's Office works exclusively for Special Prosecutor's Office. The financial benefit for investigators assigned to the Special Police Unit proves to be a relevant incentive. Due to political changes as well as the assignment of a new Head of SPU, 22 Officers are reassigned to other units and four left the SPU on their own will. That leaves now only a few officers in the SPU. **Almost all investigations, in particular on economic crime and organized crime are on hold. At the time of the assessment, there is no indication when this precarious situation and serious shortfall in all economic crime and corruption cases will change**.

In general, all units complained about their **huge workload and their lack of resources for real pro-active police and investigation work**. Looking at the staff allocation it is surprising that only eight officers are assigned to the department for combatting drug smuggling, especially given the fact that Montenegro is part of the international cocaine smuggling and home for several drug gangs.

The new government plans to increase the number of officers working in all Departments of the sector for the fight against crime[2]. This is highly appreciated, but concrete measures are to be seen.

1.2. Special Prosecution Office

1.2.1. SPO prosecutors show to be willing to make use of the existing legal tools. **One of the biggest concerns is the lack of adequate premises to function properly**. The current location of SPO affects seriously the security, the confidentiality as well as the effectiveness of the prosecutors' daily job. A new and more adequate location is envisaged, which should of course be considered a major priority[3].

[2] Update received after deployment: the rulebook on internal organization and job descriptions of the Ministry of the Interior/Police Directorate adopted during the Government session of 28th of July.

[3] Update received after deployment : Government conclusions of 6 of September by which the Minister of Justice, in cooperation with the Ministry of Finance, Cadastre and State Property Administration, Supreme State Prosecutor's Office and Special Police Unit, is obliged to establish a work team which will draft an analysis of the working premises available in the old building of the Government of Montenegro located at the cadastre plot 399/2 KO Podgorica I, 2954m2 total in size, owned by the state of Montenegro – to be disposed with by the Government of Montenegro, for the needs of the state prosecution offices referred to in item 1 of this conclusion.

There is also **a major problem of human resources**. **The number of prosecutors in the office is more than insufficient**. According to the systematisation act the SPO, should have 13 Special Prosecutors (including the Chief SPO), but currently only 11 are acting (1 is on training and 1 additional is allocated to Supreme Court). In addition, **administrative and support staff for prosecutors is totally inadequate** and have to be increased substantially.

On the basis of information collected during the meetings with some of SPO Prosecutors, the workload allocated to each of them ranges from 60 to 100 cases. Objectively, managing this workload in a proper and speedy way goes beyond the capability of any single prosecutor. This is even more true because of the poor working conditions which were mentioned above. During the meetings, it was indicated that in order to bring the workload in the SPO to a more acceptable level, three additional public prosecutors should be appointed.

At the moment, prosecutors are assisted by **advisers/experts, although it was reported that there is one expert for every two prosecutors only, which is by no means sufficient.** Initiatives to improve this situation were also reported.

1.2.2. **At the moment, the SPO's competence is relatively broad, which results in the SPO regularly handling less complex cases, for which such a specialised SPO is not intended**. In order to come to a reasonable balance in terms of workload, its competence should be more delineated (in addition to the need to increase its resources). The need to narrow down the competency of the SPO and focus on larger and more serious crime, to reduce the workload of the SPO, was also reported by the interlocutors. It definitely would be time to assess whether the legal competence of SPO is concretely proportionate to its mission and, if not, to make some adjustments in order to narrow it.

1.2.3. Of course, re-designing the legal competence of SPO pertains ultimately to the legislator. While waiting, taking into account that so far not all numerous cases can be dealt with in an accurate and quick manner, SPO Chief Prosecutor should give priority guidelines.
This would help SPO to manage cases - and appear to do it - in a well-grounded, coherent and transparent way. **Such a clear, transparent prioritisation is not in place at the moment**.

The allocation of cases to SPO members is based on an objective and open mechanism. This is positive. However, when a Prosecutor has to focus on a case of special complexity full time and even for a long while , other cases may suffer delays. In such circumstances some flexibility in allocation of workload should be possible and the Chief Prosecutor should be allowed to take a decision *ad hoc* on the basis of open and pre-established criteria.

1.2.4. One of the weaknesses in the functioning of the SPO is the **lack of specialisation** with regard to the Office as such and to each of his Prosecutors. There are plans in the future, when there is sufficient capacity, to reorganise the functioning of the SPO in such a way that it will work with more specialised sections such as war crime, money laundering, etc. This would certainly be an important step forward.

Once it will be possible to work in more specialised units, individual specialisation will also benefit. The training on offer is certainly more than sufficient. Many training courses took place within the framework of donors' projects; the judicial training centre has an annual plan that it sends to the prosecutors and judges. Prosecutors choose the training courses they want. However, **it is reported that attending trainings is problematic due to lack of time**. For specialised prosecutors, training in specific targeted areas is key. Even mandatory training might be recommended. Such trainings would even save time in creating a common understanding between practitioners, leading to a quicker resolution of cases.

2. The relationship between the law enforcement authorities and the Prosecution

2.1. Cooperation within Law enforcement and with other authorities

The cooperation with other interlocutors (tax administration, customs, financial sector, etc.) was reported to be good and is relevant to the success in fighting organised crime and high-level corruption.

