

STATE CAPTURE

Montenegro National Report
March 2021



**The Network for Affirmation of NGO Sector - NGO
MANS is a non-governmental organization that
fights against corruption and organized crime that
affect Montenegro.**

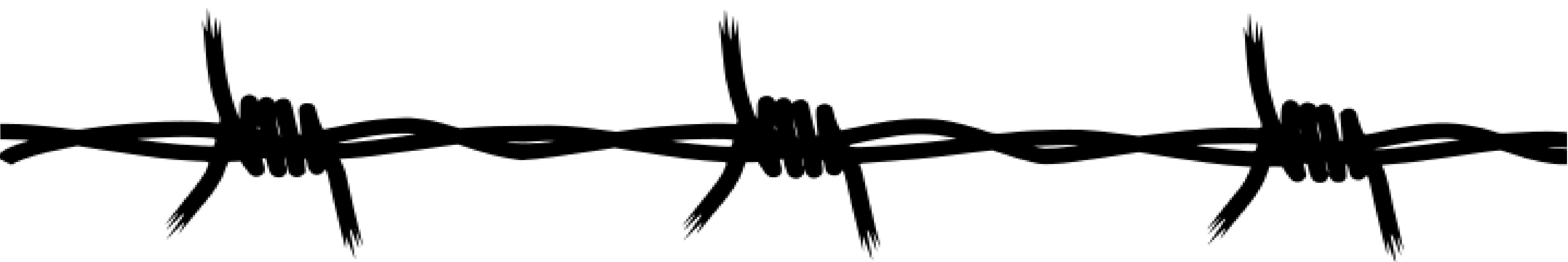


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EXECUTIVE SUMMARY

Impunity for corruption, and the use of tailor-made laws as vehicles for achieving and maintaining state capture, are common in Montenegro. This report profiles these problems and make recommendation for their resolving. Supported by the European Union (EU), Transparency International and its partners from Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, Serbia and Turkey are seeking to improve governance, transparency and accountability of the judiciary and democratic law-making in these countries. To do so, we have researched how state capture is achieved and sustained, highlighting shortcomings of the criminal justice system when handling grand corruption cases, and exposing tailor-made laws created to protect the private interests of a few.

After decades of undisturbed political domination by the Democratic Party of Socialists (DPS), Montenegro is facing serious problems with poor implementation of key reforms related to the rule of law. This is taking the country far from its desired path of joining the EU. It is caused primarily by the efforts of the ruling political elite to retain the status quo and protect their dominance and privileges. This report explores the main levers used to establish and maintain this state capture in Montenegro.

Its analysis shows that courts tend to give milder penalties for high-level corruption than for administrative corruption. They also have a more lenient attitude towards high-level corruption in the public sector, which causes multi-million-euro losses in the state budget, than to corruption in the private sector, where damages are less harmful to state finances.

The corruption cases analysed show that high-level public officials receive more favourable treatment before the courts than other accused persons. In the majority of cases, the courts assess the same circumstances differently, depending on the accused. This works heavily in favour of public officials, who even receive suspended sentences when there is no legal basis.

Key shortcomings in the judicial system are also related to a lack of transparency and free access to information, a weak and non-functional liability system, and the overwhelming political influence of the ruling elite. This contributes to an overall situation where the judiciary today represents one of the main levers of state capture in Montenegro.

So-called “tailor-made laws”, used to maintain political dominance of the ruling elite in Montenegro for years, are another important aspect of state capture. The report analyses different typologies of law, from legal amendments to promote private interests, to the adoption of new laws, introducing new legal forms into the country’s legislation.

Most such laws and policies are adopted without the proper public consultation that could provide accurate assessment of their worth. Parliament has frequently been required to discuss proposed laws in shortened procedures, with a timeframe prohibiting quality discussion – for example, the last parliamentary session before the summer or New Year recess. Such laws have been used to legalise previously illegal practices or pre-existing monopolies, or often to provide ground for the creation of future monopolies and benefits for entities close to the ruling elite.

