MONTENEGRIN RESPONSE TO CORRUPTION – INSTITUTIONAL AND POLICY REFORM –

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I. INTRODUCTORY REMARKS

This paper will elaborate on the approach that Montenegro has employed in fighting corruption, with a particular emphasis on the legislative efforts regarding incriminations, in line with the leading international anti-corruption instruments, institutional setup for prevention, detection, investigation and adjudication of corruption offences, as well as the more recent proactive initiatives in the area of criminal justice. The focus will be on measures to detect corruption, such as special investigative means, procedures for reporting corruption and whistleblower protection, and the regime for confiscation of the proceeds of crime, to be introduced by the upcoming adoption of the new Criminal Procedure Code (CPC). Throughout the paper, reference will be made to the United Nations Convention against Corruption (UNCAC) and the mutual evaluation conducted by the Group of States against Corruption (GRECO).

II. INCRIMINATION OF CORRUPTION OFFENCES

The inception of anti-corruption efforts in Montenegro can be traced back to 2001, when the Government of Montenegro established the Directorate for Anti-corruption Initiative (DACI). The DACI is inherently a preventive body; therefore, it facilitated the adoption of a number of anti-corruption lex specialis, e.g. in the areas of money laundering and conflict of interests. The forthcoming period has been marked with the rounding up of the legislative framework and institutionalisation of the fight against corruption.

Following a public referendum, which resulted in the demise of previous federal structures, and a subsequent Parliamentary declaration of independence in June 2006, Montenegro has reconfirmed its dedication to the goals and purposes of the UN. Montenegro deposited a notification of accession to the United Nations Convention against Corruption (UNCAC), the first truly global anti-corruption treaty, in October 2006. Efforts to implement the Convention effectively through the domestic legislation have been undertaken in the previous years. The Directorate for Anti-corruption Initiative, joining efforts with the UNDP, conducted an assessment of compliance of the criminal legislation with the provisions and requirements of the Convention. It was concluded that high level of compliance had been achieved inasmuch the offences of corruption had been codified in the Criminal Code, with the exception of trading in influence (Article 18), illicit enrichment (Article 20) and obstruction of justice (Article 25). This is not to say that these Convention offences are not considered illegal behaviour in Montenegro; rather these are sanctioned through complementary measures of the criminal justice system, e.g. through incriminating the abuse of official duty, through procedures for deprivation of illegally acquired property and through provisions of criminal procedure.

When it comes to the perpetrator of the mentioned criminal offences, the Criminal Code gives broad effect to the incriminations, as the Article 142(3) offers the definition of what is to be considered 'a public office holder': a person who performs official duties with state authorities; elected, appointed or designated person in a state authority, a local self-government body or a person who performs on a permanent or temporary basis official duties or official functions in these bodies; a person in an institution, company or other organization to whom the performance of public powers is assigned, who decides on rights, obligations or interests of natural and legal persons or public interests. Additionally, these offences are not limited to a particular setting, and may be committed in either public or private sector.

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III. THE INSTITUTIONAL SETUP FOR PREVENTING AND SUPPRESSING CORRUPTION

The criminal justice system of Montenegro is largely inquisitorial in nature, with some recent reform processes which introduce a flavour of the adversarial system, which will be elaborated in the next section. The police are tasked with detection of criminal offences; the investigation is entrusted to the investigative judge who must co-operate closely with the police. The criminal charges in the form of an indictment will be brought forward by the State Prosecutors and courts will have the final say in the procedural cycle.

A. Detection of Corruption Offences

Police tasks and affairs are defined by Article 2 of the Law on Police ("Official Gazette", No. 28/05) comprising:

(i) protection of citizens' security and freedoms and rights guaranteed by the Constitution;
(ii) protection of property;
(iii) prevention and detection of criminal offences and misdemeanours;
(iv) identifying and capturing offenders;
(v) maintaining order and peace;
(vi) surveillance and protection of the state border and performing border control;
(vii) control of movement and stay of foreigners.

Substantial efforts have been deployed to specialize various segments of the criminal justice system for effective suppression of corruption. The Department for Suppression of Organised Crime and Corruption operates within the Criminal Police Sector of the Police Directorate.

B. Detection of Money Laundering and Terrorism Financing

The Directorate for the Prevention of Money Laundering and Terrorism Financing was established in December 2003 as an autonomous public administration body, in order to enforce the Law on the Prevention of Money Laundering and Terrorism Financing ("Official Gazette", no. 14/07, 4/08).