2.2. The cooperation between SPO and law enforcement

Prosecutorial services and law enforcement are the most important criminal justice actors and should cooperate with each other in an active and constructive way.

In general, a very good cooperation between the police and SPO Prosecutors have been reported and was observed during the meetings. A partial allocation of the staff of the Special Police Unit to the premises of the SPO creates synergies and effectiveness in the investigation phase. This could serve as a model for the future. A building used jointly by SPO and SPU should be the final goal.

The SPO can also constitute a multidisciplinary investigative team. If necessary, they can hire professionals from other institutions (e.g., cadastre). This positive cooperation with the police, but also with the other authorities was also illustrated by the studied cases.

2.3. International cooperation

The International Police Cooperation Unit is well established and delivers results within its tasks and responsibilities.
Montenegro holds a strategic agreement with Europol and is able to exchange SIENA (Europol's Secure Information Exchange Network) messages with EU Member States as well as other connected countries. A prosecutor is deployed as liaison officer to Eurojust. An excellent cooperation was reported.
Montenegro maintains a good cooperation with CEPOL, the EU Agency for Law Enforcement Training.

In some of the studied cases suspects and accused chose Serbia as a shelter to avoid justice in Montenegro. In these cases, extradition was refused for various reasons. If so, Montenegro should promote with the neighbouring country a clearer policy of cooperation in full compliance with the rules of the international law – including that of *aut dedere aut iudicare* - and in view of avoiding any impunity.

3. Investigative approach and the use of special Investigation Measures

3.1. Pro-active investigations

No detailed information (such as statistics) about proactive investigations was provided. Based on the reporting from the Montenegrin authorities, it appears that police officers also act on their own initiative. Police also said that intelligence led policing was implemented. **What is lacking in general within the Special Prosecution Office is the capability to expand investigations from the initial single case in order to better tackle criminal phenomena that 'threaten' the country**. One reason behind is the low number of staff and the huge workload.

The Police is lacking a case handling and case management system, a solid track record of cases as well as interoperable databases. Police has no direct access to relevant key national databases, i.e., cadastral service, banks account register, citizens register. The Police is using an Info-Stream system that allows obtaining operational information across Montenegro. The US and UK are in the process of establishing a case-handling system for the Police. Once established, it will allow a more transparent view on the police work and police performance.

The Police drafted a SOCTA Report and shared it with Europol. The SOCTA serves as an important basis for decision makers to prioritize in the fight Organized Crime groups in Montenegro. However, due to the low number of staff and the huge workload no major further steps can be taken.

3.2. Investigations – building up evidence

3.2.1. As per the legal framework of Montenegro, the pre-trial phase includes the "preliminary investigation" and the "investigation" as two distinct but consecutive phases. As an exception, the investigation phase is not conducted when the Prosecutor has sufficient grounds for bringing a direct indictment (Article 288). **As a general rule, there is no preclusive deadline neither for the finalisation of the preliminary investigation, nor for the (judicial) investigation**.

3.2.2. Upon reception of a criminal complaint, the Prosecutor, in compliance with article 256a of the CPC, shall decide whether or not to undertake actions. If the gathering of additional information does not lead to reasonable suspicion, **the Prosecutor – upon his/her INDIVIDUAL decision and without an adequate cross-checking mechanism – dismisses the complaint**, therefore, the initiation of the preliminary investigation phase can be blocked. It is noted that such a relevant decision to dismiss a criminal complaint should be taken by a third-party who is in a position of neutrality. The investigative judge should play this role upon a motivated motion of the Prosecutor.

An attempt to regulate the possible complaint procedure against the decision of the Prosecutor to dismiss a criminal complaint is provided in Article 271a of the CPC, but it does not provide sufficient guarantees. The injured party and the body who filed a criminal complaint may request reconsideration of the decision on dismissal of criminal complaints by the higher Prosecution Office.

The issue here is that the police that files the criminal complaint has hardly ever dared to file an appeal and that, particularly in corruption cases, the injured party is not precisely identifiable. As a result, nobody files an appeal.

3.2.3. Regarding the regulation about the cooperative witnesses, **Article 125 of the CPC specifies that the organizers of a criminal group shall not be allowed to enjoy the status of cooperative witness**. This limitation frustrates the aim of the law because it is well known that the criminal organizations are structured hierarchically and as a consequence the participants who are at the top of the hierarchy and who organize or lead the criminal group are precisely those who can provide with key information about the structure and the strategy of the criminal group.

The legislation about the cooperative witnesses should also be amended on the following points:

- Using cooperative witnesses should be allowed both for organised crime and corruption, money laundering and any other serious crimes cases.
- a cooperative witness – whatever be his/her role in perpetrating crimes – **should be granted a reduced sentence only. He/she should not benefit from any kind of immunity.**

3.3. Special investigative measures.

In 2018, the Constitutional Court suspended the application of the Special Investigative Measures (SIMs) established in the CPC. However, these SIMs can now be enforced again. In accordance with Article 157 of CPC, the Police has in general all relevant tools to fight organized crime and corruption at their disposal, such as, e.g., an IMSI Catcher. However, **they face difficulties intercepting the public spoken word (**interception of, e.g., conversations in a public space or in a car)**, or the communication inside cars or buildings. The surveillance unit is lacking up to date equipment.** A thorough assessment on the existence or absence of measures to prevent the abuse of SIMs by law enforcement agencies was not carried out as suggested in 2017. This issue should be taken care of as soon as possible in order to get a clear understanding of the current situation in Montenegro.

