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Monitoring report 2

JUDICIARY AND FIGHT AGAINST CORRUPTION

April 2019.

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Monitoring report 2 - Judiciary and fight against corruption

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ABSTRACT

Clear and objective system of liability has not been established in the judiciary. Violation of laws by prosecutors and judges is tolerated in practice.

Omissions of prosecutors and judges in favour of the defendants for serious crimes remain with impunity.

Due to noted illegalities and omissions in specific cases for corruption offenses, MANS has filed complaints with the Prosecutor's and the Judicial Council against several judges and prosecutors, but until the conclusion of this report, none of them has been processed.

The method of decision making on criminal charges by the state prosecutors does not contribute to the increase of their liability, because they do not provide explanations and reasoning for rejecting complaints. State prosecutors have discredited the right to complain to a decision on dismissal of the criminal complaint in practice because they do not submit their decisions to persons who have the right to challenge them.

In order to improve the legal framework, MANS submitted an initiative for amendments to the Criminal Code to impose new criminal offenses in the area of illicit enrichment of public officials, public procurement, privatization and bankruptcy. We also submitted an initiative to the Supreme Court of Montenegro to assume the principle legal position and establish binding guidelines for the courts when deciding in cases on the plea agreement.

Courts, the State Prosecutor's Office and the Prosecutorial Council conceal a range of information from their scope of work, thus preventing the public from seeing and publicly checking the lawful conduct. MANS submitted an initiative to the Constitutional Court of Montenegro for reviewing the constitutionality and legality of the Rulebook on the Anonymization of Data in Court Decisions. Pursuant to this Rulebook, numerous data from the verdicts are deleted before their publication, and important information on public officials who have been legally convicted of corruption in public trials is hidden from the public.

The database of final verdicts for corruption adopted in the past five years is available athttp://www.mans.co.me/pravosudje/

I

LIABILITY IN THE JUDICIARY

Disciplinary liability in judiciary was addressed in the monitoring report by MANS - Judiciary and the fight against corruption published in November 2018, and this part is a continuation that addresses the areas of respect for the code of ethics by judges and prosecutors, as well as complaints submitted to the Judicial and Prosecutorial Council for unlawful conduct and omissions of judges and prosecutors in specific cases.

A clear and objective system of liability has not been established in the judiciary. Violation of laws by prosecutors and judges is tolerated in practice. Mistakes of prosecutors and judges in favour of the accused for serious crimes remain with impunity.

1.1. Code of Ethics

The violation of the Code of Ethics of judges and prosecutors does not constitute a disciplinary offense and the basis for determining disciplinary liability, thus in practice, violation of the Code is in most cases with impunity. A significant number of disciplinary violations coincide with the description of violations of the Code, which allows legal uncertainty, arbitrariness in decision-making and unequal treatment of judges and prosecutors. Decisions of the Commissions on the Code of Ethics of Judges and Prosecutors have no clear and convincing reasoning.

The Committee for monitoring the implementation of the Code of Ethics for Judges acts differently in same situations, depending on who initiated the proceedings.

1.1.1. JUDGES

The Conference of Judges adopted the Code of Judicial Ethics on July 26, 2008 and it was published on 31/07/2008. [1] On 22/03/2014, the new Code of Ethics of Judges came into force and was published on March 28, 2014. [2] Therefore, both of these Codes came into force before they were published. This practice calls into question the expertise of the Conference of Judges because it is contrary to the provisions of Article 146 of the Constitution of Montenegro. [3] In 2014, the Code was specified and partially extended in relation to the previous one.

The Law on Judicial Council and Judges does not prescribe that violation of the Code of Judicial Ethics is a disciplinary offense, or a basis for determining the disciplinary liability of a judge. Thus, the violation of the Code is still with impunity.

Namely, 2008 Code prescribed that "contempt of the Code of Judicial Ethics is the basis for initiating a disciplinary procedure or a procedure for dismissal of a judge". However, the Code as a by-law could not stipulate the conditions for initiation of the legally prescribed procedure for determining disciplinary liability. 2014 Code no longer contains this provision. However, the Law on the Judicial Council and judges also does not have such provision, thus, the violation of the Code in most cases remained with impunity.

Namely, according to the Rules for evaluation of judges and presidents of courts, violation of the Code is partially of importance for evaluating general competence to exercise judicial function during promotion through evaluating of communication skills. [4] However, this evaluation takes into account the violation of the Code only in the part relating to "the judge's behaviour towards the parties, colleagues and employees of the court". Other violations of the Code that the Committee may establish, such as a violation of the principle of independence or impartiality, expertise, integrity, etc., could not be taken into account during promotion of judges.

The Law on Judicial Council and Judges and the Code of Judicial Ethics do not distinguish between certain disciplinary offenses for which it is possible to impose more severe sanctions, including the ban on promotion and dismissal, and violation of the Code, which only partly affect a judge's promotion. Thus, some disciplinary violations and violations of the Code significantly coincide and almost half of the disciplinary offenses can be interpreted as a violation of the Code. Namely, nine disciplinary offenses to a great extent coincide with the provisions of the Code, so it is unclear based on what in such cases it is assessed whether it is a violation of the Code or a disciplinary offense. This allows legal uncertainty, arbitrariness in decision-making and unequal treatment of judges.

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[1] "Official Gazette of Montenegro" No.45/2008 of 31/07/2008
[2] "Official Gazette of Montenegro" No.16/ 2014 of 28/03/2014
[3] Provision of Article 146 of the Constitution of Montenegro stipulates:
The law and other regulation shall be published prior to coming into effect, and shall come into effect no sooner than the eighth day from the day of publication thereof.
Exceptionally, when the reasons for such action exist and have been established in the adoption procedure, law and other regulation may come into effect no sooner than the date of publication thereof.
[4] Article 20

The only decision of the Disciplinary Council in 2016 [5] showed that it is unclear in practice as well what is the difference between a disciplinary offense and a violation of the Code. This decision does not have any reasoning, and this additionally contributes to the creation of legal uncertainty and shows that the difference between a disciplinary offense and a violation of the Code is not clear. Namely, the disciplinary procedure in this case was initiated due to violation of inappropriate behaviour towards the participants in the court proceedings and the employees of the court. [6] Almost the same procedure is prescribed by the Code of Ethics of the Judges in Article 7, paragraph 1, which prescribes the judge's obligation to respect and develop standards of behaviour that contribute to preserving the reputation of the court and building public trust in judiciary through its conduct in court and outside the court, while Article 10 stipulates that the judge is obliged to maintain and develop good collegial relations and professional cooperation with colleagues and behave fairly to all employees in the court. The Disciplinary Council, by this decision, rejected the proposal for establishing of disciplinary liability and submitted the files to the Code of Judicial Ethics for further proceedings. However, there is no reasoning as to why the Disciplinary Panel considers that this is not a disciplinary offense, but a violation of the Code.

The Article 12 paragraph 6 of the Code of Ethics prescribes that the Code of Ethics Committee shall interrupt the procedure and file a motion for determining the disciplinary liability of the judge when it finds that there are elements of a disciplinary offense in the actions of a judge. It is unclear in what way the Committee will make such decisions and how to make a distinction between the violation of the Code and the disciplinary violation in cases where the description of the offenses and violations of the Code coincide. In the aforementioned case, acting in the case submitted by the Disciplinary Committee, the Commission issued a decision [7] establishing that the judge had violated the Code, but in this decision there was no valid reasoning on the basis of which can be concluded what is the difference between this violation of the Code and disciplinary offense.

The Code prescribes that, against a decision of the Committee establishing a violation of the Code, a judge has the right to object to the Judicial Council. [8] However, it is not stipulated whether the applicant of an initiative dissatisfied with the Commission's decision has the same right.

Practice

Statistics

	First Code				Second Code					
Year	Violation determined	Rejected	Dismissed	Non-competent	Violation determined	Rejected	Dismissed	Non-competent	Violation determined	Terminated
2013	1	1		1						
2014		3				4				
2015						11	2	1		
2016					4	9		6		1
2017						6	1	8		
2018					1	14				

[5] Number: 03.2-2304/16 of 09/06/2016
[6] Article 108, Paragraph 3, Item 8 of the Law on Judicial Council and Judges
[7] EC. No. 7/16 of 16/09/2016
[8] Article 12 paragraph 4

Who initiated?

	First Code			Second Code		
Year	President of the court	Parties	Others	President of the court	Parties	Others
2013		3				
2014		3			4	
2015					14	
2016				4	16	
2017					14	1
2018				1		

Practice of the Code of Ethics Committee did not contribute to strengthening the impartiality and accountability of judges. On the contrary, the Committee's decisions give a strong impression that the Committee is biased in making decisions. The Committee most often based its decisions solely on judges' statements and did not objectively determine the facts or provide a proper reasoning of its decisions. Reasoning of decisions of the Committee are usually unclear and incomplete. In addition, the Committee declared itself as non-competent in its practice without reasoning and the legal basis. In addition, in identical situations, the Committee made completely opposite decisions.

In practice, the Committee has acted solely on complaints and has not monitored the implementation of the Code in any other way. The Committee has never submitted a proposal for determining the disciplinary liability of a judge.

Although the principle of legality referred to in Article 2 of the Code talks about the judge's duty to make decisions lawfully, in several cases [9] the Committee arbitrarily declared itself non-competent to evaluate the legality of the work of judges, but it did not provide a reasoning for such position. In all these cases, the Committee declared itself non-competent without reasoning, referring only to Article 11 of the Code, although this provision does not at all provide the basis for the Committee to declare itself non-competent. [10]

The Code of Ethics Committee showed different practice and suspicion of impartial and objective conduct particularly in decisions adopted on the initiative of the President of Supreme Court of Montenegro. Namely, the Committee accepted and made decisions that judges violated the Code in two initiatives against judges submitted by the president of the Supreme Court Vesna Medenica in 2016. [11] In both cases, the initiative was filed against the judges because the judges did not seek their exemption in cases initiated by judges, officials and employees of the same court against the Government of Montenegro for non-paying of employment remuneration.

However, less than five months later, in the second, identical case, the Code of Ethics Committee declared itself non-competent. [12] In this case, the Committee states that it is not competent to examine and comment on whether the judge had to be exempted, although on the initiative of the President of the Supreme Court it had already done so in two cases.

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[9] EC.no. 2/2013 of 03.07.2013, EC.no. 8/14 of 19.11.2014, EC.no. 14/15 of 31.12.2015, EC.no. 8/16 of 16.09.2016, EC.no. 12/16 of 16.09.2016, EC.no. 14/16 of 16.09.2016, EC.no. 15/16 of 07.10.2016, EC.no. 6/17 of 11.10.2017, EC.no. 8/17 of 11.10.2017, EC.no. 9/17 of 11.10.2017, EC.no. 10/17 of 11.10.2017, EC.no. 16/17 of 22.12.2017, EC.no. 17/17 of 22.12.2017, EC.no. 18/17 of 22.12.2017

[10] Article 11 of the Code of Ethics of Judges stipulates:
Judges are obliged to respect the Code. A judge has the right and duty to point out to the competent authorities to the conduct of a judge contrary to this Code. The existence of a violation of the Code is determined by the Code of Ethics of Judges Committee (hereinafter: the Committee). The procedure for establishing a violation of the Code may be initiated by any person.

[11] EC.no. 4/16 of 11.05.2016 and EC.no.4-1/16 of 11.05.2016

[12] EC. no.10/16 of 07.10.2016

The Committee refused to act on the initiative of a natural person initiated against the Supreme Court judge for violating the principle of impartiality because she did not request her exemption from the case from which she had to be exempt because her relative worked in the company that had been sued in the proceedings. The initiative stated that the judge was exempted from the work in another case for the same reason, in which she also made decision on the audit, and that according to the same principle she should have been exempt from the other case as well. Unlike the initiatives filed by the President of the Supreme Court, the Code of Ethics Committee declared itself non-competent to act in this case.

Such unequal treatment in same situations, depending on whether the initiative was filed by the President of the Supreme Court or another person, seriously questions the independence of the Judicial Council and the Code of Ethics Committee.

The Code of Ethics Committee did not determine whether there was a violation of the Code in the case of complaints against several judges, including a member of the Code of Ethics Committee, where the verdicts stated that it is illogical for the deputy Supreme State Prosecutor to commit a serious crime, especially since in order to perform that function, he had to have a high reputation in both professional and personal life, in addition to professional references, and that it is impossible for the Prime Minister to lead an immoral way of life. [13] It is incomprehensible why the Committee refused to evaluate the ethical principle of the impartiality of judges who considered it illogical that the State Prosecutor could commit a criminal offense and that it was impossible for the Prime Minister to lead an immoral way of life.

Moreover, unlike cases where it considered itself non-competent and unable to evaluate the legality of the work of judges, in some cases the Committee determined precisely the legality of the work of judges and compliance with the deadlines prescribed by the procedural laws. Namely, the first decision in which the Code of Ethics Committee established the violation of the Code by a judge was adopted by the Committee on 28/10/2013. [14] The Committee decided that the judge violated the Code because in one case she did not undertake actions for a period of six months and eight days, and thus violated the provisions of the Law on Civil Procedure. The Committee considered that such behaviour by the judge constituted a violation of Article 10 para. 2 in conjunction with Article 5 paragraph 3 of the Code of Ethics of Judges.