Specific competences derived from the Law caused the Directorate to be established as an administrative financial intelligence unit. Apart from detection of money laundering and terrorism financing, the Directorate is also in charge of initiating and conducting first instance misdemeanour proceedings, in the cases of breaches of the Law. It collects and analyses data needed for the detection of money laundering and terrorism financing and creates the list of indicators of suspicious transactions which is shared with the reporting entities. The scope of the law is wide inasmuch as the list of reporting entities includes all relevant actors in the financial and business operations, i.e. banks, insurance companies, stock exchanges, broker companies, etc. The Directorate for Prevention of Money Laundering and Terrorism Financing co-operates closely with the Police Directorate and State Prosecution; however, there have only been a handful of money laundering cases which resulted in a final judgement of the court.

C. Prosecution and Adjudication of Corruption Offences

Specialized departments have been established in the judiciary so as to take concerted action against corruption. The Law on State Prosecutor ("Official Gazette", no. 69/03, 40/08), adopted in 2003 and amended in 2008, provided for the establishment of the Special Department for Suppression of Organised Crime, Corruption, Terrorism and War Crimes. Corresponding chambers have been formed in two High Courts in Montenegro so as to achieve concentration of competences, higher levels of specialization and, eventually, more effective adjudication of these offences.

According to the Criminal Procedure Code ("Official Gazette", No. 71/03, 07/04, 47/06), the state prosecutor is, regarding the criminal offences that are prosecuted ex officio, competent to:

(i) conduct pre-trial proceedings;
(ii) request that an investigation be carried out and direct the course of preliminary proceedings,
(iii) issue and represent an indictment or indicting proposal before the competent Court, i.e. in the case of organized crime before the Special Chamber of the High Court;
(iv) file appeals against Court decisions that are not final and to seek extraordinary legal remedies against the final Court decisions;

(v) undertake other actions determined by the Code.

The Special prosecutor is competent to prosecute criminal offences committed throughout the territory of Montenegro.

D. Prevention of Corruption

The DACI is tasked with prevention of corruption. The DACI is not entrusted with detection and investigation of corruption related offences. Its operations relate predominantly to preventive activities such as:

(i) Awareness raising, including researching the phenomenon of corruption, the form it takes, its causes, etc;

(ii) Co-operation with relevant state bodies aimed at drafting and implementing of the legislative and programmatic documents in the area of anti-corruption;

(iii) Co-operation with non-government organizations and private sector towards combating corruption;

(iv) Co-operation with state authorities related to the corruption reports that Directorate receives from the citizens and other subjects;

(v) Proposing to Government the adoption and implementation of European and other anti-corruption international standards and instruments;

(vi) Monitoring the implementation of recommendations of GRECO (Group of States of the Council of Europe against corruption);

(vii) The co-ordination of activities that arise from the applying of UN Convention against corruption.

However, in the past period and, particularly, in the research of integrity and capacity of the judiciary in Montenegro,[1] it transpired that the citizens report corruption reluctantly. The DACI operates an anti-corruption hotline where citizens may report suspicions of a criminal offence having taken place. Thus, the DACI acts as a mediator between the citizenry and the law-enforcement authorities.

IV. FROM REACTION TO PRO-ACTION: THE MOST RECENT CRIMINAL JUSTICE INITIATIVES

A. Special Investigative Means

Montenegrin law-enforcement and judicial authorities have often stated that the lack of convictions in corruption related offences was directly caused by the fact that corruption is a clandestine activity and that the police were hampered by legislative constraints from using special investigative means to detect and investigate corruption. Special investigative means were introduced in 2003 by the Criminal Procedure Code (CPC);[2] however, they can be brought into play in relation to offences committed within a criminal organisation, as well as offences sanctioned by imprisonment of at least ten years or a more severe penalty. These measures, *inter alia*, include:

(i) secret surveillance and sound recording of telephone conversations;
(ii) secret photographing and video recording in private premises;
(iii) simulated purchase of objects and persons and simulated giving and taking of bribe;
(iv) supervision of the transportation and delivery of instrumentalities of criminal offence;
(v) use of an undercover investigator and witness.