Audio Video recording of witness or suspect statements is possible due to the donation of two interrogation rooms. The Montenegrin Police has the capacity to intercept telecommunications but is facing the same difficulties as all law enforcement agencies that the messenger communication cannot be intercepted.

4. Financial investigation

4.1. Financial investigations in parallel with Criminal investigations

A sound review of the approach of the Montenegrin authorities is necessary. Numerous weaknesses affect financial investigations. Even a review of the law on financial investigations, seizure and confiscation is recommended, in order to come to a more differentiated process, whereby financial investigations are not only linked to tracing assets related to extended confiscation.

At the moment, there are two major bodies dealing with financial investigations in Montenegro. One unit is located within the SPO and the other one in the serious crime department. The relevant Police unit has five staff members and the SPO has six staff members dealing with financial investigations. **Both units lack adequate office space, up to date analytical software, training, and sufficient human resources.**

Financial Investigations in Montenegro require a significant increase of technology, staffing and qualification**. At the moment, Montenegrin authorities cannot respond to large scale financial analyses in transnational economic crime cases**. As financial investigations are the first step of the final confiscation of assets, the final results will not be seen.

A better understanding of the practical application of internationally accepted standards on financial investigation and a better reporting in line with this concept, but also a more effective use, are necessary.

4.1.1. Based on the cases studied and the information obtained during the meetings, it must be concluded that the Montenegrin authorities are trying to conduct a number of financial investigations with the limited capacity available. Some of these investigations delivered results.

However, there is room for improvement in terms of how financial investigations are conducted. **In most of the reported cases, financial investigations (in order to trace assets) have been conducted too late.** Only in very few cases, these financial investigations were conducted in parallel with criminal investigations. There were no parallel financial investigations in the preliminary investigation phase. This limits the possibilities for the timely detection and confiscation of illicit proceeds. The faster the tracing of assets derived from crime is, the more effective the confiscation and recovery of criminal profits can be. Financial investigations should even be pursued prior to initiating criminal investigations for the underlying offences in order to gather evidence of the commission for those offences.

Trying to discover money flows during the time of committing criminal acts and their connections to criminal acts and the final beneficiaries, was not observed. In none of the discussed cases. the financial investigation was directed towards proving elements of criminal acts and to the scale of the pecuniary gain (illegal profits deriving from criminal acts) This should even be – beside the crime itself - the main objective of criminal procedures.

In Montenegro, financial investigations are usually aimed only at asset tracing. This use is too limited compared to what such investigations are intended for. **No cases of financial investigations into structures of criminal networks, nor into financial flows – investments of illicit money – were presented**. Financial investigations aimed at discovering financial structures of Organised Crime Groups, to disrupt the financial basis of international criminal structures and to discover elements of conducting criminal acts were not observed.

4.1.2. On an operational level, too, there are some comments to be made. Notably, **at the moment, the final financial investigation report is presented during the trial by certified court experts that have not worked on the report** . This practice appears to be rather strange. The financial investigator should present his work in front of the court as an expert witness.

In addition, the fact that, although the Central Bank hosts a centralized account register, **a judicial authorisation to obtain bank accounts information of residents needs to be presented physically to the banks in order to obtain a full and correct information**, which hampers the efficiency of a financial investigation. With 16 different banks in Montenegro, such a practice is challenging and time consuming for the financial investigators. Also, the collection of information of non-resident accounts was reported to be very challenging.

4.1.3. **Furthermore, a too passive approach of the financial investigations was observed**. Using more modern and pro-active techniques, such as the monitoring of bank accounts, is required, as well as other methods such as house searches (in order to find documents) or interception of electronic telecommunications.

The fact that there does not seem to be systematic cross-border investigations has a negative impact on the rate of success. No cases of international cooperation in financial investigations was reported, while in this area , even more than in other, international cooperation with relevant countries is strongly recommended.

4.2 Money laundering

4.2.1. No major problems have been reported and observed about the FIU. The FIU has access to all relevant databases including the police systems, an adequate number of staff and software at their disposal.

The switch from an Administrative-FIU in 2019 to a Police-FIU is seen as a good development. The FIU passed the screening of EGMONT and is now member of the EGMONT group.

4.2.2. An increased number of money laundering cases has been reported. However, **all the cases referred to were concluded by plea agreement**. As a result, so far there is **no judicial case law on money laundering.** During the meetings with the judges of the special department of the High Court the issue of the level of understanding of the money laundering legislation and how it can be/should be used came forward. These Judges stated that not mentioning or not being very clear about the predicate offence is no hindrance for a conviction for money laundering. The facts and circumstances that often consist of so-called money laundering typologies (objective circumstances that, according to experience, indicate money laundering) and the discrepancy with legal income are taken in account as evidence. In this regard it is worth mentioning that the European Court of Human Rights (ECHR) decided in a money laundering case Zschüschen v. Belgium[4], that the fact that the predicate offence is not specified during the proceedings, allegedly is not a breach of his defense rights and not a breach of the right to be informed promptly about the charges. However, the knowledge of the principles included in the 'Zschüschen-case' appears to be insufficiently known among prosecutors, and among all judges.