Although unlike other decisions in this case, the Committee determined the facts and gave a reasoning for its conclusion, it remains unclear why the Code was violated in this case, but the procedure was not interrupted and a motion for determining the disciplinary liability of the judge was not sent. Thus, it is still unclear on the basis of what it is assessed whether the exceeding of the legal deadline for undertaking actions in cases are grounds for determining the disciplinary liability of judges or grounds for initiating the procedure of violation of the Code, because this action is described by the law as a disciplinary offense, but also by the Code of Ethics of Judges.

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[13] Source: "ODGOVORNOST ZA KRŠENJE SUDIJSKE ETIKE U CRNOJ GORI" Work of the Code of Ethics Committee (2011-2016), NGO Human Rights Action, Podgorica 2017
[14] EC. no.3/13

The following year, the Committee had a completely opposite opinion and found that there were no violations of the Code in case where a judge did not respect the deadlines in a procedure that was urgent, since the Committee considered that those were instructional legal deadlines for managing the main hearing and that it was possible to prolong them due to "justified circumstances". However, the decision did not provide the reasoning of such justified circumstances, i.e. determination of the fact whether the judge was able to act more promptly and comply with the legal deadlines.

Also, in decision of 17/10/2014 [15], the Committee again found that there was no violation of the Code for breaching of deadlines in a labour dispute, which is urgent according to the law. The Committee based its decision entirely on the judge's statement, it did not even make an insight into the case files as it did in other cases, instead, it concluded that the judge did not violate the Code, because she could not schedule a hearing when it was due for objective reasons.

In 2018, the Code of Ethics Committee continued the same practice. The Committee made five decisions and in each of them it was established that judges did not violate the Code of Ethics. 14 decisions that there were no violations of the Code was adopted by the Committee based only on the statement of the judges, it did not objectively determine the facts and did not give a proper reasoning of its decisions.

It was established in only one decision that the judge violated the Code of Ethics by publishing photographs and so called selfies from the beaches and the hotel on the social network Instagram, which is unworthy of judicial function. This procedure was initiated by the President of the Supreme Court as well. [16] However, a year before, the same Committee found that the other judge did not violate the Code of Ethics [17] by publishing photographs in the bathrobe from the hotel room on a social network. In this decision, the Committee states that it determined that the judge posted several photos on Instagram and finds that the allegations of inappropriate dressing in one photo are not relevant for establishing a violation of the ethical principles of the integrity of the judge, and that it took into consideration the fact that the applicant was convicted of threats to the judge, thus it found that the investigation into the private life of a judge constituted that the applicant was indignant by the outcome of the criminal proceedings.

Thus, Committee for the Code of Ethics for Judges showed that the fact who and from what motive files an initiative against a judge is of decisive importance, instead of specific conduct of the judge.

[15] EC.no.6/14
[16] https://m.cdm.me/hronika/od-deset-prijavljenih-jedan-sudija-prekrsio-eticki-kodeks/
[17] EC.No.14/17 of 15/11/2017

1.1.2. PROSECUTORS

The Conference of State Prosecutors adopted the Code of Ethics for Public Prosecutors that came into force on 11/01/2015, on the same day when it was passed, while it was stated that it will be published in the "Official Gazette of Montenegro". [18] Therefore, as in the case of the Code of Judicial Ethics, the Code of Ethics for Public Prosecutors entered into force before it was published, which also calls into question the expertise of the Conference of State Prosecutors because such norm is contrary to the provisions of Article 146 of the Constitution of Montenegro. [19]

The Code of Ethics of State Prosecutors determines the principles and rules of conduct of the heads of State Prosecutor's Offices and state prosecutors. The text of the Code is available on website of the State Prosecutor's Office. [20] Although it is stated that it will be published in the Official Gazette of Montenegro, this Code of Ethics for State Prosecutors, as well as the previous Codes, were not published in the Official Gazette of Montenegro. For this reason, it is not possible to compare the text of the current Code with the previous one and make an analysis of whether and how much the new Code is possibly improved compared to the previous one.

As in the case of judges, the Law on State Prosecutor's Office does not stipulate that the violation of the Code of Ethics of State Prosecutors is a disciplinary offense, i.e. the basis for determining disciplinary liability of a judge.

According to the rules for evaluating state prosecutors and heads of State Prosecutor's Offices, violation of the Code is partially of importance for evaluating the general ability to perform prosecutorial function through evaluating communication skills. [21] However, this evaluation takes into account the violation of the Code only in the part referring to relations with parties, colleagues and other employees. Other violations of the Code, as well as in the case of judges, could not be taken into account.

As in the case of judges, the Law on State Prosecutor's Office and the Code of Ethics for State Prosecutors also do not distinguish between some disciplinary offenses for which it is possible to impose more severe sanctions such as ban on promotion and violation of the Code. Thus, some disciplinary violations and violations of the Code coincide and the same behaviour can be interpreted both as a disciplinary offense and as a violation of the Code. This allows legal uncertainty, arbitrariness in decision-making and unequal treatment of prosecutors.

The Committee for monitoring the implementation of the Code of Ethics for State Prosecutors is one of the authorized proposers for determining the disciplinary liability of state prosecutors. [22] Also, other authorized proposers for determining the disciplinary liability of state prosecutors may contact the Committee for monitoring the implementation of the Code of Ethics for State Prosecutors to give an opinion on whether a certain behaviour of the state prosecutor is in accordance with the Code. [23] However, it is unclear in what way the Committee and other proposers will make such decisions and how they will make a distinction between the violation of the Code and the disciplinary violation in cases where the description of an offense and violations of the Code coincide.

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[18] Chapter IV (Final provisions), Item 3.
[19] Provision of Article 146 of the Constitution of Montenegro stipulates:
The law and other regulation shall be published prior to coming into effect, and shall come into effect no sooner than the eighth day from the day of publication thereof.
Exceptionally, when the reasons for such action exist and have been established in the adoption procedure, law and other regulation may come into effect no sooner than the date of publication thereof.
[20] http://www.tuzilastvocg.me/index.php/kodeks-tuzilacke-etike
[21] Article 16.
[22] Article 110, Paragraph 1 of the Law on State Prosecutor's Office
[23] Article 110, Paragraph 2 of the Law on State Prosecutor's Office

Practice

According to data published on website of the State Prosecutor's Office, the Committee for Monitoring the implementation of the Code of Ethics for Public Prosecutors has adopted a total of 4 decisions and one opinion since 2015. During 2013 and 2014, the Commission did not adopt any decision. [24]

In 2015, the Committee gave one opinion in which it found that the behaviour of the Deputy Basic State Prosecutor was not in accordance with the Code of Ethics for Public Prosecutors. In this case, at the trial before the court, the prosecutor acted inappropriately towards the court and other participants in the proceedings by throwing case files on the judge table, interrupting the defence counsellor in presentation before being allowed to speak by the judge and by ignoring the judges' remarks. It is unclear in what way the Committee distinguished this behaviour and clear violation of the Code from a serious disciplinary offense whose legal description is inappropriate behaviour towards participants in the proceedings [25] and why it did not submit a proposal for determination of disciplinary liability.

During 2016, the Committee made two decisions. In first decision [26] of 09/06/2016, the Committee found that there was no violation of the Code. However, the Committee's decision does not have a valid reasoning. Namely, the decision says that the initiative stated that the prosecutors who acted in a particular case refused to perform actions within their jurisdiction in a timely manner. The decision states that the case is terminated by a verdict dismissing the charges due to the absolute obsolete of prosecution, the course of the proceedings is stated, but there is no reasoning in relation to the allegations of the initiative that the prosecutors did not act in a timely manner, i.e. the explanation that their untimely behaviour did not lead to the obsolescence of criminal prosecution. In the second decision, [27] the Committee found the Prosecutor's conduct not in accordance with the Code because he did not refrain from contact and actions that could cast doubt on his objectivity because he had twice held a conversation with the defendant.

In 2017 and 2018, the Committee adopted one decision [28] respectively, which determined that there were no violations of the Code.

In practice, the Committee acted solely on the basis of complaints and did not monitor the implementation of the Code in any other way. The Committee has never submitted a proposal for determining the disciplinary liability of a prosecutor. The Committee did not have a proactive approach in order to promote respect of ethical principles, did not monitor the implementation of the Code in a planned manner and acted solely upon lodged complaints, whose number is very low.

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[24] Decision of the Prosecutorial Council no: 05-1-39-2/18 of 23.05.2018 which rejected the request of NGO MANS for access to this information because the Prosecutorial Council **"does not have the requested information"**
[25] Article 108, Paragraph 3, Item 5 of the Law on State Prosecutor's Office
[26] Pc.no.207/15
[27] Pc.no 191/15 of 10/06/2016
[28] No.02-9-1301-1/17 of 28/12/2017 and No.02-9-1313/1 of 17/01/2018

LIABILITY IN THE JUDICIARY

5
Complaints against judges

9
Complaints against prosecutors

1.2. Complaints to the Judicial and Prosecutorial Council

Due to noted irregularities and omissions in specific cases for corruption offenses, MANS filed complaints against judges and prosecutors. Complaints relate to the inexplicably favourable treatment of those accused of the most serious crimes of corruption, to undue and untimely treatment in favour of the accused, to the unlawful delay in execution of sentence of imprisonment, and to the unlawful evaluation of the circumstances on which the sentence depends and on suspicion of impartial treatment. Until the conclusion of this report, there has been no proceedings on complaints and none of the judges and prosecutors have been held liable.

1.2.1. JUDGES

Since the beginning of 2019, NGO MANS submitted five complaints to the Judicial Council and the presidents of the courts against judges for the undue and unlawful acting in criminal proceedings for corruption offenses.

The complaints refer to the accepting of unjustifiably lenient sentences agreed by the prosecutors with the defendants for the most serious corruption offenses, by completely ignoring the circumstances that affect the sentence to be stricter, as well as to undue and untimely acting in favour of defendants and to unlawful delay in serving of the prison sentence.

None of the judges has been held liable in these cases, so it was requested from the Judicial Council and the presidents of courts to consider filing complaints and to take actions within the framework of legal authorities. Until the completion of work on this report, no complaint has been processed.

Due to omissions and unjustifiable delays of the proceedings in the case of high corruption before the High Court in Podgorica, we asked for the initiation of liability proceedings of the president of the court.

Instead of January, decision adopted in August. Convicted person gained citizenship of another country and fled

According to verdict of the High Court in Podgorica [29], on December 31, 2015, the President of the High Court in Podgorica, Boris Savić, accepted the plea agreement concluded with the defendant Miloš Marović and sentenced him to one year's imprisonment for the criminal offense for which at the time of execution the prescribed sentence was between two and ten years of imprisonment, and the Municipality of Budva suffered damage of € 2.3 million. According to the law, the amount of damage caused had to be regarded as an aggravating circumstance in determining of the sentence, but Judge Savić ignored this circumstance.

Also, the plea agreement with Miloš Marović was concluded on December 31, 2015, and the indictment was filed and submitted to the court on January 4, 2016. Although the Criminal Procedure Code [30] stipulates that the court decides on the agreement without delay, Judge Savić issued a decision [31] on which the agreement was adopted on May 13, 2016.

Furthermore, the Criminal Procedure Code prescribes that the court shall, not later than within three days, render a decision to the effect in accordance with the accepted agreement, [32] while the judge Savić adopted the verdict on August 29, 2016, which became valid on September 16, 2016.

Following the validity of the verdict, serving of the sentence of imprisonment of Miloš Marović was postponed, and Marović used all the time for which the trial was postponed to acquire the citizenship of Serbia and then fled to that country in order not to serve a sentence which is below the legal minimum.

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[29] Decision 56/16 of 29/08/2016
[30] Article 302, Paragraph 5.
[31] Decision no.3/15
[32] Article 303. Paragraph 1.

Serving of the prison sentence unlawfully delayed in order for the convicted person to escape

NGO MANS requested initiation of a liability procedure for the judge who unlawfully approved the postponement of serving of the prison sentence to Miloš Marović, which allowed him to flee the country and avoid serving of his sentence.

Namely, after validity of the verdict against Miloš Marović, the Special State Prosecutor's Office requested the postponement of serving of the prison sentence for a period of three months so that Miloš Marović would pay the amount awarded for seizing the pecuniary gain he had acquired through the commission of the criminal offense.

Such request from the Special State Prosecutor's Office had to be rejected by the court, since no provision of any law provides the basis and the right of the prosecution to request the postponement of serving of the prison sentence in order for the convicted person to return the pecuniary gain he had acquired through the criminal offense. However, the president of the Basic Court in Kotor, Branko Vučković, postponed the serving of the prison sentence to Miloš Marović for a period of three months.

When serving of the prison sentence was postponed for three months, Miloš Marović used that time to move to Belgrade and acquire citizenship of the Republic of Serbia, where he remained so that he could avoid serving of the sentence imposed on him, and he is now unavailable to the competent authorities of Montenegro.

Also, after the unlawful delay of serving of the prison sentence and fleeing to Serbia, Miloš Marović requested to serve the sentence in Serbia, where the possibility of serving a sentence of up to one year in prison in the premises where the defendant resides (the so-called house arrest) is prescribed.

The unlawful acting of the President of the Basic Court in Kotor, Branko Vučković, enabled Miloš Marović to unlawfully delay serving of that sentence and use that time to flee to the Republic of Serbia and acquire Serbian citizenship, to avoid extradition in order to serve the sentence, and then to consider the possibility to serve his sentence in the apartment in Serbia.

Had Branko Vučković, the President of the Basic Court in Kotor acted lawfully, Miloš Marović would have served the prison sentence imposed on him and would not have avoided its serving.