This legislative arrangement has been addressed by the GRECO in the Joint First and Second Evaluation Rounds, recommending for the scope of the provisions to be extended to cover all corruption-related offences.[3] Consequently, the Proposal CPC[4] proposes the use of the special investigative techniques in the pre-trial proceedings, as well as in the investigation stage. An amendment to the previous regime is introduced and the list of criminal offences in relation to which the techniques may be employed is provided

[1] Research was commissioned by the DACI. It was finalized and published in October 2008.

[2] Criminal Procedure Code, Articles 237-242.

[3] The Report on Joint 1st and 2nd Evaluation Rounds was adopted by GRECO, at its 30th Plenary Session. Strasbourg, France, 9-13 October 2006. The Report is available at:
www.coe.int/t/dg1/greco/evaluations/index_en.asp.

[4] Adopted by the Government of Montenegro; currently awaiting parliamentary debate and adoption.

for. The list specifically mentions the following corruption related offences:

(i) money laundering;
(ii) violation of equality in the conduct of business activities;
(iii) abuse of monopolistic position;
(iv) causing false bankruptcy;
(v) abuse of assessment;
(vi) disclosing a business secret;
(vii) disclosing and abusing a stock-exchange secret;
(viii) active bribery;
(ix) passive bribery;
(x) disclosure of official secrets;
(xi) illegal mediation;
(xii) abuse of authority in business activities;
(xiii) abuse of official status; and
(xiv) fraud in service.

The expected adoption of the Proposal CPC will thus extend the scope of these penetrating investigating techniques and provide leverage to the law-enforcement bodies. At this point, it would be useful to offer an example of the procedure for the use of special investigative means. The case revolves around activities of a financial inspector who attempted to induce a bribe. The owner of a private commercial company turned to the Police Directorate, stating that a financial inspector has not discharges his duties in a lawful manner, since he requested a payment for which he offered to be more lenient in his control. The police officers swiftly informed the competent state prosecutor who issued specific guidelines as regards the course of action. It was agreed that the owner of the company would simulate active bribery, with a set of bills which have been marked. Preparatory actions were taken and the owner of the company called the financial inspector to come at a specific time, so as to give the bribe in exchange for a lenient treatment of his company. The owner simulated giving of bribe and the financial inspector walked away with marked bills. He was then apprehended by the police; he was searched and marked bills were found. A crime report for passive bribery was submitted to the state prosecutor and the person was turned to the investigative judge who ordered one month of detention, on account of charges for passive bribery.

B. Confiscation and Reversed Burden of Proof

Criminal offences of corruption are inherently profit-driven offences. Therefore, taking the ill-gotten assets away from the offenders is one of the main pillars of the UNCAC. The proviso of Article 31 is formulated to that effect and contains a number of obligations for the Parties. The underlying obligation is to enable confiscation of proceeds acquired by a criminal offence established by the UNCAC, including its equivalent value; as well as instrumentalities used or planned to be used in a Convention offence. Furthermore, States Parties are required to introduce measures directed at identification, tracing, freezing or seizure of all objects and property that would be subject to confiscation. States Parties are expected to consider shifting the burden of proof to the offender in relation to origin of property which is liable for confiscation.

Confiscation of the proceeds of crime, including but not specific to corruption, is regulated by Chapter VII of the Criminal Code,[5] as well as by Section 2 of Chapter XXXI of the Criminal Procedure Code.[6] Confiscation of proceeds acquired by a criminal offence may be ordered in the framework of a sentencing act (a conviction; a warrant pronouncing a sentence issued without the trial; a ruling on a judicial admonition; or a ruling imposing a security or corrective measure).[7] Therefore, confiscation of material gain is inextricably linked to a conviction of the perpetrator. During the course of the criminal proceedings, it is the duty of the court to determine the extent to which the defendant has increased his property and possessions.

With regard to the confiscation of criminal proceeds, GRECO addressed a recommendation, calling for guidelines to be issued addressing effective methodology for financial investigations that would enable seizure and confiscation in corruption cases. Moreover, it was highlighted that law enforcement and

[5] Criminal Code, Articles 112-114.
[6] CPC, Articles 538 – 545 (Proceedings for confiscation of property gain).
[7] *Ibid*, Article 542.

prosecutorial services must benefit from training programmes, tailored to enable, promote and encourage better use of the means available for identifying, tracing and seizing the proceeds of crime, including corruption.[8] It was further recommended to encourage seizing of the proceeds of corruption offences in the earliest stages of the preliminary investigation, in order to secure possible confiscations.[9] Clearly, a proactive approach is called for; one that would look ahead and secure the property for the more advanced stages of the proceedings that could eventually result in a confiscation order.