A further follow-up of the results of Money Laundering investigations is certainly recommended. As indicated above, a focus on stand-alone money laundering cases is necessary. **At present, there is still a lack of accurate statistics that would allow a more detailed overview of the nature of ML cases, the way they are followed up at the level of the prosecutor's office, the results of seizure, as well as the final results in court (including confiscation).**

B/ THE TRIAL PHASE

1. The capacity of the judicial system to decide upon complex cases of organised crime, corruption and money laundering

[4] https://hudoc.echr.coe.int.

1.1. Concerning the judicial system, one of the biggest issues is and remains **the lack of people and resources.** Of course, this is linked to whether or not there is a sufficient budget. An essential prerequisite for allowing the courts to work independently is to make their own budget available.

While Montenegro's budget for the judiciary remains above the regional per capita average, it is quite clear that a more efficient allocation and use is urgently needed **in order to have a well-functioning judiciary**. A change in the budget legislation was to be under discussion, with an own budget for each court. Nevertheless, since 2019, till now there has been no increase.

One important issue was revealed during the mission regarding the use of ex officio lawyers and the enormous impact on the budget of the judiciary. The remuneration of these lawyers is to be guaranteed from the budget of the respective courts, putting an enormous strain on their budgets. It was reported that the Higher Regional Court in Podgorica has a budget of EUR 4.5 million. Two million euros are needed for the wages and salaries of the judges and employees and almost one million was necessary for the payment of these lawyers.

The latter has an enormous impact on the functioning of the court. A central office should be considered that bears the costs and thus relieves the court budget.

1.2. One of the things that urgently needs to be solved, is **the lack of adequate housing facilities for the courts. This applies both to courtrooms alone and to office space and the other facilities**.

This lack of space has an immediate impact on the functioning of the court. However, it also has a direct impact on the way a criminal case proceeds. This is simply not acceptable. It was observed that courtrooms have to be used twice because there are not enough courtrooms available. It was also learned that the hearings were often transmitted to another hearing room via screens. Due to the lack of hearing rooms, the hearings usually take a long time, but the right to participate directly in the hearing is also affected by the transmission via screens. Limited place capacities affect especially the results of the work of the specialized special departments. It was reported that the lack of court rooms makes it difficult to finalize the criminal cases within three years. In some of the cases, suspects already had to be released because of exceeded deadlines.

It was also observed that **confiscated items were being kept in unsuitable premises at the court**. Explosive substances, for example, must be stored separately in special rooms due to the danger they pose. It was also determined personally during an inspection that addictive substances - accessible to everyone - were kept in the basement and in the toilets.

1.3. Regarding the available human resources to run the judicial system, there is both a general problem and a problem with the special department of the High Court.

One of the general problems relates to the findings that while there are **currently places for 305 judges, only 260 have actually been filled**. The difference is due to the large number of judges retired in 2021. In order to have a sufficient number of judges available, nationwide human resources management and forward-looking planning are required in order to identify and replace judges leaving at an early stage, with a pool of fully trained judge. Regarding the special department in the High Court, the problem is even more particular. The available capacity, there are only six judges assigned within this department, is largely insufficient to seriously handle the specialised cases assigned to them.

In addition to the issues about buildings/location and human resources, it was reported that **even the budget for the purchase of paper and writing materials is often not sufficient**. But the problem is much wider. **The digitalisation of justice has not started yet in Montenegro**. There is also a need to digitize files. This makes it possible to provide the defense attorney with a copy of the file more quickly, even in complex files, and to be able to better discuss parts of the file during the hearing, for example, using a beamer. But for example, also language

software should be made available to the judges in order to be able to put verdicts and other decisions on paper more quickly.

1.4. The limited number of judges available in the special department of the High Court has a direct impact on the individual specialisation of the judges who have to deal with cases of organised crime and high-level corruption. Such **individual specialisation is not at a sufficient level in Montenegro**. For the cases of the Special Department of the High-Court in Podgorica, even non-specialist judges of another department have to be assigned to conduct trials. This means that in some cases, the most complex cases are handled by judges who have no experience/specialisation in this area at all. In the court of appeal, there does not even appear to be the beginning of specialisation.

Judges charged with fighting corruption and organized crime have no specific training. Especially in this complex and rapidly changing matter, it seems necessary that the judges should receive special training for this requirement profile. European legal norms and institutes are also to be taught as part of the training. In order to be able to cooperate across borders and in a promising way, further training in areas of international cooperation is necessary.

The training of the judges takes place in a dedicated training center, but also in seminars or in the form of study-visits to other countries, is sufficient, although **the participation of the judges in such training could be increased**. A rather low level of participation was reported. One of the remarks made about training was that the trainers were mainly judges with little professional experience. Of course, it is true that young judges are up to date with the knowledge acquired at university in specialist areas, nevertheless it would also be welcome to involve judges with decades of experience as lecturers for presentations relating to court practice.