Earlier conviction for the same criminal offense is not an aggravating circumstance

In the verdict of the High Court in Podgorica [33], Judge Vesna Pean ignored the aggravating circumstance of the former conviction of the former Mayor of the Municipality of Budva with allegations that the court had "taken into account" earlier conviction for the same offense, but noted that the earlier offence was carried out in the same time period as the offences he was charged with.

The court is obliged to take into consideration the circumstances that affect the type and level of punishment, and not to "take them into account" and then ignore them with an unacceptable and incomprehensible explanation. It thus stems that Judge Pean found the fact that he committed several similar crimes in the same period in favour of the defendant.

In addition, in three other cases in which we asked for determining of liability of judges in cases of high corruption, sentences that are below the legally prescribed minimum were accepted, and the circumstances that multi-million damage was caused and the pecuniary gain obtained through committing of criminal offenses were completely ignored, which must be regarded as aggravating circumstances. [34] Also, in one case, the President of the High Court in Podgorica unreasonably cited as a mitigating circumstance that the defendant was not previously convicted, although it was a person who was already convicted for the same criminal offense.

Joint body of misdemeanour judges and executive power - unauthorized influence of the executive power on the court

Until the end of 2015, misdemeanour judges were elected by the Government, i.e. the executive power for a period of five years and the Government decided on their dismissal and temporary removal. An objective approach in assessing the independence of judges through the method of election of judges and the apparent dependence on the executive power, which is usually one of the parties to the proceedings, indicated that the misdemeanour judges did not give a minimum guarantees that they were able to judge independently as guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The first election of misdemeanours judges not done by the executive power occurred at the end of 2015, when the Judicial Council elected all judges who had also previously performed the duty on behalf of the Government.

However, the same judges who gained legal independence by the end of 2015 through the election by the Judicial Council now allow the executive authorities to influence their decisions, misdemeanour practice and interpretation of the law in some other, and all this work judges should do protected from external influence, especially from the influence of the executive authorities and the parties.

Namely, last year, at the initiative of the High Misdemeanour Court, a Coordinating Body was formed which, in addition to the members of the aforementioned court, consists of representatives of all applicants for misdemeanour charges: APC, Police Directorate, Customs Administration, Administration for Inspection Affairs and Property Administration.

[33] Decision no. 68/2016 of 26/07/2016
[34] Article 42, Paragraph 3 of the Criminal Code

The body was established with the aim of promoting inter-institutional cooperation by pointing out the issues that each institution encounters with regard to misdemeanour practices, from technical problems to legal passing, as well as submitting of proposals for overcoming interference in work. [35]

The establishment of a joint body with representatives of applicants of misdemeanour charges, who are mainly executive authorities and representing one of the parties to the misdemeanour procedure initiated at their request, seriously violates the principle of the independence [36] of the misdemeanour court.

Judges who "consider cooperation" and "legal passing" with one of the parties in the joint body's proceedings, cannot be considered impartial in the proceedings initiated by those parties. Coordinating body of judges with representatives of the executive authorities which until recently elected those judges has increased the impression that misdemeanour judges cannot be impartial in cases where the executive authority is one of the parties. [37]

Therefore, the initiative of judges and the forming of bodies with parties - the executive authorities, in which "cooperation is considered" as well as "lawful passing" seriously endanger the independence of misdemeanour judges by the executive authorities and one of the parties in misdemeanour proceedings. The task of the judges is to resolve "legal passing" with the parties initiating the misdemeanour procedure through decisions, rather than forming a body with the parties that initiate proceedings and cooperate and seek solutions with them.

Article 2 of the Law on Judicial Council and Judges prescribes that a judge shall work and decide independently and autonomously, that judicial office must not be exercised under any influence, that no one should influence a judge in the performance of judicial office, while the Judicial Council shall have the task of ensuring the maintenance of an independent, autonomous, accountable and professional judiciary. Also, Article 27, paragraph 6 of the Law on Judicial Council and Judges stipulates that the Judicial Council shall take a position on endangering independence and autonomy of judges.

Forming of the Coordinating Body together with the bodies of the executive authority has severely endangered the independence and autonomy of misdemeanour judges, thus, MANS filed a complaint with the Judicial Council with a proposal to take the legally prescribed measures and actions to ensure that the misdemeanour judges work independently and autonomously and do not perform the office under the influence of the executive authority and the parties in the proceedings, and to take a stand on the endangering of independence and autonomy of judges by participating and working in a joint body with bodies of the executive authority who initiate misdemeanour proceedings.

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[35] Source: Report on the work of the Agency for Prevention of Corruption for 2018 (pages 70 and 71)
[36] In terms of independence of the court within the Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Justice set certain criteria in the Campbell and Fell verdict (page 40, paragraph 78) in determining whether a body can be considered to be "independent" - **notably of the executive and of the parties to the case.** Court had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures, and the question whether the body presents an appearance of independence.
[37] In relation to the subjective impartiality of judges, the objective approach is crucial for assessing impartiality. According to the Court in Strasbourg, under the objective test *"it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance."* Paragraph 30 of the decision *Fey v. Austria*, 1993 refers to this.

1.2.2. PROSECUTORS

Since the beginning of 2019, NGO MANS has filed eight complaints to the Prosecutorial Council, competent prosecutor's offices and the Ministry of Justice against the state prosecutors due to non-timely and unprofessional conduct in criminal proceedings for corruption offenses.

The complaints relate to the inexplicable and unacceptable acting of state prosecutors in favour of the defendants which ultimately resulted in imposing extremely mild sentences, rejecting of charges against the defendants and significant costs for the state budget or significant benefits for the defendants.

None of the state prosecutors has been held liable, so the Prosecutorial Council, the competent prosecutor's offices and the Ministry of Justice were asked to consider submitted complaints and take actions within the framework of legal powers. Until the completion of work on this report, no complaint has been processed.

Due to the severe omission of the Special Prosecutor in the case of high corruption before the High Court in Podgorica, we requested the initiation of the procedure of prosecutor's liability.

Special prosecutor "forgot" the pecuniary gain of 2 million Euros in the closing statement

In the criminal proceedings before the High Court in Podgorica, [38] the former President of the Municipality of Bar, Žarko Pavićević, was sentenced to one year in prison. The same verdict also convicted Danijela Krković, the Executive Director of the Institute for Development of Bar, in which Pavićević is a shareholder and chairman of the Board of Directors, and she received a suspended sentence [39].

According to the Special State Prosecutor's indictment [40] of November 2015, Pavićević was sentenced to one year of imprisonment for the most severe form of the criminal offense of abuse of office, for which, at the time of committing, prescribed imprisonment was in the range of two years to 10 years prison. [41] It was an extended crime for which the Criminal Code prescribes the possibility of imposing a more severe sentence, up to 20 years in prison in this case.

The total damage caused to the Municipality of Bar by the criminal offense amounts to almost two million Euros.

However, during the closing statements of the parties, the Special Prosecutor [42] changes the indictment in the factual description and leaves out the consequences of the criminal offense in the form of pecuniary gain of almost 2 million Euros. For this reason, the court could not have convicted the defendants for the most severe form of the criminal offense of abuse of office, but only for the basic form of that offense which exists when a gain of up to three thousand Euros was obtained and for which a prison sentence of six months to five years is prescribed. This is why minor sentences were imposed to the defendants, although damage to the Municipality amounted to two million Euros.

Thus, the closing statement of the Special Prosecutor significantly improved the status of the defendants because instead of the sentence of imprisonment for two to ten years, they were facing between six months to five years in prison.

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[38] Decision no. 23/2015 of 28/02/2017
[39] Four months' imprisonment, which will not be served if the defendant fails to commit a new criminal offense within two years from the date of the validity of the verdict
[40] Decision no. 71/15 of 19/11/2015
[41] Article 416 paragraph 3 of the Criminal Code
[42] Saša Čađenović

Since the court is bound by the factual description of the indictment from which the special prosecutor omitted the pecuniary gain of 2 million Euros, the court could not convict the defendants for something that the prosecutor did not factually indicate in the indictment, but only for the criminal offense for which the punishment is prescribed as if a gain of up to three thousand Euros was obtained.

In addition to the omission in the closing statement that enabled a more lenient punishment, the Special Prosecutor did not file an appeal to that verdict.

The Special Prosecutor agreed the sentence below the minimum, then requested delay of its serving. The convicted person fled the country

NGO MANS requested the initiation of procedure for determining liability of the prosecutor who worked in the case against Miloš Marović, due to agreeing of inappropriately lenient sentence, and then enabling the convict to escape and avoid serving of such lenient sentence.

Namely, the Special State Prosecutor Lidija Vukčević concluded a plea agreement with Miloš Marovic to one year's imprisonment for a criminal offense for which a sentence of imprisonment of two to ten years was prescribed at the time of committing.

After validity of the verdict adopted based on this agreement, the Special State Prosecutor Lidija Vukčević requested the delay of serving of the prison sentence for a period of three months so that convicted Miloš Marović would pay the amount for the seizure of the property gain acquired by committing of the criminal offense. However, no provision of any law provides the basis and right to the prosecution to request delay of serving of the sentence of imprisonment so that the convicted person could return the property gain he had acquired through the criminal offense.

When serving of the prison sentence was postponed for three months, Miloš Marović used that time to move to Belgrade and acquire citizenship of the Republic of Serbia, where he remained so that he could avoid serving the sentence imposed on him, and he is now unavailable to the competent authorities of Montenegro.

Also, after the unlawful delay of serving of the prison sentence and fleeing to Serbia, Miloš Marović requested to serve the sentence in Serbia, where the possibility of serving a sentence of up to one year in prison in the premises where the defendant resides (the so-called house arrest) is prescribed.

Unlawful acting of the Special State Prosecutor Lidija Vukčević has led to the pronouncement of the sentence to Miloš Marović which is significantly below the legal minimum, which enabled Miloš Marović to unlawfully delay serving of that sentence and use that time to flee to Republic of Serbia and acquire Serbian citizenship. At the same time, he was able to avoid extradition in order to serve his sentence, and then count on the possibility of serving the sentence in Serbia in the apartment. Had Lidija Vukčević, the Special State Prosecutor, acted lawfully, Miloš Marović would not have received any of the aforementioned benefits and would serve his sentence in Montenegro where he committed the criminal offense he was convicted of.

In addition, in five cases, we asked for determining of liability of state prosecutors in cases where duration of the proceedings and the arbitrary suspension of prosecution after several years of the duration of the proceedings caused the dismissal of charges and costs of the criminal proceedings at the expense of the budget funds of the court. Also, in two cases, we asked for determining of liability of state prosecutors in cases where prosecutors arbitrarily and without explanation gave up the prosecution after several years of the duration of the proceedings.

II

PROCEEDINGS ON CRIMINAL CHARGES FOR CORRUPTION

The manner of election of state prosecutors on criminal charges does not contribute to the increase of liability. On the contrary, the practice of the Prosecution additionally undermines trust in lawful acting.

The public has no possibility of an insight on the basis of which state prosecutors make decisions and which reasons they are guided by when deciding to reject a criminal complaint. State prosecutors reject criminal complaints without explanations and reasoning for such decisions. State prosecutors have denied the right to complain about the dismissal of the criminal complaint in practice because they do not submit their decisions to persons who have the right to challenge them. Thus, this right is denied to persons authorized to challenge the decisions of the prosecution because they have no insight into the decision and the reasons that should be challenged.

Also, it is unclear on what basis the prosecution determines the jurisdiction to act on individual criminal complaints. Criminal complaints for criminal offenses under the jurisdiction of the Special State Prosecutor's Office are submitted to the lower level - the Basic Prosecutors, without explanation and the reasons for such conduct.

RIGHT TO COMPLAIN TO A DECISION NOT SUBMITTED

Amendments to the Criminal Procedure Code that have been in force since 15/08/2015 prescribe the right to file a complaint against the decision on the dismissal of criminal charges. [43]

The injured party, or the applicant who filed criminal charges in case when there is no injured party or where the injured party is unknown, shall be entitled, within eight days of receipt of the notice to file a complaint to immediately higher State Prosecution Office, which shall notify the injured party or the applicant who filed criminal charges on its action within 30 days of filing the complaint.

Same amendments to the Criminal Procedure Code for the first time stipulate a deadline for the state prosecutor to make a decision on a criminal charge. [44] Previously, this deadline was prescribed by a by-law, the Rulebook on Internal Affairs of the State Prosecutor's Office. Now the legal deadline for making a decision is no later than three months from the date of receipt of the case. Exceptionally, in complex cases because of the volume, factual or legal issues, a decision shall be made no later than six months, with the exception of cases involving the use of secret surveillance measures when the decision ought to be made within three months of completion of the secret surveillance measure. In cases in which the evidence was collected through letters rogatory for mutual legal assistance, a decision must be made within one month from the date of obtaining evidence through letters rogatory. The Head of the State Prosecution Office may, with a written explanation, seek approval for the extension of the deadline for up to one month.

These amendments to the law were supposed to contribute to a more responsible and efficient acting of state prosecutors, to enable effective control of their decisions, and to protect the injured party and applicants from unfounded and arbitrary dismissal of criminal charges.

Thus, for the first time in criminal legislation, interested parties granted the right to legal remedy against the decision of the state prosecutor to reject a criminal complaint, if they believe that the state prosecutor did this without justified reasons and that he had reason to initiate criminal proceedings.