The timely and efficient disposal of criminal proceedings has been one of the most highly regarded goals in the reform process of the criminal justice system in Montenegro. This objective is to be realized by, inter alia, consolidating the role of the prosecution in the initiation and conduct of the investigation. The Proposal CPC stipulates that an investigation is instituted by an order of the State Prosecutor. The order is final and is not subject to appeal. The course of the criminal justice reform in Montenegro is that of combining the features of both adversarial and inquisitorial systems. A useful case in point could well be the reversal of the burden of proof in the section 283 of Chapter VII which deals with evidence. Articles 85 to 89 regulate provisional measures, i.e. seizure of objects that are likely to be confiscated or could be used as evidence in the court proceedings. However, Article 90 deals specifically with seizure of objects or property suspected to originate from a criminal offence.

In order to set in motion seizure of ill-gotten property, the prosecution must apply to the court, providing a summary of the criminal offence; the specifics of the objects, property or profits; the personal data of the suspect; as well as the grounds of suspicion that have been acquired by a criminal act. More importantly, the prosecution must submit compelling evidence pointing to the fact that, by the end of the trial, the seizure/confiscation of the ill-acquired profits will be significantly more difficult or even impossible. The provision may be invoked in the early stages of the proceedings and the person affected by the order of seizure may challenge the decision of the court. The court will be obliged to annul the order only in the event that the defendant manages to demonstrate, by means of documentary evidence or in any other manner, that property comes from a legitimate source.[10]

Thus, the departure from the traditional rules of evidence, when the prosecution bore the onus of proving beyond reasonable doubt all elements of a criminal offence, is signalled by the shift of the burden of proof in relation to seizure. However, certain concerns remain as to the compatibility of the proposed regime with the exigencies of the European Convention on Human Rights, particularly Article 6 on the right to a fair trial. It could be argued that the proposed reversal of the burden of proof in the pre-trial proceedings runs counter to the presumption of innocence (Article 6(2)). Presumption of innocence is a building block of the right to a fair trial, and as such safeguarded in the Constitution of Montenegro and the Criminal Procedure Code. Moreover, the jurisprudence of the European Court of Human Rights is prolific when it comes to Article 6. The right to a fair trial is of paramount importance; therefore, any activity with potential impact on the fair and impartial administration of justice must be vigorously scrutinized. "It was held in Kostovski v. Netherlands that 'the right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed to expediency'".[11]

The Strasbourg Court has already dealt with the reversed onus of proof in relation to the confiscation orders. However, in *Phillips v. The United Kingdom*[12] confiscation procedure was preceded by a conviction for involvement in the importation of a large amount of drugs. During the confiscation procedure, the burden of proof was placed on the offender, and the standard was on the balance of probabilities. The Court took a holistic stance in ascertaining the nature of the confiscation proceedings under the relevant UK legislation. The Court pointed out that confiscation orders follow through the conviction of the defendant and do not entail bringing new charges against the convicted offender. Thus, the confiscation proceedings were equated with the sentencing process inherent to criminal proceedings resulting in a conviction. It is due to this conclusion that the Court found the presumption of innocence does not apply to the confiscation proceedings

[8] See n3 above, 17.
[9] *Ibid*, 18.
[10] Proposal CPC, Article 93(3).
[11] S. Greer, The European Convention on Human Rights: Achievements, Problems and Prospects, Cambridge University Press New York 2006, 252.
[12] *Phillips v. The United Kingdom*, 41087/98, 5 July 2001, 11 B.H.R.C. 280.

instituted against Mr. Phillips.[13] The House of Lords reached much the same conclusion in two later cases on confiscation of proceeds from drug offences.[14]

These cases bring to the fore features of the UK's criminal confiscation – it is dependent upon the conviction, triggering the process of deprivation of the ill-gotten assets. And in the ensuing phase of the procedure, the one aimed at ascertaining the property which shall he confiscated, there is an express reversal of the onus of proof, calling for the defendant to rebut the assumptions that it originates from an offence. Thus, it would follow from the reasoning of the European Court of Human Rights and the House of Lords that the presumption of innocence is not violated in confiscation proceedings, provided that there is a valid conviction to set in motion the determination of the amount to be confiscated. It is established that the statutory assumptions on the origin of property do not amount to a fresh criminal charge, which effectively renders Article 6(2) inapplicable. It is for the prosecution to initiate the confiscation proceedings. In any event, the court is obliged to reverse its assumption if the defendant discharges a persuasive burden of proof; in much the same vein, the court must refrain from any action that would create serious injustice for the defendant.