Apart from this issues related to individual specialisation, **there is also a problem with organisational specialisation**. There are no delineated units within the court. Every judge has to deal with all types of cases without distinction.

1.5. The judiciary in Montenegro has made progress in court management. The respective court president is able to determine the workload of the judges based on the recording of the files. This enables him to take action to initiate a redistribution of the workload. During the meetings, it also became clear that within the court, and especially the High Court in Podgorica, attempts are being made to fill certain gaps that exist, and in this way to try to make progress where possible.

The problem, however, is still ultimately trial management. There is still much progress to be made in this respect. The judges leave the conduct of the trial too much in the hands of the lawyers. If lawyers request a postponement, these requests are all too easily accepted. The final predetermined timing and/or conduct of the trial is left to the lawyers. Judges are too hardly the ones who take the lead in the conduct of proceedings. Judges should be much more active in this respect and really be the ones who are in control of the conduct of the trial.

Procedures should be carried out quickly. In criminal cases in particular, the adjournment of the hearing should be an exceptional case. If defense counsel cannot come to a hearing due to time constraints, they should be obliged to send a representative. Due to a strike by the defenders, which lasted almost five months, all hearings even had to be postponed during this time. It is recommended that a regulation be included in the Code of Criminal Procedure that in such cases, at least in custody matters, a smooth course of the hearing is guaranteed, and the defense counsel is obliged to send a representative.

Based on the case studies, it also became clear that in many cases the hearing had to be adjourned because the public prosecutor responsible had another criminal case to deal with on the same day. In order to prevent this, the possibility to be represented by other public prosecutors should be guaranteed.

1.6. Apart from the above-mentioned issues concerning the budget, which have an impact on the independence of the judiciary, there is an additional important issue in Montenegro, which has a direct impact on the independence of both the judiciary and the judges themselves, and this concerns in specific **a particularly problematic functioning of the Judicial Council.**

In principle, the Judicial Council is the institution to select, train and appoint judges independently of political influence, and is meant to be an important safeguard to preserve the aforementioned independence. **In Montenegro, this council must consist of ten members. Of these ten members, four members are elected by the Conference of Judges, four are elected by the Parliament with a two-thirds majority and two members are members by function (the President of the Supreme Court of Montenegro and the Minister of Justice). Currently, the Judicial council consists of only six people**. The reason why no further members are appointed by the Parliament is that no two-thirds majority can be found. This hampers the functioning of the judicial council to such an extent that it is difficult to speak of an effectively functioning judicial council. Due to the insufficient number of members of the judges' council, it is not in a position to make the upcoming personnel decisions. The result is that vacant judge positions cannot be filled due to the faulty appointment structure. There are currently 95 judges waiting for their job description.

Another issue remains the fact that **the Minister of Justice still is an ex officio member of the Judicial Council**. With a view to ensuring an independent Judicial Council, it is recommended that the Minister of Justice is removed from the Judicial Council.

During the meetings, the experts were also informed of an operational concern regarding the judicial council, more precisely, regarding the promotion of the decisions it takes. It was **reported these promotions were not sufficiently based on merit. The impression arose that judges who had disproportionately participated in various training events were given preference over other judges when it came to promotion**. Continuous further training might not be overestimated when it comes to promotion, neither might be used as an overweight quality criterion.

2. The implementation and application of the Criminal Code and other relevant legislation

2.1. With regard to legislation, one of the most frequently heard complaints during the meetings held was about its quality. It was mentioned several times that **the quality of legislation is problematic in various areas**. There are several loopholes, ambiguities and incompleteness. Judges, among others, complain that all too often they have to look for solutions and in certain cases even seem to take over the legislator's task.

However, it was stated that they can be involved in working groups and have the opportunity to comment on draft legislation, but their comments are not taken into account. In discussions with the judges, it was found that legal provisions are too complex and difficult to apply. There was also the impression that laws are written by people who have never worked in court and who accordingly lack the necessary knowledge of how courts work

Although working groups, in which the Ministry of Justice is also involved, have been set up to make legislation, a comprehensive assessment procedure is necessary, on which the judiciary should also be able to give their opinions and statements.

In some areas, legislation is lacking. It was explicitly stated that there is no legislation on how to deal with seized drugs nor with weapons. A clearly adapted legislation is urgently needed.

2.2. One of the major issues in the judicial system of Montenegro is the regulation of plea-bargaining and especially the use in practice of plea-bargaining in Montenegro. As in all neighbouring countries, plea-bargaining is an institution introduced in the legislation. But compared to these countries, in Montenegro **the instrument of plea-bargaining is overused**.

As such, the application of this legal institution is suitable for significantly reducing the duration of the procedure, nevertheless some comments and concerns need to be formulated.

In Montenegro, plea bargaining can be used for offences, including the most serious ones (e.g., **c**rimes against humanity, murder, corruption, money laundering, exploitation, drug trafficking, arms trafficking and human trafficking). However, there are no specific guidelines in what cases it can be used and to what extent. What matters is that the consent to plea bargain be based constantly on an accurate costs/benefits assessment in the interest of Justice. At least some clear guidelines on how to deal with plea bargain in view of strengthening both the transparency and the consistency in using such alternative tool to the trial is necessary.