Such tailor-made laws relate predominantly to management of Montenegro’s natural resources, such as energy and land, but they also affect public procurement, spatial planning and other state concessions. These are all sectors able to generate significant benefits for privileged individuals and entities with close political ties.

The report makes concrete recommendations for reducing opportunities for the judiciary and legislative processes to become key drivers for achieving and maintaining state capture in Montenegro.

These include significant changes in judicial processing of grand corruption, such as more effective checks and balances, greater transparency and better access to information on judicial work. To prevent tailor-made legislation, law-making should include the widest possible public consultation processes and comprehensive parliamentary scrutiny during the adoption process.

INTRODUCTION

Key shortcomings in the work of the judiciary have amplified state capture in Montenegro, seriously affecting the rule of law and efforts towards reform to promote European values and standards. Despite these efforts, and the country's status as a NATO member and an EU candidate country, reforms are producing only limited democratisation. Montenegro is a captured state.

Since the overthrow of the communist regime in 1989, political pluralism has remained only an illusion. The ruling Democratic Party of Socialists (DPS) has captured state institutions at all levels. Political networks of patronage, nepotism and clientelism are spread across all branches of power, as well as among many academics and journalists.

Independent institutions exist only on paper, and almost all appointments are purely political. Employment in state institutions depends on political affiliation, resulting in an army of public servants loyal to the party, not the public interest.

The checks and balances that exist in democratic countries have also been captured. Montenegro's Parliament has served as a voting machine for decades, without fulfilling its control function. This has resulted in both the adoption of laws tailored to serve private interests, and an almost complete lack of political will for Parliament to play its oversight role.

The privatisation of state companies and management of national resources has provided fertile soil for corruption and organised crime, resulting in the transfer of national wealth to the pockets of a small political and business elite, close to the very top of the regime.

Local tycoons and hidden owners of shady offshore companies are exploiting the country's resources through means such as public procurement, privatisation, state concessions and subsidies. Meanwhile, corrupt politicians and their business associates are above the law, with their murky deals free from proper investigation by public prosecution services.^[1]

Those such as the media or NGOs who dare to reveal corruption or organised crime have faced various types of pressure from the regime, including threats, physical attacks and attempted murder.^[2] Prosecution services have sometimes investigated those exposing grand corruption, rather than dealing with the cases they report.^[3]

Important judicial reforms have ignored the fact that judges and prosecutors used to be appointed by simple parliamentary majority, instead empowering Judicial and Prosecutorial Council to select future candidates for those positions. In this way, a judiciary already captured by the regime was given authority to continue with the selection of like-minded individuals.

This has frequently been viewed as an improvement in the independence of the judiciary, while in practice it has simply strengthened the mechanisms of the regime to capture this branch of power.

Political influence of the executive over the judiciary was also supported by provision of lucrative benefits to judges and prosecutor in form of apartments and/or favourable loans, justified as legitimate efforts towards improving the status of the judiciary and supporting their resistance to corruption and other illegal influence.

In order to continue enjoying the benefits of state capture and to avoid criminal prosecution, the regime has invested heavily in elections, with every election in Montenegro tarnished by abuse of public funds and institutions in order to influence voters, therefore creating stronger parliamentary majority for the ruling party.^[4]

By analysing concrete cases of grand corruption and institutional responses to them, this report tries to better understand how state capture manifests itself, which mechanisms are used to control the judiciary and how lucrative interests are protected by legislation. It examines the development of tailor-made laws that serve the interests of the ruling political elite and their associates from business and criminal organisations. It also exposes connections between tailor-made laws and corruption cases, and how the legislative framework contributes to state capture in Montenegro, identifying key loopholes and proposing solutions.