Moreover, the law prescribes a deadline for making a decision, but no violation of this legal obligation is prescribed. Namely, the Law on the State Prosecutor's Office stipulates a serious disciplinary offense of the state prosecutor only if he fails to act within legally prescribed deadlines without due cause, which resulted in obsolescence, inability to conduct the proceedings and other consequences prescribed by law. Hence, state prosecutors may without sanctions violate the legally prescribed deadlines for making a decision on criminal charges, which is in practice a rule because decisions on criminal charges are usually adopted after the legal deadline significantly expired.

Given that the law now stipulates the right to file a complaint against the decision on the dismissal of criminal charges, when deciding on criminal charges, the state prosecutor would have to assess allegations of the charges in particular as well as any evidence to which it is indicated and provide a reasoning in its decision.

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[43] Article 271a of the Criminal Procedure Code
[44] Article 256a of the Criminal Procedure Code

This obligation of the state prosecutor arises also from the provision of Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which obliges to provide a reasoning for decisions when deciding on the rights and obligations of others. Likewise, when deciding on a complaint against a decision to reject criminal charges, which is now recognized by the Criminal Procedure Code, the prosecution must immediately evaluate the allegations of the complaint and give explanations and reasoning in case that the complaint is rejected.

However, state prosecutors do not respect these rights in practice and dismiss criminal charges arbitrarily, without even submitting decisions on the dismissal of criminal charges to persons who have the right to file complaints to them. Also, state prosecutors who decide on complaints and who should examine the legality of the work of lower prosecutors, accept such behaviour. Moreover, although they do not deny filing complaints in order to examine the decision to reject criminal charges, state prosecutors who decide on complaints and who should examine the legality of the work of lower court prosecutors state that the decision on dismissal of criminal charges does not have to be submitted to the person who has the right to complain. Thus, both the injured parties and the applicants of criminal charges should appeal the decision that state prosecutors refuse to provide.

At the same time, state prosecutors repeatedly violate the legally prescribed deadlines for making a decision on a criminal complaint without sanctions, thus, complaints are arbitrarily rejected after several years. Therefore, the injured parties and the applicants of criminal reports do not have any possibility of effectively controlling the actions of state prosecutors on criminal charges, they are not able to know what the state prosecutors have been doing for years in a case, why they have exceeded the legal deadline for passing the decision and, most importantly, for what reason the criminal charges were dismissed.

In 2019, the prosecutor dismissed the criminal charges from 2014 in a single sentence

On June 30, 2014, NGO MANS filed criminal charges against the then Mayor of Podgorica and the Secretary of the Secretariat for Social Welfare, on grounds of reasonable suspicion that they had committed the criminal offense of abuse of office and negligent performance of duty.

As the criminal prosecution for the criminal offense of abuse of office is under jurisdiction of the Special State Prosecutor's Office, criminal charges were filed with the Supreme State Prosecutor's Office, which immediately submitted the application to the Basic State Prosecutor's Office in Podgorica, [45] without explanation and reasons why it was considered not to be a criminal offense abuse of office and that therefore the case is not within the competence of the Special Prosecutor.

Four years and seven months later, NGO MANS received a notice from the Basic State Prosecutor's Office in Podgorica [46] that it had dismissed criminal charges alleging that there was no reasonable doubt that the reported persons had committed these criminal offenses, or any other criminal offense prosecuted ex officio.

The decision of the Basic State Prosecutor's Office dismissing the criminal charges was not submitted to the applicant, so it remained unclear on the basis of what the Prosecution concluded that there was no reasonable suspicion that the reported persons committed these criminal offenses, as well as any other criminal offense prosecuted ex officio. Also, it is unknown what actions the prosecution has undertaken in four years and seven months of their work on the criminal charges.

[45] Document KTR number 489/14 of 09/07/2014
[46] Kt.no.777/14 of 04/02/2019

On February 13, 2019, within the legal deadline, NGO MANS filed a complaint with the High State Prosecutor's Office in Podgorica to review the decision on dismissal of a criminal complaint in which, inter alia, it indicates that the state prosecutor had to make a decision on the criminal charges with a reasoned decision [47], instead of using a notice, in one sentence, to arbitrarily and vaguely inform us that the charges are rejected.

The complaint states that it is incomprehensible in what way the Prosecutor assessed the charges, the evidence in the charges, which facts and information he obtained and how he assessed them, and in particular, in what way he concluded that there was no reasonable doubt that the reported persons had committed the reported offence, as well as any other criminal offense prosecuted ex officio. It was also stated that there is no indication that the prosecutor has taken any action from which he has established any fact, there is no indication that he has collected any information from anyone, that he obtained and examined any evidence, nor indications how and on what basis he established any fact, and even the indication that he had interrogated in any way the reported persons or any other person on the circumstances and allegations from the criminal charges.

High State Prosecutor's Office: You have the right to complain, but you have no right to ask for the decision

On 19 March 2019, the High State Prosecutor's Office in Podgorica submitted to MANS a new notice [48] stating that they had reviewed the case files and that the decision of the Basic State Prosecutor's Office in Podgorica was rendered in accordance with the law. At the end of the notice, it is absurdly stated that there is no legal obligation to submit the decision on dismissal of the criminal charges to the applicant.

Thus, the High State Prosecutor's Office in Podgorica completely discredited the right to file a complaint against the decision on the dismissal of criminal charges, supporting the view to not deliver this decision to persons entitled to challenge them. In this way, the State Prosecutor's Office took a stance that it does not have to provide reasons and explanations for its decisions, even to persons who have a legal right to challenge those decisions.

Complaint against a decision on the dismissal of criminal charges is a remedy for protection against illegal and arbitrary decisions of state prosecutors, rendered without evaluation of the allegations of criminal charges and evidence. Failure to submit a decision on the dismissal of a criminal charges and preventing the applicant from being informed of the reasons why his application was rejected also limits his right to complain about such decision. At the same time, state prosecutors are allowed to reject criminal charges without explanation and the reasoning that would refer to such decision.

That is why such practice and law enforcement do not contribute to the trust in the work of the State Prosecutor's Office, and at the same time encourages prosecutors to make decisions arbitrarily and vaguely.

In the same manner, with a single sentence notice [49], after more than four years of proceedings, the Basic State Prosecutor's Office in Podgorica also rejected criminal charges against the then Minister of Transport and Maritime Affairs because of a reasonable suspicion that he had committed the criminal offense of abuse of office. The Basic State Prosecutor in Podgorica also decided on the charges, although it was a criminal offense for which the Special State Prosecutor was competent to prosecute. Although the ruling on the dismissal of the criminal charges was also not submitted, NGO MANS filed a complaint with the High State Prosecutor's Office, which has not made decision on it until the drafting of this report.

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[47] Article Član 271 of the Criminal Procedure Code
[48] Decision no. 72/19 of 19/02/2019
[49] Decision no. 35/15 of 28/01/2019

Complaint adopted - without reasoning

Even when a complaint is adopted on a decision that the prosecution fails to submit to the applicant, the reasoning for such a decision is again lacking, and the applicant cannot know which of the reasons stated are founded and what constitutes the unlawful conduct of the prosecution.

Namely, two years and three months after the filing, the Basic State Prosecutor's Office in Podgorica with the same notice [50] dismissed the criminal charges against the then mayor of Podgorica and another person on grounds of reasonable suspicion that they committed criminal offenses of violation of the freedom of choice in voting and negligent performing of duties.

According to amendments to the Law on the Special State Prosecutor's Office, which came into force on 19 August 2016, the jurisdiction of the Special State Prosecutor's Office was complimented by the prosecution of perpetrators of criminal offenses of violation of electoral rights, including violation of the freedom of choice in voting. Although this amendment to the law was adopted precisely to specifically prescribe these crimes in the jurisdiction of the Special Prosecutor's Office, the lower body- the Basic State Prosecutor's Office once again decided on the charges.

On 6 February 2019, NGO MANS filed a complaint against this decision as well, according to which the State Public Prosecutor's Office in Podgorica informed [51] us that it was established that the decision of the Basic State Prosecutor was based on an incompletely established factual state, because of which he was ordered to fully determine factual situation and then make right and lawful decision. However, there was no explanation as to what specifically the state prosecutor did not establish, as well as any liability of the prosecutor for failure because he made a decision after two years and three months, and during that time he did not fully determine the factual situation.

[50] Decision no. 22/18 of 24/01/2019
[51] Decision no. 145/19 of 25/02/2019

III

ACCESS TO INFORMATION ON THE WORK OF THE JUDICIARY

Courts hide a range of information from their scope of work, thus preventing the public from seeing and publicly checking the lawful conduct.

The State Prosecutor's Office and the Prosecutorial Council also persistently hide information from the scope of work of state prosecutors and thus prevent the public from seeing and publicly checking the lawful conduct. The State Prosecutor's Office often does not respond to requests for access to information, and when it does, it rejects them with incomprehensible and unreasonable allegations, while the Prosecution Council usually rejects the requests. In doing so, the grounds for hiding information are various, often absurd, and what is especially worrying is insisting on such practices even when such decisions are annulled as illegal.

Such inadequate non-transparency of the courts, the Prosecutorial Council and the State Prosecutor's Office is contributed by the practice of the Agency for the Prevention of Corruption and the Agency for Personal Data Protection of and Free Access to Information. Thus, the Agency for the Prevention of Corruption rejects the requests for information regarding the illegal actions of judges and state prosecutors, while the Agency for Personal Data Protection and Free Access to Information also takes the stance that data on the illegality of the work of judges and prosecutors should not be published because it is personal data.

DATA ON VIOLATIONS OF LAWS BY JUDGES AND PROSECUTORS - PRIVATE MATTER

The Agency for Prevention of Corruption refuses to submit decisions on initiation of misdemeanour proceedings in cases where irregularities have been established when registering property of judges and state prosecutors in the period from 01/01 until 30/06/2018. [52]

Namely, the Agency for Prevention of Corruption considers this information related to the private life of judges and prosecutors to be personal data, so their disclosure without the consent of the person concerned would violate the Personal Data Protection Law.

However, the Law on Free Access to Information prescribes that a government authority may restrict access to information or part of the information if it is in the interest of protecting privacy from disclosure of information provided by the law governing the protection of personal data, with exception of data relating to public officials in relation to performing public office, as well as income, property and conflict of interests of those persons and their relatives, which are covered by the law regulating the prevention of conflict of interest. [53]

Acting on the appeal of the NGO MANS against this decision, the Agency for Personal Data Protection and Free Access to Information annulled this decision and returned the case to the Agency for Prevention of Corruption for further procedure and decision-making. [54] However, the Agency for Personal Data Protection and Free Access to Information also accepts the stance that this information cannot be published without the consent of the person to whom it relates, and instructed the Agency for Prevention of Corruption to only correct the reasoning of its decision.

Thus, the Agency for Prevention of Corruption again rejected the request for submitting this information, alleging that the information contained personal data and that its submitting to third parties would exceed the scope of its processing. [55] Neither the Agency for Prevention of Corruption nor the Agency for Personal Data Protection and Free Access to Information provided a reasoning in relation to the legal provision that stipulates that access to information cannot be restricted in the case of data relating to public officials in connection with the performing of public functions, as well as income, property and conflict of interests of those persons and their relatives, which are covered by the law regulating the prevention of conflict of interest.

By hiding these data, the public cannot know whether judges and prosecutors who have violated the law in relation to the reporting of property are generally held accountable. Although the decision establishing the violation of the law also contains personal data of the prosecutor and the judge, the Agency for Prevention of Corruption submitted those decision at the request of NGO MANS [56], which additionally raises the suspicions that judges and prosecutors are not held accountable when they violate the law. In the period from January 1 to June 30, 2018, one state prosecutor and one judge violated the law on reporting of the property. [57]

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[52] Decision no. 03-04.2425/2 of 26/09/2018
[53] Article 14, item 1, indent 1
[54] Decision no. UPII 07-30-3549-2/18 of 26/12/2018
[55] Decision of 10/01/2019
[56] Decision no. 03-04-2427/2 of 26/09/2018
[57] Decision of the Agency for Prevention of Corruption no.03-04-2426/7 of 26/09/2018

DATA ON EVALUATION OF JUDGES AND PROSECUTORS - PRIVATE MATTER

In the same way, the Judicial Council of Montenegro hides from the public reports, decisions, results and other information from the procedure for assessing the work of judges and court presidents. [58]

The Judicial Council states that these are personal data and that it does not have the consent of the persons who participated in the process of evaluation of the work of the judges, nor the judges evaluated, and therefore restricted access to this information.

Acting on the complaint of the NGO MANS against this decision, the Agency for Personal Data Protection and Free Access to Information annulled this decision and the case was returned to the Judicial Council for reconsideration and decision-making. [59] However, in this case as well, the Agency for Personal Data Protection and Free Access to Information, expresses the view that this information cannot be published without the consent of the person to whom it relates, and the Judicial Council is also instructed only to correct the explanation of its decision.

Thus, the Judicial Council also adopted a new decision [60], which again denies access to reports, decisions, results and other information from the procedure for evaluating the work of judges and court presidents. The Judicial Council now states that these are data relating to consultation within and between the authorities in relation to determining of positions, for the purpose of drafting official documents and proposing a solution to a case, and that this information is available online at the time of publication of the decision on selection judges and presidents of courts.