It is clear that in Montenegro, the policy on plea bargain is conditioned by the problems faced during trials before the courts, and especially the non-functioning of the judicial system. **There is a constant favour to apply plea bargain, even with lenient sanctions, because no result will be achieved if the case goes to trial**. In such a situation, it becomes difficult to take a harder line. Indeed, in such circumstances refuse the plea bargain would turn into consuming more resources – time and staff – for the trial without any prospect of getting a (heavier) penalty. Montenegrin counterparts themselves understand there is a need for a more equal application of the law in this field and to make the use of plea agreements more consistent.

In Montenegro, plea bargaining also leads to problems that prevent an efficient functioning of the judicial system. One of the issues is **the provision in the Code of Criminal Procedure that states that the deciding judge is excluded from the further proceedings when plea bargaining is** taken into account for evidentiary purpose**. This provision should be reconsidered, as it entails a waste of resources**, especially because not all plea agreements are processed at the same time and the practice is that for each processing of one or more plea agreements at one of these times a different judge should be assigned. This has the consequence that, especially in cases involving several defendants, several judges are unable to conduct the final hearing in the court-trial. Often these are the most experienced and specialised judges who are no longer available for the court-trial. This is not only a waste of resources, it is hampering the system.

Another important practice problem that needs to be solved concerns the time lapse in concluding plea agreements. Often, there is a long wait before normal proceedings continue because discussions are still ongoing with one of the defendants regarding a plea agreement to be concluded. It should be noted that this leads to long delays in the proceedings of the other defendants who have chosen to take their case to court. Because there are no (time)limits in Montenegro on the conclusion of plea agreements, it has been observed that in cases where there are several defendants, agreements are concluded at intervals, resulting in an even longer standstill of the further proceedings. In this case, there is a question of many months during which the further proceedings just seem to come to a standstill.

An additional problem with the plea agreements that could be observed is that the final penalty in such agreements is systematically below the legal minimum. This is not consistent with the basic principle of the rule of law which implies that judges should comply with applicable law fully. In some cases, the confiscation of assets can be taken into account, which is a positive aspect, but **the general penal policy in the agreements is simply too lenient**.

The latter is partly caused by one of the major concerns that can be formulated concerning the plea agreements. It is very clear that the reason why plea agreements are concluded at all costs by the public prosecutor's office, is simply because there is no alternative. Without a plea agreement, criminal cases always get blocked in court. The prosecution sees these agreements as the only way to achieve a result and this puts them in an impossible position to conclude well-balanced plea agreements.

2.3. The duration of the proceedings in Montenegro is problematic. As already mentioned, one of the main reasons is the lack of human resources, housing and equipment. **Another reason for the length of the proceedings is the review of the indictment. As per the relationship between SPO and Courts, the current mechanism for the**

indictment confirmation looks even to be a significant source of misunderstanding - and even tensions - between judges and prosecutors. It is clear that in this matter, the last word pertains to judges. However, they should take position on the requests of prosecutors by respecting legal deadlines and by giving reasons of their decisions.

If this does happen, some legal remedies should be foreseen for impeding any unjustified stall in criminal proceedings and any loss of credibility for justice.

The simple confirmation of the indictment even extends the procedure for more than a year in some cases. One of the reasons indicated as an important cause of such delays is the legal obligation to hold a formal hearing during the proceedings. Such a hearing in itself has a rather limited added value and gives rise to a lot of delaying tactics and actual delays in the procedure.

2.4. **In Montenegro, there is a three-year limit for pre-trial detention, which creates considerable problems for the courts. Often, complex criminal proceedings cannot be determined and negotiated within three years**. A consequence of exceeding the 3-year limit is the release of the accused. In many cases, the accused filed motions aimed at protracting the proceedings in order to get the accused released.

As far as is known, the upper limit will be abolished by a change in the law. The duration of imprisonment is then to be measured in terms of proportionality, for which there is sufficient case law on the part of the European Court of Justice.

2.5. Out of the case discussions it became clear **that the use of indirect evidence should be promoted and shown to the judges in seminars**. Especially complex cases can only be solved by indirect evidence. In any case, this requires training based on case study and cases and study trips as well as the exchange of experience with colleagues from other EU member states.

2.6. One of the instruments to come to a uniform application of the law **is the publication of decisions and the availability of databases with case law that are accessible for practitioners, i.e., courts and lawyers**. Since 2019, such a database is in preparation. It was said that at the moment a database is redesigned until the end of 2023.

It was reported that within courts, 'special units' deal with case law, in order to come to an internal and external harmonisation. All decisions were said to be posted on a webpage. Another tool to come to harmonisation of case law was the Supreme courts' general session were on request opinions were given (request opinion) (i.e., on request of the lower instance judges the supreme court gives its opinion on legal issues).

3. Asset Confiscation

3.1. In accordance with international standards[5], the following legal tools should be available in the field of confiscation: confiscation of instrumentalities and proceeds of crime, value-based confiscation, extended confiscation and third-party confiscation. Non-conviction-based confiscation is strongly recommended.

In Montenegro, efforts were made to include these legal tools into the legislation. However, **the legislation on financial investigations aimed at extended confiscation and the legislation on extended confiscation, in particular, are problematic**. Legislation was said to be very difficult and at a certain point not applicable. The latter even to the extent that the whole approach to financial investigations and eventual confiscation in Montenegro should be reconsidered.