C. Whistleblower Protection

The most recent initiative in the anti-corruption area has been the protection of whistleblowers. This was achieved through the amendments of the Law on Civil Servants and State Employees. Article 54 prescribes that the employment of civil servant and state employee, who report criminal offence of corruption to the head of a state authority or an authorized person, cannot be terminated on this basis. These persons are guaranteed that their identity will not be disclosed to unauthorized personnel, as well as the protection from abuse, denial or limitation of rights, set forth in the Law. Should there be reasonable fear that life, health, physical integrity, freedom or properties of a civil servant and state employee are endangered; whistleblowers are protected pursuant to the special provisions on witness protection.

In order to effectively implement provisions of the law and to encourage citizens to report cases of corruption, the Director of the Police Directorate adopted the Professional Directive on procedures for reporting corruption offences and protection of persons who report these crimes to the Police Directorate in October 2008. This Directive stipulates in detail the procedures for reporting corruption offences to the Police Directorate, the actions of authorized police officers upon corruption reports, the protection of citizens reporting corruption, as well as the means and methods of promoting the procedures and guaranteed protection. Designated police officer is obliged:

(i) to protect the identity of the person reporting corruption, as well as the contents of the report;
(ii) to undertake all necessary measures for protection of this person;
(iii) to undertake immediate security assessment of threats made to the person;
(iv) to protect the person reporting corruption or disclosing such information from abuse and humiliating treatment; and
(v) to undertake measures for protection of this person in accordance with the law, and should the threats prove to be reasonable, to undertake measures of protection in accordance with the Law on Witness Protection.

The DACI and the Police Directorate are currently conducting a promotional campaign aiming to inform the citizens that, in case when reporting corruption, they will be granted adequate protection. Since the adoption of the Professional Directive (October 2008 to February 2009), the Police Directorate received 20 criminal charges related to corruption, 18 of which are now in the investigation phase while two have already been forwarded to the State Prosecutor. Despite these efforts, the European Commission has stated that the protection of whistleblowers remains insufficient in practice.[15]

[13] Ibid, paragraph 36.
[14] *R v Benjafield, R v Rezvi*, House of Lords, 24 January 2002, [2002] UKHL 2, [2002] UKHL 1, [2003] 1 A.C. 1099
[15] Montenegro 2008 Progress Report, available at: http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/montenegro_progress_report_en.pdf.

V. CONCLUDING REMARKS

An examination of the more recent steps undertaken in the process of the criminal justice reform indicates that Montenegrin legislators are determined to design a system for effective seizure and confiscation of criminal proceeds. However, much will depend on investing in human capital. Montenegrin law-enforcement and judicial authorities are in dire need of capacity-building and training programmes. The complexities that go hand-in-hand with corruption cases, i.e. its clandestine nature, the lack of a victim to report a crime, the subsequent laundering of criminal proceeds, might act as a deterrent and actually reduce the number of initiated proceedings. Specialization of investigators and prosecutors for corruption related offences should be considered as a way forward, as it enhances the likelihood of a positive outcome in the struggle against corruption.

The advancements in the criminal reform will be tested come implementation time. Notwithstanding the positive feedback of international actors on the Proposal Criminal Procedure Code, significant efforts will need to be effectuated so as to enable its effective enforcement. The revised concept of investigation will require an increase in human resources, particularly within the State Prosecution, who will be in charge of conduction the pre-trial and investigation proceedings. The provisions on reversed burden of proof might be tested against the backdrop of the exigencies of the European Convention on Human Rights. The protection of whistleblowers, introduced through legislative amendments, is yet to contribute to the increase in the number of reported and adjudicated cases of corruption. The use of special investigative means will aim to provide a level-playing field for the law-enforcement authorities, however further training needs be provided in order to boost financial investigations. Finally, these repressive measures need to be assessed in terms of their proportionality, as the need for a more effective criminal justice system should not override the framework for protection of the fundamental rights and freedoms.