In the new decision, the Judicial Council is also referring to the Consultative Council of European Judges (CCJE), which on 24 October 2014 in Opinion No. 17 (2014) issued Recommendations on the evaluation of the work of judges, the quality of justice and respect for the independence of the judiciary, 14 states that "Principles and procedures in which evaluation of judges is based must be made available to the public, but the procedure and results of individual evaluations must, in principle, remain confidential in nature in order to guarantee the judicial independence and security of judges (paragraph 14)."

However, although this recommendation also states that the principles and procedures on which judge evaluation is based must be made available to the public, the Judicial Council conceals all information relating to evaluation of the work of judges, and not only the personal data of the judges.

The Prosecutorial Council of Montenegro rejected the request from NGO MANS to submit reports, decisions, results and other information from the procedure of evaluating the work of state prosecutors and heads of state prosecutors' offices. [61] The Prosecutorial Council states that these are personal data and that their disclosure can cause harmful consequences for an interest that is greater than the public's interest in knowing that information.

The Agency for Personal Data Protection and Free Access to Information rejected the appeal of NGO MANS against this decision, [62] assessing that there is no prevalence of public interest in publishing of information, since the head of the body is responsible for the work of the prosecution.

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[58] Decision no. 17-2-6048-1/18 of 04/10/2018
[59] Decision no. UPII 07-30-3563-2/18 of 21/12/2018
[60] Decision no. 17-2-6048-5/18 of 10/01/2019
[61] Decision no. 05-1-47-2/18 of 24/09/2018
[62] Decision no. UPII 07-30-3551-2/18 of 01/12/2018

DECISIONS OF THE DISCIPLINARY COMMISSION OF THE PROSECUTOR COUNCIL ALSO A PRIVATE MATTER

The Prosecutorial Council of Montenegro refused the request from NGO MANS to submit copies of all the decisions of the Disciplinary Committee issued between January 1, 2018 and September 30, 2018. [63]

The Prosecutorial Council states that this is also personal data and that their disclosure can cause harmful consequences for an interest that is greater than the public's interest in knowing that information.

The Agency for Personal Data Protection and Free Access to Information did not reply to the appeal of NGO MANS against this decision of the Prosecutorial Council within the legally prescribed deadline, therefore the Administrative Court of Montenegro filed a lawsuit against the so-called silence of the administration.

RESULTS OF THE PROSECUTOR'S OFFICE REGARDING CONFISCATION OF PROPERTY – SECRET

The State Prosecutor's Office hides information from the public about the results of the financial investigations conducted by the State Prosecutor's Office and its success in combating the most serious forms of crime.

Namely, the High State Prosecutor's Office in Podgorica refused to submit to MANS a decision on temporary and permanent seizure of property (confiscation of property). The Prosecution's decision [64] states that the Law on confiscation of pecuniary gain acquired through criminal activity and the Criminal Procedure Code stipulate that decisions on temporary and permanent confiscation of property are adopted by the court at the proposal of the state prosecutor, so the request is denied because access to information requires or involves the compilation of new information.

However, pursuant to the Law on seizure and confiscation of pecuniary gain derived from criminal activity, [65] decisions on temporary and permanent confiscation of property are submitted to the state prosecutor. Thus, it is information that was made by the court, but it was submitted to the state prosecution and which are in the possession of the prosecution. Pursuant to the Law on Free Access to Information [66], the information in the possession of the authorities is the factual possession of the requested information by the authorities (own information, information provided by another authority or by a third party), regardless of the basis and method of acquiring it.

[63] Decision no.05-1-65-2/18 of 21/11/2018
[64] Decision no. 3/19 of 01/03/2019
[65] Article Član 26, paragraph 1 and 41, paragraph 3.
[66] Article 9, item 2.

IV

INITIATIVES FOR IMPROVING LAWS AND PRACTICES

- New criminal offenses
- Secret surveillance measures
- Plea agreements
- Access to court verdicts

In order to improve the legal framework and create conditions for more efficient suppression of the most serious types of crime and at the same time protection of human rights and fundamental freedoms, MANS submitted initiatives for amendments to the Criminal Code and the Criminal Procedure Code.

4.1. Introducing of new criminal offenses

Following the example of comparative experiences, MANS submitted the initiative for amendments to the Criminal Code that would stipulate new criminal offenses in order to combat corruption. The new criminal offenses would deal with areas of public procurement, privatization and bankruptcy, which are areas of high risk of corruption.

Also, in accordance with the United Nations Convention against Corruption ratified by Montenegro, as well as recommendations of the European Commission, the United States and international experts, we have proposed the criminalization of illicit enrichment. This crime would significantly contribute to the suppression of corruption in the public sector and more effective proving of these cases by the State Prosecutor's Office. [67]

4.2. Better regulation of secret surveillance measures

The Constitutional Court annulled the provisions of the Criminal Procedure Code which stipulated that certain measures of secret surveillance can be determined by the state prosecutor. However, more than a year after the Constitutional Court's decision was adopted, the Criminal Procedure Code has not been amended and aligned with the decision of the Constitutional Court, and now we have a legal gap in the Criminal Procedure Code because it is not stipulated whose jurisdiction is to determine the measures of secret surveillance previously determined by the state prosecutor. This undoubtedly must be within the jurisdiction of the court, but the Criminal Procedure Code does not currently prescribe it, so MANS in this regard submitted an initiative to amend the CPC.

Also, duration of the measures of secret surveillance and the possibility of their extension is controversial in terms of compliance with the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to which the restriction of human rights and freedoms must be reduced to the minimum necessary time and by which citizens must have the possibility of effective control of implementation of these measures in practice. Therefore, we initiated the amendments to the CPC, which would reduce the duration of the measures of secret surveillance and condition their extension by the results in their implementation. [68]

Conditions for determining secret surveillance measures

The Code of Criminal Procedure prescribes the procedure for the determination and implementation of secret surveillance measures (SSM). [69]

The first condition for the use of those measures is that evidence cannot be obtained in another manner or their obtaining would require a disproportional risk or endangering the lives of people.

The second condition is if grounds for suspicion exist that a person has individually or in complicity with others committed, is committing or is preparing to commit criminal offences. [70]

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[67] Initiative submitted to the Ministry of Justice on April 15, 2019, attached in Annex 1
[68] Initiative submitted to the Ministry of Justice on April 15, 2019, attached in Annex 2
[69] Criminal Procedure Code, Articles 157 to 162 of CPC
[70] Criminal Procedure Code, Article 157. Paragraph 1 of CPC
1) for which a prison sentence of ten years or a more severe penalty may be imposed;
2) having elements of organized crime;
3) causing false bankruptcy, abuse of assessment, passive bribery, active bribery, trading in influence, abuse of an official position, as well as abuse of powers in economy, and fraud in the conduct of an official duty with prescribed imprisonment sentence of eight years or a more severe sentence;
4) abduction, extortion, blackmail, meditation in prostitution, displaying pornographic material, usury, tax and contributions, evasion, smuggling, unlawful processing, disposal and storing of dangerous substances, attack on a person acting in an official capacity during performance on an official duty, obstruction of evidence, criminal association, disclosure of confidential information, breach of confidentiality of proceedings, money laundering, counterfeiting of money, forgery of documents, falsification of official documents, making, procuring or providing to others means and materials for forging, participation in foreign armed formations, arranging outcomes of competitions., unlawful keeping of weapons and explosions, illegal crossing of the state border and smuggling in human beings
5) against the security of computer data.

Jurisdiction for determining secret surveillance measures

On the reasoned proposal of the state prosecutor, the investigating judge may determine the following measures of secret control:

1) Secret surveillance and recording of telephone conversations and other distance communication;
2) Interception, collection and recording of computer data;
3) Entry into premises for the purpose of secret photographing and video and audio recording in premises;
4) Secret following and video and audio recording of persons and objects. [71]

4.3. Guidelines for sentencing in plea agreements

Due to the uneven and inappropriately lenient penal policy in cases under the plea agreement, MANS suggested that the Supreme Court of Montenegro, in accordance with legal authority, take the principle legal position and establish binding guidelines to the courts when deciding in these cases. The principle legal position and guidelines of the Supreme Court should equate the criminal policy and prevent the continuation of the practice of imposing sentences that are significantly below the statutory minimum and prescribed for minor offenses for the most serious crimes of corruption that cause multi-million damage to public funds. [72]

4.4. Access to court verdicts for corruption and organized crime

The Rulebook on the Anonymization of data in Court Decisions, adopted in 2011 by the President of the Supreme Court of Montenegro, enables the so called anonymization of court decisions prior to their publication on the website of the courts, and in this way the information from the final court decisions adopted in the trials that were public is concealed from the public.

Thus, according to this Rulebook, the public is hiding not only who, for example, are those who have been legally convicted of an international smuggling of narcotics, but also which companies have been used for committing of these criminal offenses and for money laundering acquired by drug trafficking, which ships were used for drug smuggling, through which ports, etc., etc.

Based on this Rulebook, we have noted cases hidden from the public, the identity of judges that have been tried in certain proceedings and in one case it is even hidden how the Supreme Court, headed by its president, Vesna Medenica, mitigated the sentences imposed for high corruption. The concealment of these data further undermines public trust in the work of the judiciary and raises a number of doubts in the lawful and impartial work of the courts.

The Rulebook on the Anonymization of data in Court Decisions violates the principle of publicity that should ensure public oversight of public authority bodies, including the court, all in terms of constitutional principle of sovereignty on the direct exercise of power by citizens.

Therefore, MANS submitted an initiative to the Constitutional Court of Montenegro for reviewing the constitutionality and legality of the Rulebook on the Anonymization of data in Court Decisions. [73]

[71] Criminal Procedure Code 157, Paragraph 1, items 1 to 4 of CPC
[72] Initiative submitted to the Supreme Court of Montenegro on April 11, 2019, attached in the Annex 3
[73] Initiative submitted to the Constitutional Court of Montenegro on November 12, 2018, attached in Annex 4

Annex 1

Initiative to the Ministry of Justice of Montenegro - amendments to the Criminal Code to impose new criminal offences aimed at suppression of corruption.

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GOVERNMENT OF MONTENEGRO
MINISTRY OF JUSTICE
Attn: Minister Zoran Pažin

Dear Mr. Pažin,

In order to improve the legal framework and create conditions for more efficient suppression of the most serious types of crime as well as protection of human rights and fundamental freedoms, we are submitting the

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for amendments to the Criminal Code in order to prescribe new criminal offences aimed at suppression of corruption. The new criminal offences would address the areas of public procurement, privatization and bankruptcy, which are the areas of high risk of corruption.

In addition, in line with the United Nations Convention against Corruption ratified by Montenegro, as well as recommendations of the European Commission, the United States and international experts, we also propose the criminalization of illicit enrichment. This criminal offence would significantly contribute to the suppression of corruption in the public sector and more effective proving of these cases by the State Prosecutor's Office.

R e a s o n i n g

CRIMINAL CODE

The areas of public procurement, privatization and bankruptcy carry a high degree of risk for corruption and abuse to the detriment of public funds.

In cases of abuses in public procurement procedures and privatization, damage to public funds may be caused by the actions of bidders and/or the actions of the contracting authority. However, the prescribed criminal offences do not provide sufficient grounds for prosecution and sanctioning of persons who commit such abuses, especially of officials on the side of the contracting authority with public funds at its disposal, and whose actions therefore constitute corruption in the public sector. Also, there are no final court convictions for abuses in privatization procedures in court practice, while final verdicts for abuses in public procurement procedures are rare.

When it comes to criminal offences of corruption in bankruptcy proceedings, the Criminal Code of Montenegro prescribes two criminal offences: causing bankruptcy [1] and bankruptcy fraud. [2] The perpetrator of both crimes can only be a responsible person in a company or other business entity and it is the corruption in the private sector. In both cases, the offence is committed before the opening of the bankruptcy procedure and is followed by a bankruptcy procedure.

However, the Criminal Code does not contain criminal offences that would be committed during the conduct of bankruptcy proceedings. The Criminal Code does not contain criminal offences where the perpetrator is a person in the bodies of bankruptcy proceedings. The Criminal Code does not contain criminal offences in which the perpetrator is an official person in bankruptcy proceedings, or a bankruptcy administrator or a bankruptcy judge. There are numerous bankruptcy proceedings initiated and conducted against state-owned entities in which the state is one of the creditors. In such proceedings, the insolvency practitioner has great authorities, especially in the case of the sale of assets of the bankruptcy debtor. In these proceedings, the insolvency practitioner has public funds or state property at his disposal.

Legal limitations in combating corruption in areas that are particularly at risk from the point of view of corruption should, as a rule, cause a reaction of the legislator in order to suppress this type of crime. However, although the Criminal Code of Montenegro has been amended 12 times since its adoption, ten times by the amendments to the text of the Code and two times by passing other laws, no amendments were aimed at suppression of corruption in the fields of public procurement, privatization and bankruptcy. Therefore, not one out of twelve amendments to the Criminal Code did criminalize any new criminal offence of corruption in these high-risk areas where state funds are spent in large amounts.

Therefore, based on comparative experiences, we believe that is necessary to amend the Criminal Code with new criminal offences.

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[1] Article 273 of the Criminal Code of Montenegro
[2] Article 274 of the Criminal Code of Montenegro

In Chapter 23 of the Criminal Code, where criminal offences against payment transactions and business operations are prescribed, we propose prescribing of the following criminal offences:

Abuse connected to public procurement

Article 272a

(1) A person who in relation to public procurement submits a proposal based on false information, or negotiates with other bidders contrary to law, or undertakes other activities in order to influence the decision-making of the public procurement contractor,

shall be punished by a prison term from six months to five years.