3.2. Based on the case discussions, it is clear that efforts are being made in Montenegro to ultimately achieve the confiscations of criminal assets. Moreover, the most important concrete results were achieved within the framework of plea agreements.

[5] Directive 2014/42/EU

There is, in fact, not only a willingness but also an understanding of the necessity of confiscation and the various legal options available. However, **due to the lack of legislation and the difficulties in financial investigation mentioned above, the final results are rather low**.

This willingness to confiscate, even extended confiscation, is also demonstrated by the cases studied. This illustrates that, despite various gaps/vagueness in the law, the court has made the necessary efforts to implement this law and apply it in (an admittedly limited number of) concrete cases.

4. Security/privacy of prosecutors and judges

4.1. Although concrete incidents of (possible) threats were mentioned, in general, it was reported that the prosecutors/judges felt fundamentally secure. As soon as a prosecutor/judge would be exposed to a threat of physical violence, sufficient personal protection would also be provided.

4.2. Several SPO prosecutors and judges reported **inappropriate reactions in the media about ongoing criminal investigations**, which in many cases have not even been finally decided yet.

This frequently includes incorrect or incomplete information and sometimes also unjustified attacks on judges dealing with the case. Also mentioned was the fact that sometimes personal details of judges were published by the media.

All this is not only an attempt to influence the judicial process, but also to undermine trust in the judiciary. It is unacceptable that members of certain political parties are involved in this, as was reported.

It is necessary that such inappropriate, sometimes aggressive media interventions, not only by politicians but also by lawyers and civil society organisations, is responded to by official bodies. The higher court or a prosecutor council is the most appropriate body for this purpose.

4.3. In general, it is clear that **the cooperation between the judiciary / justice and media has to be improved**. The practice of (investigative) journalists reporting on ongoing investigations on the basis of false information or not even bothering to question the spokesman must be countered.

5. Recommendations

A/ THE PRE-TRIAL PHASE

1. The capacity of law enforcement agencies and the Special Prosecution Office-to fight organised crime, corruption and money laundering

- Avoid the reassignment of investigators to other units due to political changes.
- Increase the number of police-officers in all Departments of the sector for the fight against crime, with a priority for the following: Department for the suppression of drug abuse, Department for the suppression of the crimes of smuggling and trafficking human beings, Special Police Department, Department for combating drug smuggling.
- Enhance the financial and human resources for real pro-active police and investigation work and make sure investigations can be conducted
- Come to further specialisation within the SPO, for example in more specialized units, and increase individual specialisation of Prosecutors
- Bring the workload of the Special Prosecutors to an acceptable level (if necessary, establish a working group in order to come to some initiatives)
- Ensure adequate premises for the SPO

- Increase human resources in the SPO (at least three more Special Prosecutors should be appointed)
- Increase substantially the number of administrative and support staff for Special Prosecutors
- Narrow down the competency of the SPO and focus on larger and more serious crime, to reduce the workload of the SPO
- SPO Chief Prosecutor should give priority guidelines in order to come to a clear transparent prioritisation

2. The relationship between the law enforcement authorities and the Special Prosecution Office

- Consolidate good cooperation between law enforcement authorities and the Prosecution
- Establish more multi-disciplinary teams within criminal investigations
- Establish networks of expertise on certain domains in order to share experiences and come to best practices in various more specialized domains
- Come to a more joint project-based approach in fighting organized crime between the various relevant authorities (eventually after having organized a workshop about the Dutch best practices[6] in this regard)

3. Investigative approach and the use of Special Investigative Measures (SIMs)

- Establish an integrated criminal policy approach to fight organised crime and high-level corruption, in which using financial investigation and final confiscation is included
- Increase the number of pro-active (= not reactive) investigations by structured using of existing information available at law enforcement authorities
- Establish multi-disciplinary investigative teams to tackle complex organised crime and high-level corruption cases more efficiently
- Enhance the capacity of the SPO to expand investigations from the initial single case in order to better tackle criminal phenomena that 'threaten' the country
- Establish a case handling and case management system, a solid track record and (self)monitoring of cases
- Establish interoperable databases
- Amend the CPC and establish an adequate cross-checking mechanism regarding decisions of the Prosecution service (e.g. dismissals of complaints); this means that it should be possible to appeal each decision (or at least, the ones with particular importance) of a prosecutor, for example in front of the investigating judge (but the choice of mechanism is open).
- Amend the legislation about the cooperative witnesses in such way that status of cooperative witnesses is not only allowed for organised crime cases, but also for corruption, high-level corruption, money laundering and any other serious crime investigations; cooperative witnesses should be prosecuted for the criminal offence for which the proceedings are conducted.
- Provide police with the necessary equipment in order to solve the difficulties intercepting communication in public spaces, or the communication inside cars or buildings.
- Provide the surveillance unit of the police with up to date equipment
- Procure equipment and to train investigators in order to intercept communication via social media and encrypted communication

4. Financial investigation and money laundering

- Ensure the implementation of all necessary (legal) tools at all levels for conducting efficient financial investigations, also in the pre-investigation phase
- Use financial investigations to trace assets, but also to detect evidence of criminal acts, or investigate the scale of the pecuniary gain (illegal profits deriving from criminal acts) and doing this, bringing financial investigations to a higher level, and take more investigation measures in order to really come to a more dynamic tracing of

[6] The essence of the approach: act as one government. In doing so, the project has both a repressive and preventive focus. Abuses are tackled decisively. In addition, much is invested in creating a setting where there is no room for crime. The important element here is breaking through anonymity, making it unattractive for criminals to continue their practices.

asset (working further on the more detailed exploitation of purchase and sale documents, as well as using SIMs)
- Launch more systematically (parallel) financial investigations, also in the pre-investigation phase
- Provide specialized financial police units as well as financial investigators within the SPO with up-to-date analytical software, training, and an increase their human resources.
- Ensure access to all necessary databases
- Ensure that the final financial investigation report is presented by certified court experts that have worked on the report.
- Establish a more detailed track record of cases of money laundering
- Launch more stand-alone investigations on money laundering cases.

B/ THE TRIAL PHASE

1. The capacity of the judicial system to decide upon complex cases of organised crime, corruption and money laundering

- Take legislative actions in the field of the management of seized materials such as drugs or weapons
- Bring the budget, at least related to the SPO and the special department of the High Court in line with what is needed for a well-functioning judicial system (even the budget for the purchase of paper and writing materials)
- Solve the problem of the huge impact on the budget of the budget for the lawyers to be appointed ex officio
- Start with the digitalisation of justice, included in an overall ICT strategy
- Resolve personnel shortage with courts, lack of human resources management and forward-looking planning included.
- Resolve shortage of space with courts, both to courtrooms and to office space and the other facilities, premises at the court to store confiscated items included
- Come to more institutional and individual specialization
- Enhance the trial management of judges in order to become much more active in this respect and really be the ones who are in control of the conduct of the trial (not the lawyers), by e.g., establishing a working group in order to take initiatives about a more efficient court-system (trial-management)
- Ensure an independent Judicial Council, both in terms of a complete composition (fully operational) and the way it is put together (e.g., is recommended that the Minister of Justice is not a member of the Judicial Council)
- Ensure merit-based promotions of judges (e.g., solve the disproportionately regarding the participation in various training events, stop including the fact that a sentence is changed in the higher instance)
- Ensure specialized training for all judges dealing with high-level-corruption, organised crime, and money-laundering cases
- Monitor irregularities about the indictments, leading tot delays in the entire procedure, in order to come to 'best practices' manual

2. The implementation and application of the Criminal Code and other relevant legislation

- Ensure a better quality of the legislation in the field of fighting organised crime, high-level corruption and asset-recovery, by (at least) consulting practitioners when drafting the legislation, and also taking into account the comments they made

- Establish an expert group of judges, prosecutors, and experts to follow up on possible legal problems, and make suggestions for amendments (if needed), but also to bring in the necessary expertise on all possible topics related to the fight against organised crime
- Exclude specific crimes from plea bargaining (e.g., terrorism, high-level corruption, for crimes whose punishment foreseen by law is higher than 5 years in prison) and agree at the level of the Prosecution service on concrete written binding guidelines about this. To this end, a workshop involving all relevant parties (prosecutors/judges) could possibly be organised.
- Organize accurate follow-up of the contents of plea-bargaining agreements, especially in relation to the complexity and seriousness of the crime and available court decisions. Such a follow-up could be done by a working group, to be appointed.
- Improve the sentencing policy and raise awareness that strong dissuasive proportionate penalties in high-level-corruption, organised crime and money-laundering cases are an essential component of assessing the efficiency of a judicial system. Such a follow-up could be done by the High Judicial Council and/or High Prosecutorial Council.
- Reconsider the provision in the Code of Criminal Procedure that states that each deciding judge is excluded from the further proceedings when plea bargaining is used
- Raise awareness about the importance of indirect evidence, especially in cases of organised crime, high-level corruption and money laundering
- Reconsider the procedure on the review of the indictment in order to make it more efficient and if necessary, amend the law
- Reconsider the three-year limit for pre-trial detention (including the necessary legal changes)
- Implement an up-to-date database on case-law

3. Asset Confiscation

- Ensure the implementation of all necessary (legal) tools at all levels in line with EU-standards as regards seizure/confiscation, e.g., review legislation on extended confiscation and reconsider the draft-law on non-conviction-based confiscation
- Identify the amount of the proceeds of crime in criminal investigations and financial investigations, taking into account the overall duration and frequency of the investigated crime
- Improve results on seizure and confiscation (also abroad)
- Increase the level of specialisation and expertise in seizure and confiscation of assets in courts, establishing guidelines and a national expert group.
- Establish a comprehensive system on data collection on asset recovery

4. Security/privacy of prosecutors and judges

- Guarantee strong reaction from authorities to reported incidents of (political) influence and/or threats and establish a mechanism for reporting (political) influence and/or threats in order to take into consideration some concrete safety measures
- Monitor incidents about political pressure, corruption, intimidation of prosecutors and judges
- Improve the cooperation between the judiciary / justice and media, e.g., by organizing workshops, meetings with journalists

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