(2) The punishment referred to in paragraph 1 of this Article shall also be imposed on a person in the public procurement contractor who, by abusing his office or authority, by violating his authority or by non-performing of his duty violates the law or other regulations on public procurement, thereby causing damage to public funds.

(3) The punishment referred to in paragraph 1 of this Article shall also be imposed on a person who puts a legal entity in a more favourable position by adjusting the terms of the public procurement or by entering into a contract with a bidder whose offer is contrary to the conditions of the tender documentation.

(4) The punishment referred to in paragraph 1 of this Article shall also be imposed on a person who, by abusing his office or authority, by exceeding the limits of his authority, or by non-performing his duty acquires gain by giving, taking over or contracting jobs for his own legal entity or legal entities of persons with whom he is related

(5) If the offence referred to in paragraphs 1 to 4 of this Article is committed in connection with public procurement, the value of which exceeds the amount of one hundred thousand Euros,

the perpetrator shall be punished by a prison term from one to ten years.

(6) The perpetrator referred to in paragraph 1 of this Article who voluntarily reveals that the offer is based on false information or an unlawful agreement with other bidders, or that he has undertaken other actions with the intention to influence the decision-making of the contracting authority before it makes a decision on the award of a contract, may be released.

Paragraphs 1 and 2 describe two acts of commission of this criminal offence, depending on whether the perpetrator is on the side of the bidder in the public procurement procedure or a person with the public procurement contractor.

In first case, a person who participates in the public procurement procedure with the intent to influence the decision-making of the public procurement contractor shall be punished by a prison term from six months to five years if he:

- submits a proposal based on false information;
- negotiates with other bidders contrary to law or
- undertakes other activities

In second case, the same punishment shall be imposed on a responsible person or official person in the public procurement contractor who, by violating laws or other regulations, causes damage to public funds by

- abusing his office or authorities;
- exceeding the limits of his authority or
- non-performing his duty

These two offences are prescribed based on the comparative experience of Serbia, where these criminal offences have been prescribed in the Criminal Code since 2012.

Paragraphs 3 and 4 describe two more acts of committing a criminal offence.

The first offence is made by an official or responsible person who puts a legal entity in a more favourable position by adjusting the terms of the public procurement or by concluding a contract with the bidder whose offer is contrary to the conditions in the tender documentation. Thus, this provision incriminates the so-called fixing of jobs to certain entities, i.e. adjusting the conditions of public procurement to a particular entity or concluding a contract with an entity whose tender is contrary to the conditions of public procurement.

The second offence is made by an official or responsible person who, by exercising his office or authority, by overstepping the limit of his authority, or by not-performing of his duty, acquires gain by giving, taking over or contracting jobs for his own legal entity or legal entities of persons with whom he is related. In this case, the abuse that allows assigning jobs to oneself or related people is incriminated.

The actions described in paragraphs 3 and 4 are prescribed based on the comparative experience of Croatia which criminalizes these actions in Article 292 of the Criminal Code.

Paragraph 5 prescribes more severe form of this criminal offence for which a prison sentence of one to ten years is prescribed. This severe form is prescribed in relation to the value of public procurement and exists in case of abuse of public procurement, the value of which exceeds the amount of one hundred thousand Euros.

Paragraph 6 provides for the possibility of exemption from punishment for the perpetrator of the offence referred to in paragraph 1 who reveals the offence before the decision on the award of the contract is made.

Abuse in the privatization process

Article 272b

(1) A person who in the process of privatization, by submitting a proposal based on false information or by negotiating with other bidders in the privatization process contrary to law or by undertaking other illegal activities influences the decision-making of the organization responsible for implementation of the privatization process

shall be punished by a prison term from six months to five years.

(2) The punishment referred to in Paragraph 1 of this Article shall also be imposed on an official who, by abusing his office or authority, by exceeding the limits of his authority or by non-performing of his duty violates the law or other regulations on privatisation, thereby causing damage to funds or diminishing the assets that are subject to privatization.

(3) If the offence from Paragraphs 1 and 2 of this Article is committed in connection with the privatization of capital or assets whose estimated value exceeds the amount of 1 million Euros,

the perpetrator shall be punished by a prison term from one to ten years

This article prescribes two acts of committing of a criminal offence, depending on whether the perpetrator is a participant in the privatization procedure or an official person.

In first case, during the privatization process, a person who influences the course of the process or decision-making of the organization responsible for implementation of the privatization process or decision-making of the organization responsible for the implementation of the privatization procedure, by:

- submitting a proposal based on false information
- negotiating with other bidders in the privatization process contrary to law or
- undertaking other illegal activities

In second case, the same punishment shall be imposed on a an official who violates the law or other regulations on privatisation, thereby causing damage to funds or diminishing the assets that are subject to privatization by:

- abusing his office or authorities;
- exceeding the limits of his authority or
- non-performing of his duty

Paragraph 3 prescribes more severe form of this criminal offence for which a prison term from one to ten years is prescribed. This more severe form is prescribed in relation to the privatization of capital or assets whose estimated value exceeds the amount of 1 million Euros.

Receiving or Giving Bribes during Bankruptcy Proceedings

Article 274a

(1) A creditor or member of the board of creditors who solicits or accepts a bribe or accepts an offer or promise of a bribe for himself or herself or another in order to vote a certain way or fail to vote or act in some other way for the purpose of causing damage to at least one creditor in bankruptcy proceedings,

shall be punished by imprisonment from two to twelve years.

(2) If the offence referred to in Paragraph 1 is committed by the insolvency practitioner, he or she shall be punished by imprisonment from three to fifteen years.

(3) Whoever offers, promises or confers a bribe to a creditor, member of the board of creditors, insolvency practitioner or bankruptcy judge for the commission of the criminal offence referred to in paragraph 1 or 2 of this Article,

shall be punished by imprisonment from one to eight years.

Paragraph 1 prescribes a punishment ranging from two to twelve years of imprisonment for a creditor or a member of the board of creditors who accepts a bribe in the bankruptcy proceedings. Paragraph 2 prescribes a more severe punishment for the insolvency practitioner or bankruptcy judge bribed in bankruptcy proceedings ranging from three to fifteen years of imprisonment, while paragraph 3 provides for a sentence of imprisonment from one to eight years for a person who offers bribe in the bankruptcy proceedings.

The criminal offence was proposed in accordance with the experience of Croatia that criminalizes this offence in Article 251 of the Criminal Code, while punishments are proposed in accordance with the punishments prescribed in the criminal offences of receiving and giving bribes.

Illicit enrichment

Also, in Title 34 of the Criminal Code, where criminal offences against official duty are prescribed, we suggest that the Ministry first make a draft law that would prescribe the criminal offence of Illicit enrichment.

Criminalization of Illicit enrichment of public officials is in accordance with Article 20 of the United Nations Convention against Corruption ratified by Montenegro [3], as well as recommendations of the European Commission, the United States and international experts. By prescribing this criminal offence, the emphasis is placed on public officials as perpetrators of criminal offences, as stated in the United Nations Convention against Corruption, which specifically speaks of the sanctioning of public officials who are unlawfully enriched. Thus, this criminal act suppresses the so-called high corruption, i.e. corruption whose actors are public officials.

[3] Illicit enrichment has so far been criminalized in as many as 44 countries that ratified the United Nations Convention to Combat Corruption, and concrete cases show that this has led to significantly better results in the fight against corruption

In April 2012, British expert Rupert Vining, at the invitation and request of the Government of Montenegro, made an analysis of the possibility of imposing illicit enrichment as a special criminal offence in Montenegrin legislation. The analysis found that there were serious problems of corruption in Montenegro, that they were above the level recognized in the EU countries and that it coincided with significant examples of unexplained enrichment of public officials. The analysis gave a positive answer to the question of the possibility of imposing illicit enrichment as a special criminal offence in Montenegro's legislation.

However, although it hired an international expert to conduct an analysis of the possibility of imposing illicit enrichment as a special criminal offence, since the development of this analysis, which gave a positive response to this possibility in April 2012, the executive authorities have been opposing the criminalization of illicit enrichment. Any proposal to prescribe this criminal offence in the amendments to the Criminal Code was rejected as well. Such approach shows a clear lack of political will because incrimination and sanctioning of illegal enrichment is purely political decision or choice, not a question of legal compatibility.

We believe that problems Montenegro has with corruption require the reaction of the legislator and prescribing of the criminal offence of illicit enrichment, as recommended by the European Commission in its Progress Report on Montenegro. Incrimination against illicit enrichment would contribute to the fight against corruption in Montenegro and more effective proving of these cases by the State Prosecutor's Office.

Numerous countries have introduced the illicit enrichment of public officials as a criminal offence by linking crime with property declarations and conflicts of interest programs. Practice has shown that property declarations and conflicts of interest have no impact on the detection of illicit enrichment, and that all officials that might unlawfully become rich can without any delay retain the property they have acquired in an unlawful manner. Likewise, public officials have so far without any consequences given false information in declarations on property and conflict of interest.

The European Court of Human Rights (case of John Murray v. The United Kingdom) considers that the law can enable to draw common sense conclusions from the silence of the Accused, when the prosecution charges the accused with an accusation requesting an explanation. In this case, the evidence presented during the trial constituted a strong charge against the Accused, so the European Court considered that the drawing of such conclusions, over which there were strong procedural guarantees, did not constitute a violation of the Article 6 in the circumstances of the case. The European Court believes that drawing conclusions from the silence of the Accused may be permitted in a system where courts freely evaluate the evidence presented, provided that the evidence is such that the only reasonable conclusion that can be drawn from the Accused's silence is that he has no answer to what he is charged for.

In that sense, it is quite logical and common sense conclusion that a public official with multi-million dollar property and monthly income of several hundred and several thousand Euros has been illicitly enriched. In such cases, the burden of proving the legality of property may be transferred to such person i.e. public official and, according to the stances of the European Court of Human Rights, this does not violate neither presumption of innocence, nor the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Also, confiscation of property when there is sufficient indirect evidence, such as a major gap between the lifestyle of the accused and his apparent or reported income, indicating that the property comes from the illegal activities or their reinvestment, is in accordance with Article 1 of the Protocol no. 1 to the Convention, which entitles the State to adopt "the laws it deems necessary to regulate the use of property in accordance with the general interest" (see AGOSI v. The United Kingdom judgment of 24 October 1986, Series A no. 108, pp. 17, paragraph 51 et seq., and the Handyside v. The United Kingdom judgment of 7 December 1976, Series A No. 24, pages 29 and 30, paragraphs 62-63).

Furthermore, the European Court of Human Rights considers it is legitimate and in the public interest to confiscate the property by which it seeks to prevent the use of property which is illegal and in a manner dangerous to society, for which it has not been established that was acquired legally (see Raimondo v. Italy judgment of 22 February 1994, Series A No. 281-A, pp. 17, par. 30 and Commission decision in M. v. Italy case, p. 100).

In Butler v. The United Kingdom case, the European Court reminds that in the criminal proceedings against the accused it is not inconsistent with the requirements of a fair trial that the burden of proof be transferred to the defence (see in connection with the conclusions drawn from the silence of the Accused, Condron v. The United Kingdom No. 35718 97, para. 56, ECHR 2000-IX), nor the fairness of the trial was questioned by the Prosecution relying on the presumption of facts or legal norms that are detrimental to the Accused, provided that these assumptions are within reasonable limits taking into account the importance of the subject matter and that they advocate the rights of the defence (see Salabiaku v. France judgment of 7 October 1988, Series A, No. 141-A, page 16, paragraph 28, Pham Hoang v. France judgment of 25 September 1992, Series A No. 243, pp. 21, paragraph 33).

Therefore, it is undisputed that the presumption of innocence of a public official who, for example, owns multi-million dollar assets and whose monthly income amounts to several hundred or maybe several thousand Euros is not violated, if the burden of proving the legality of that property is transferred to him.

In addition, the Stabilisation and Association Parliamentary Committee (SAPC) in declaration adopted at the Strasbourg meeting reiterated its support to the Parliament of Montenegro to prescribe illicit enrichment as a criminal offence, in line with the European Commission (EC) recommendations of 2018. According to the declaration of this joint committee of the Montenegrin and European Parliament, the European Commission's proposal to punish illicit enrichment of public officials more severely has been re-established.

On behalf of submitter of the initiative of NGO MANS:

Vanja Ćalović Marković, Executive Director

Annex 2

Initiative to the Ministry of Justice – for amendments to the Criminal Procedure Code – secret surveillance measures

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GOVERNMENT OF MONTENEGRO
MINISTRY OF JUSTICE
Attn: Minister Zoran Pažin

Dear Mr. Pažin,

In order to improve the legal framework and create conditions for more efficient suppression of the most serious types of crime as well as protection of human rights and fundamental freedoms, we are submitting the

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for amendments to the Criminal Procedure Code in order to eliminate the legal void created by the decision of the Constitutional Court, which terminated the provision on jurisdiction of the State Prosecutor's Office for the establishment of measures of secret surveillance, which would reduce the duration of the measures of secret surveillance and whose duration would be conditioned by the results in their implementation.

R e a s o n i n g

CRIMINAL PROCEDURE CODE

On 26/02/2018, the Constitutional Court of Montenegro issued a decision [1] by which it abolished the provision of the Criminal Procedure Code [2] in part which stipulated that the measures of secret surveillance should be determined by a decree of the state prosecutor, upon the proposal of an authorized police officer or ex officio.

This prescribing was contrary to the provisions of the Constitution of Montenegro and the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to which such measures affecting fundamental human rights can only be abolished by the court.

[1] U-I no.5/13
[2] Article 159, Paragraph 1

However, since this provision was abolished, the Criminal Procedure Code has not been amended. Thus, now there is a legal void, that is, there is no jurisdiction for determining the following measures of secret surveillance:

1) simulated purchase of objects and persons or simulated bribe-giving and simulated bribe taking;
2) providing simulated business services or concluding simulated legal transactions;
3) establishing of fictitious business;
4) monitoring the transportation and delivery of the object of the criminal offence and
5) hiring disguised investigator and associate.

Therefore, we propose to amend the provision of Article 159, paragraph 1, in a way to read:

"Measures referred to in Article 157 of this Code, upon reasoned proposal of the state prosecutor, shall be determined by the investigative judge in a written order." The reasoned proposal shall be submitted in a sealed envelope with a note SSM - secret surveillance measures"

Duration of SSM

All measures of secret surveillance, except simulated purchase of objects or persons and simulated giving and taking of bribe and providing simulated business services or concluding simulated legal transactions, can only last as long as necessary, no longer than 4 months, and for justified reasons, can be extended for 18 more months. [3] Extension of secret surveillance measures is not conditioned by the fact that their implementation in the first four months yielded any results. Thus, it is possible to continue the measures of secret surveillance, although no evidence has been collected in four months of their implementation.

By 15/08/2015, maximum duration of the secret surveillance measures was up to seven months (the basic term of four months and the possibility of its extension for another three months). According to the amendments to the Criminal Procedure Code that have been into force since 15/08/2015 [4], this maximum period was extended to 18 months. So now, after the first deadline, which has a primary character and after which the SSM could only be extended in exceptional cases, SSM can be extended within a deadline of a secondary character, for a period which is three and a half times longer than the first deadline for which SSM are specified.

This decision is also controversial in terms of compliance with the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms, according to which the limitation of human rights and freedoms must be reduced to the minimum necessary time and by which citizens must have the ability to effectively control the implementation of these measures in practice.

[3] Simulated purchase of objects or persons and simulated bribe-giving and bribe-taking and providing of simulated business services or concluding simulated legal transactions, by nature, can only refer to one simulated act, and any subsequent proposal to take this measure against the same person must contain reasons that justify re-taking of this measure.
[4] "Official Gazette of Montenegro" no. 35/15 of 07/07/2015

In the explanation of these amendments to the Criminal Procedure Code, the Government only stated that the previous SSM duration "made the collection of evidence significantly difficult". It is unclear on the basis of which an assessment was made that the longer duration would give better results in practice. The efficiency of the State Prosecutor's Office in collecting the evidence by the use of secret surveillance measures cannot be evaluated only in relation to duration of these measures. If such logic is accepted, then some subsequent amendments to the Criminal Procedure Code could stipulate that the SSM may last for an even longer period or even be implemented for an unlimited duration only because their implementation in a given period "makes collecting of the evidence significantly difficult". However, in addition to this explanation of the Government, after three years of implementation of the new law, there has been no new case in practice in which this amendment to the law contributed to better collecting of the evidence, prosecution and passing a convicting verdict for some of the most serious crimes.

The Criminal Procedure Code also prescribes that, if the measures of secret surveillance were undertaken in contravention to the provisions of the present Code or in contravention to the order of the investigative judge, the court verdict shall not be founded on the collected information. [5]

Ratio legis of such detailed prescribing when it comes to determining secret surveillance measures is primarily in strengthening the evidence credibility of the material gathered by these measures, but also in allowing control (primarily by the defence) and preventing illegal and arbitrary interference with basic human rights.

Therefore, we believe that duration of the secret surveillance measures should be reduced, and their prolongation conditioned if their implementation in the first four months yielded results, i.e. the possibility of their prolongation should be excluded if they do not yield results in the first four months.

COMPARATIVE EXPERIENCES

CROATIA

Duration

Secret surveillance measures are determined for up to three months. Upon the proposal of the State Prosecutor, the investigating judge may extend these measures for another three months if they give results and if there is a reason to continue with their implementation in order to collect evidence. After a period of six months, for the criminal offences referred to in Article 334, Item 1 and 2 of the Criminal Procedure Code [6], the investigating judge may prolong the measures for a further term of six months. [7]

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[5] Criminal Procedure Code, Article 161 Paragraph 1
[6] Article 334 Item 1 and 2 stipulates:
Special collection of evidence referred to in Article 332 paragraph 1 of this Law may be determined for the following criminal offenses under the Criminal Code:
1) war crimes (Article 91, paragraph 2), terrorism (Article 97, paragraphs 1, 2 and 3), terrorist financing (Article 98), terrorism training (Article 101), terrorist association (Article 102), slavery (Article 105), trafficking in human beings (Article 106), trafficking in parts of the human body and human torments (Article 107), unlawful deprivation of liberty (article 136, paragraph 4), abduction (Article 137, paragraph 3), sexual abuse of a child under the age of fifteen (Article 158), child prostitution (Article 162, paragraphs 1 and 3), exploitation of children for pornography (Article 163, paragraphs 2 and 3), heavy criminal offenses of sexual abuse and exploitation of the child (Article 166), money laundering (Article 265, paragraph 4), abuse of office and powers (Article 291, paragraph 2) if the offense was committed by an official, passive bribery (Article 293) if the offense was committed by an official, trading in influence (Article 295) if the offense was committed by an official, (Article 328), committing a criminal offense within the confines of a criminal organization (Article 329, paragraph 1, items 3 to 6), the murder of a person under international protection (Article 352), the kidnapping of a person under international protection (Article 353), for Criminal Offenses against the Republic of Croatia (Chapter XXXII) and against the Armed Forces of the Republic of Croatia (Chapter XXXIV) for which imprisonment for at least five years is prescribed and for all other offenses punishable by a long-term imprisonment, 2) genocide (article 88, paragraph 3), crime of aggression (Article 89, paragraphs 2 and 3), commander responsibility (Article 96), recruitment for terrorism (Article 100), preparation of criminal offenses against values protected by international law and other cruel, inhuman or degrading treatment or punishment (Article 104) if committed at the expense of the child, murder (Article 110), unlawful seizure of liberty (Article 136, paragraph 3), abduction (Article 137), prostitution (Article 157 paragraph 2), sexual abuse of a child older than fifteen (Article 159), luring children to meet sexual needs (Article 161), child prostitution (Article 162) pornography (Article 163), exploitation of children for pornographic performances (Article 164), abduction of a child (Article 174, paragraph 3), unauthorized production and trafficking of drugs (Article 190, paragraphs 2, 3 and 4), heavy criminal offenses against general security (Article 222), an attack on an aircraft, a ship or a stationary platform (Article 223), robbery (Article 230 paragraph 2), extortion (Article 243, paragraphs 4, 5 and 6), accepting bribery in business operations (Article 257), subsidized fraud (Article 258), money laundering (Article 265), counterfeiting of money (Article 274), misuse of the public procurement procedure (Article 254) , abuse of office and powers (Article 291), unlawful favouring (Article 292), passive bribery (Article 293), active bribery (Article 294, paragraph 1), trading in influence (Article 295), Illegal entrance, Movement and residence in the Republic of Croatia (Article 326, paragraph 2), and the perpetration of a criminal offense within the Criminal Association (Article 329)
[7] Article 335 Paragraph 3 of the Criminal Procedure Code

Exceptionally, for the offences referred to in Article 334, paragraph 1 of the Criminal Procedure Act, measures may be extended for another six months. Therefore, the maximum duration of a measure of 18 months is envisaged only exceptionally for certain criminal offences and it is conditioned that their implementation gave results already in the first four months.

SERBIA

Duration

Covert interception of communications, covert surveillance and recording and simulated deals may take three months, and can be extended for another three months due to the need for further evidence collection. For the criminal offences for which the Special Prosecutor's Office has been assigned special jurisdiction [8] (which corresponds to the Special Prosecutor's Office in Montenegro), these measures can be additionally extended no more than twice in duration of three months (a total of 12 months). The measure of computer search of data can also last three months, and because of the necessity of further evidence collection, it can be extensively extended not more than two times in duration of three months (a total of 9 months).

Therefore, maximum duration of the measures of secret surveillance of 12 months is prescribed exceptionally for the most serious crimes that are within the competence of the special prosecution.

On behalf of submitter of the initiative of NGO MANS:

Vanja Ćalović Marković, Executive Director

[8] Article 162 Paragraph 1 Item 1 of the Criminal Procedure Code

Annex 3

Initiative to the Supreme Court - Guidelines for sentencing the plea agreements

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SUPREME COURT OF MONTENEGRO
GENERAL SESSION OF THE SUPREME COURT OF MONTENEGRO
Presidents of the Supreme Court of Montenegro

Due to the highly uneven and inappropriately lenient penal policy of courts, we are submitting

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for taking a general legal position in order for the Supreme Court of Montenegro, pursuant to Articles 25 and 26 of the Law on Courts, to ex officio consider the issue of penal policy in cases under the plea agreement and take a general legal position which will give the courts guidelines for deciding on the acceptance the sanctions that the State Prosecutor's Office agrees with the defendants.

R e a s o n i n g

Sentencing in cases of plea agreements

Proper determining of the factual state and proper punishment based on the factual state established by the evidence examined is one of the basic tasks of the court in the criminal procedure. This function of the court was seriously jeopardized first by the introduction of the institute of plea agreement into the legal system and then by its implementation in practice where unacceptably lenient punishments for the most serious crimes of corruption and organized crime are adopted.

Namely, when deciding on a plea agreement, the court does not examine evidence that would relate to the circumstances on which the nature and severity of the sentence depends. However, in most cases, the circumstances on which the nature and the amount of the sentence depend are indisputable. Thus, for example, the amount of damage caused which exceeds the statutory limit for a particular criminal offence must be regarded as an aggravating circumstance,[1] and that fact must be part of the plea agreement.

[1] Article 42, Paragraph 3. of the Criminal Code

Likewise, the circumstance of previous (non)conviction is stated in the agreement and in verdicts based on the plea agreements.

Also, the court would have to undoubtedly establish that the plea agreement is in accordance with the interests of justice and that the sanction is in line with the purpose of pronouncing criminal sanctions, and the agreed punishment is in line with the purpose as defined by the Criminal Code. [2]

However, the penal policy of Montenegrin courts in verdicts based on plea agreements is inadequately lenient. Courts accepted exceptionally lenient sentences for high corruption where the state suffered multi-million damage. Also, the most lenient treatment in these proceedings before the courts have public officials.

Verdicts based on plea agreements show that facts which cannot be regarded as mitigating circumstances are considered as a particularly mitigating circumstance to members of a criminal group. Thus, the defendants benefit from the fact that they are fathers to adult children who they do not support and with whom they do not live. In addition, in the case of a long-time senior state official, Svetozar Marović, who admitted he was the head of a criminal organization, the court found to be a particularly mitigating circumstance the fact that he is the father of one of the members of the criminal organization - Miloš Marović, who was also convicted on the plea agreement to a sentence below the prescribed minimum.

In one verdict, Svetozar Marović was sentenced on the limit of the legally prescribed minimum, while in all other verdicts based on a plea agreement concluded with members of the so-called Budva criminal group, the sentence was mitigated below the legally prescribed minimum.

In the case of Budva criminal group, the most commonly agreed and accepted sentence was of six months' imprisonment, and it was a criminal offence for which the law prescribes a minimum sentence of two years.

In the case of Budva criminal group, there were criminal offences that resulted in multi-million pecuniary damage, i.e. the criminal group gained multi-million benefit by committing this offence. In the case where the damage caused or the gain obtained by the commission of a criminal offence exceeds the statutory qualifying limit for the criminal offence in question, that circumstance, pursuant to Article 42, paragraph 3 of the Criminal Code, must be regarded as aggravating. However, in no case against members of the Budva criminal group this circumstance was taken into account at all by the court.

This practice of uncritical acceptance of inappropriate punishments agreed by the State Prosecutor's office with defendants for the most serious criminal offences of corruption and organized crime seriously challenges judicial authority in terms of determining sanctions and sentencing. In proceedings under a plea agreement, the court does not examine the evidence, even those on which the nature and the amount of the sentence depend. We therefore consider it necessary to limit the arbitrariness and the possibility of agreeing and accepting sentences which are at first glance perceived as mocking of the justice and laws by both the expert and the lay public.

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[2] Article 302, Paragraph 8, Item 5 of the Criminal Procedure Code

Experience of the USA

The issue of uneven criminal policy in the United States, from which the institute of plea agreement was taken over into our legislation, was solved by the adoption of the Federal Sentencing Guidelines, which came into force on November 1, 1987. The guidelines were adopted by the Congress in order to alleviate the inconsistencies in the sanctions imposed and to ensure that the defendants for the same crimes are sentenced to approximately the same sentence. Thus, a system of relatively determined sentences with narrow sentence ranges was established, and the judge's job was limited to determining the sentence within the prescribed range.

In the USA, the sentence is determined on the basis of the numerical table. Parameters for punishment are the gravity of the offence and danger of a perpetrator. Criminal acts are ranked by severity on a horizontal scale, and in determination of the gravity of the offence on a horizontal scale, aggravating and mitigating circumstances are taken into account.

The perpetrators are divided into six categories on a vertical scale according to the danger. Their danger depends on the earlier conviction and the type of criminal offences they have been convicted of. The sentence is determined mathematically by looking at the cross-section of the horizontal and vertical scale in the table. The cross-section of these two scales gives a smaller range of prison sentences expressed in months, and thus the court does not have too much space and discretionary powers to impose significantly different sentences in similar cases.

Guidelines provide grounds for mitigating sentences such as significant contributions to detection and proving of other criminal offences and perpetrators and pleading guilty. In this way, the arbitrariness in punishment and the possibility of substantially different punishment of the accused under similar circumstances are limited.

With the abovementioned, we are submitting this initiative for the General Session of the Supreme Court of Montenegro to take the principle legal position according to which the courts would not be able to accept sentences from plea agreements that are below or on the border of the legally prescribed minimum, in case of one or more aggravating circumstances, in particular when the damage caused and the acquired pecuniary gain exceed the legal qualifying limit for the criminal offence in question and in the case of defendants who were previously convicted.

On behalf of submitter of the initiative of NGO MANS:

Vanja Ćalović Marković, Executive Director

Annex 4

Initiative to the Constitutional Court - for reviewing the constitutionality and legality of the Rulebook on the Anonymization of Data in Court Decisions

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CONSTITUTIONAL COURT OF MONTENEGRO

Podgorica

Pursuant to Article 150, Paragraph 1 of the Constitution of Montenegro, NGO MANS submits:

I N I T I A T I V E

for initiating a procedure for assessing the constitutionality and legality of the Rulebook on the Anonymization of Data in Court Decisions Su.I.no.85/2010 of July 19, 2011 by the President of the Supreme Court of Montenegro and published on the website of the Supreme Court of Montenegro (http://sudovi.me/podaci/vrhs/dokumenta/1752.pdf).

The disputed Rulebook regulates the method of anonymization - replacement and omission of data in court decisions that are posted on the website of the Supreme Court of Montenegro within the framework of the "Judicial Practice" programme. The Rulebook prescribes that the decisions of the Supreme Court of Montenegro shall be published on the Court's web site in whole, but data on the parties, their representatives or proxies, on the basis of which they can be identified, are replaced or omitted (Article 1).

Article 2 of the disputed Rulebook prescribes:

In civil and commercial matters, the anonymization of data contained in court decisions applies on the:

a) parties (natural and legal persons and participants that are recognized as parties under a special law);
b) parties' proxies (attorneys, interns and other natural persons);
c) legal and statutory representatives, shareholders, company members and related persons, managing board members, representatives of employees, etc.;
d) interveners, bankruptcy creditors and bankruptcy debtors;
e) executive creditors and executive debtors;
f) proponents and their opponents;
g) testators, heirs, witnesses, relatives, close persons and neighbours of the parties;
h) court experts, court interpreters, social workers, psychologists, pedagogues, special needs educationalists, physicians and other persons who participate in the proceedings within their official capacity.

In criminal matters, the anonymization of data contained in court decisions applies on the:

a) suspect, accused, defendant, convicted person, subsidiary prosecutor, private prosecutor, injured party, defence counsel, proxy, legal representative, witness, friend, neighbour of the party;
b) court experts, court interpreters, social workers, psychologists, pedagogues, special needs educationalists, physicians and other persons who participate in the proceedings in their official capacity.

In administrative matters, the anonymization of data contained in court decisions applies on the:

a) plaintiff, respondent, first instance authority, interested party in the administrative proceedings and in the administrative dispute, party in whose favour the law was violated when the lawsuit is filed by the public prosecutor or another competent authority, person requesting an extraordinary review of a court decision, person requesting a retrial, participants in a public tender;
b) proxies, legal representatives, witnesses,
c) expert witnesses, court interpreters, social workers, psychologists, pedagogues, special needs educationalists, physicians and other persons who participate in the administrative and administrative legal proceedings within their official capacity.

Under the Rules, in reasoning of all court decisions anonymization should be applied on evidence that represents an official or business secret.

Furthermore, the disputed Rulebook (Article 3) prescribes data that is to be anonymized, this is:
- the name and family name of a natural person;
- name and seat of a legal person, institution, association, trade union, etc.;
- address (place of temporary or permanent residence, seat);
- date and place of birth;
- citizen's unique identification number;
- tax identification number;
- number of the ID card, passport, driver's license and other identity documents, as well as the vehicle registration number;
- e-mail and web address.

Article 4 of the disputed Rulebook prescribes the method of anonymization.

The Constitution of Montenegro prescribes that constitutionality and legality shall be protected by the Constitutional Court (Article 11, Paragraph 6); that the law, in accordance with the Constitution shall regulate the manner of exercise of human rights and liberties, when this is necessary for their exercise, the manner of establishment, organization and competences of the authorities and the procedure before those authorities, if so required for their operation (Article 16, Paragraphs 1 and 3); that the right to public trial and the principle of legality cannot be limited (Article 25, Paragraph 2); that everyone shall be deemed innocent until the guilt thereof has been established by an enforceable court decision (Article 35, Paragraph 1); that the hearing before the court shall be public and judgments shall be pronounced publicly and exceptionally, the court may exclude the public from the hearing or one part of the hearing for the reasons necessary in a democratic society, only to the extent necessary: in the interest of morality; public order; when minors are trialed; in order to protect private life of the parties; in marital disputes; in the proceedings related to guardianship or adoption; in order to protect military, business or official secret; and for the protection of security and defence of Montenegro (Article 120) and that the law shall be in conformity with the Constitution and confirmed international agreements, and other regulations shall be in conformity with the Constitution and the law (Article 145).

The Law on Civil Procedure prescribes that: if the law prescribes it, the court may decide that the main hearing shall be closed to the public (Article 5), that the main hearing shall be public (Article 308, Paragraph 1), that the court may exclude the public from the entire main hearing or a part of it, if needed in order to preserve the state official, business or personal secret, or to protect interests of public order or morals, and the court may also exclude the public when the measures for preserving order at the hearing provided by this law cannot ensure the unhindered course of the hearing (Article 309), while the Article 347 stipulates what a written judgement shall contain, and 351 stipulates when and how the court shall correct the judgement.

The Criminal Procedure Code prescribes that the main hearing shall be open to the public (Article 313), and that the public may be excluded from the entire main hearing or any part of it, if that is necessary for keeping information secret, protecting public order, preserving morality, protecting the interests of a minor or protecting the personal or family life of the accused person or the injured party (Article 314). Article 375 prescribes time, place and manner of announcement of the judgment, while Paragraph 4 of this Article stipulates that if the main hearing was in camera, the decision shall always be read out in a public session, while the Panel shall decide on whether the announcement of reasons of the decision shall be closed to the public.

The Law on Administrative Dispute in Article 38 stipulates the content of decision of the Administrative Court of Montenegro, while Article 4 stipulates that that in an administrative dispute not regulated by this Law, the law regulating civil proceedings shall be applied accordingly.

Contrary to the cited constitutional and legal provisions, the President of the Supreme Court of Montenegro adopted the disputed Rulebook which replaces and omits data in judicial decisions from civil, commercial, criminal and administrative areas.

The disputed Rulebook was passed with reference to the provisions of Article 84, Paragraph 2 and Article 101 of the Law on Courts ("Official Gazette of Montenegro" no. 5/02, 49/04 and 22/08) as the legal basis of the adoption. Pursuant to Article 84, paragraph 2 of the then Law on Courts, which is cited as the legal basis for the adoption of the disputed Rulebook, it was prescribed that the president of court shall organise the work in the court, allocate tasks and take measures for orderly and timely performance of tasks in the court, while Article 101 of the same Law prescribed that the administration of the court shall include the activities ensuring orderly and timely work and operations of the court and in particular: internal allocation of tasks in the court; allocation of lay judges; activities related to expert witnesses and court interpreters; considering complaints and applications; managing information system; maintaining prescribed records and reports; the work of registry office and archive office; financial and material operations; handling deposits and notarisation of documents to be used abroad.

Therefore, the provisions of the Law on courts that were valid at the time of passing the disputed Rulebook, as well the provisions of any other regulation, do not give the court president the power to anonymize, i.e. replace and omit data in court decisions from civil, commercial, criminal and administrative authorities.

The President of the Supreme Court of Montenegro overstepped the legal powers with the disputed Rulebook because it prescribed the manner of publishing court decisions. These issues are regulated by special procedural laws, in a manner contrary to what is stipulated by the disputed Rulebook.

From the cited constitutional and legal provisions stems that, in accordance with the Constitution, the law regulates the way in which human rights and freedoms are exercised when it is necessary for their exercising, the manner of establishment, organization and competence of the authorities and the procedure before these bodies; that the principle of the public trial is a rule that can only be excluded exclusively for reasons that are necessary in a democratic society, only to the extent necessary in the interest of morality, public order, when minors are tried, in order to protect private life of the parties, in marital disputes; in the proceedings related to guardianship or adoption, in order to protect military, business or official secrets secret; and for the protection of security and defence of Montenegro and that the law shall be in conformity with the Constitution and confirmed international agreements, and other regulations shall be in conformity with the Constitution and the law.

Contrary to the cited constitutional and legal provisions, the President of the Supreme Court of Montenegro regulated the issues related to human rights and freedoms with the disputed Rulebook as a by-law, limiting the principle of the publicity of the trial and the publication of court decisions arbitrarily and without reason. The disputed Rulebook does not protect human rights and freedoms, instead, data from public prosecutions is concealed, which prevents public access to the work of the court. The disputed Rulebook also protects the interests of persons convicted of criminal offences, including those in the field of high-level organized crime. Thus, for example, it is hidden from the public who are persons legally convicted of international drug trafficking, which companies were used for the commission of these crimes and the laundering of money acquired by drug trafficking, which ships were used for smuggling and through which ports, etc., etc. Hiding these data from the public is contrary to the principle of the rule of law and is not in accordance with the Constitution, the law and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Also, the provision of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to a public hearing when deciding on civil rights and obligations and on a criminal charge, including the public announcement of judgments. Pursuant to the provisions of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the public may be excluded from a procedure in the interests of morality, public order or national security in a democratic society, where the interests of the minor or the protection of the private life of the parties so require, or to an extent that is indispensable in specific circumstances where the public could distort the interests of justice. None of the above grounds for general public restrictions in all court cases exists.

The principle of publicity ensures the control of the public over public authorities, including the court, all in terms of the principle of sovereignty of Article 2 of the Constitution of Montenegro on the direct exercise of power by citizens.

Since publicity of the work is a rule, that is, the principle prescribed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution and the law, thus any exclusion or limitation is an exemption which lays down the obligation to provide clear and convincing reasons, due to which the public is excluded or restricted.

The interests to be served by the public proceedings are not only the interests of the parties in the proceedings, but also the interests of the general public, thus the procedure open only to parties involved does not meet the criteria of Article 6 of the Convention (Kadubec v. Slovakia, 1998 and Malhous v. Czech Republic, 2001).

Therefore, by arbitrary restrictions of the public, without giving reasons and explanations, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution of Montenegro and the law are violated and the public's interest in the lawful conduct of the authorities that perform public authorizations is grossly undermined.

With the disputed Rulebook, the President of the Supreme Court of Montenegro arbitrarily and without explanation overstepped the legal powers and the principle of the public.

The cited Constitutional provision of Article 145 states that the legal order of the state is based on the hierarchy of legal acts, the basis of which constitutes the constitution as a legal act of the highest legal force. According to the principle of conformity of legal regulations was established, the supremacy of the Constitution and the confirmed international agreements in relation to the law, as well as the Constitution and the laws in relation to other regulations. This principle enables the uniqueness and effectiveness of the legal system and is one of the essential elements of the rule of law.

The disputed Rulebook, based on its name, the legal basis, the body that adopted it and the method of its adoption, has the character of a general act in the formal sense and represents the legal rules, i.e. the general legal act, because its content determines the rights and obligations in an abstract manner, i.e. certain relations are defined in a general manner, which gives the disputed document the character of a general legal act. Also, in the material sense, the disputed act does not contain any provision that has the character of an individual legal norm and which determines the rights and obligations of certain entities.

In the disputed Rulebook, the President of the Supreme Court of Montenegro repeatedly overstepped the legal powers by regulating matters from the domain of legislative authority, instead of matters of administrative procedure. Also, the President of the Supreme Court of Montenegro regulated all the matters from the domain of legislative competence in a manner contrary to the law.

From the abovementioned, it stems that the disputed Rulebook on Anonymization of Data in Court Decisions, Su.I.no.85/2010 of April 19, 2011, issued by the President of the Supreme Court of Montenegro and published on the website of the Supreme Court of Montenegro (http: //sudovLme/podaci/vrhs/dokumenta/1752.pdf), is inconsistent with the Constitution and the law, thus I propose that the Constitutional Court accept the initiative, initiate the procedure for reviewing the constitutionality and legality, and after the conducted procedure adopt the:

D E C I S I O N

It is established that the Rulebook on Anonymization of Data in Court Decisions, Su.I.no.85/2010 of April 19, 2011, issued by the President of the Supreme Court of Montenegro and published on the website of the Supreme Court of Montenegro (http://sudovLme/podaci/vrhs/dokumenta/1752.pdf), it is not in accordance with the Constitution and the law, and it ceases to be valid on the day of publication in the Official Gazette of Montenegro.

In Podgorica, 12/11/2018

On behalf of submitter of the initiative of NGO MANS, proxy:

Veselin Radulović, lawyer from Podgorica

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