[1] The Higher Court in Podgorica dropped the indictment against the secretary to the President of Montenegro and high-level DPS official after the Special Prosecutor failed to properly investigate the case of political corruption, despite available evidence: <https://www.vijesti.me/vijesti/crna-chronika/516971/stjepovica-vise-ne-gone-zbog-koverte-potvrdjena-optuznica-protiv-knezevica>

[2] 2020 Reporters without Borders' World Press Freedom Index shows no improvement for Montenegro: <https://rsf.org/en/montenegro>

[3] Investigative journalist Jovo Martinovic was sentenced to one year in prison after the prosecution brought charges against him as a member of the organised crime group which he was investigating: <https://www.slobodnaevropa.org/a/presuda-jovo-martinovic-cg-novinar/30881752.html>

[4] Publication "Implementation of the Law on Financing Political Parties (2016-2018)":
<http://www.mans.co.me/en/implementation-of-the-law-on-financing-of-political-entities-and-election-campaigns-2016-2018/>

BACKGROUND

This report analyses state capture in Montenegro, and has been developed as one of the research outputs of the EU-funded project *Ending impunity for grand corruption in the Western Balkans and Turkey*. The project aims to decrease corruption and state capture in Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, Serbia and Turkey, and to improve governance, transparency and accountability of the judiciary and democratic law-making.

To achieve this, Transparency International is researching how state capture became possible and is sustained, highlighting shortcomings in the criminal justice system when handling grand corruption cases and exposing tailor-made laws created to protect the private interests of a few.

Research is combined with evidence-based advocacy campaigns to push for change in each of the targeted countries. Together with the regional report, the research outputs of the project are seven national reports and two databases.^[5] One database lists corruption cases in the region, specifically grand corruption cases or those that might represent an entry point to state capture. The cases illustrate the red flags and shortcomings in the judicial systems of these countries when addressing political corruption. The second database includes tailor-made laws which serve to gain and maintain privileged benefits and, in doing so, make state capture legal. Its contents reveal how law-making is used to protect private interests. The databases are not meant to be fully comprehensive. Instead, they use a qualitative approach to both the cases and the laws as tools to understand how the judicial system operates and how law-making is influenced.

This project builds on Transparency International's previous work in the Western Balkans and Turkey. In-depth research into anti-corruption efforts in Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Serbia and Turkey between 2014 and 2015 found that state capture was a consistent problem across all countries.^[6]

The report for Montenegro also builds on extensive investigative work by MANS (Transparency International's partner organisation in Montenegro) into concrete cases of corruption and organised crime, and its monitoring of transparency and accountability of state institutions and relevant laws, policies and practice. Through direct contact with state institutions, including the judiciary, the police and Parliament, the research offers detailed insight into their work and identifies key shortcomings that sustain state capture in Montenegro.

Subsequent research into cases of state capture in specific sectors^[7] in each country further revealed the characteristics of capture and where it takes place. Now, analysis of how each country's judiciary addresses corruption cases that can be an entry point to capture, and how undue influence in law-making results in tailor-made laws, is revealing what makes that state capture possible.

To build on this research, Transparency International is developing recommendations for effective anti-corruption and rule-of-law reforms in these countries. We are also seeking to promote a broader public debate on the institutional mechanisms that enable state capture. This is critically important to shaping the debate on corruption by highlighting institutional shortcomings and building widespread pressure to establish publicly accountable and transparent institutions.

[5] <https://www.transparency.org/en/projects/grand-corruption-western-balkans-and-turkey>.

[6] Transparency International, Fighting corruption in the Western Balkans and Turkey: priorities for reform, 2016, https://images.transparencycdn.org/images/NISWBT_EN.pdf

[7] Dona Dimov, Slagjana Taseva, State Capture – Illustration through “Skopje 2014” Project, Skopje, Transparency International Macedonia, 2018, http://www.transparency.mk/en/images/stories/publications/state_capture.pdf.

METHODOLOGY

State capture is a key obstacle to the effectiveness of anti-corruption and rule-of-law reforms in the Western Balkans and Turkey. It occurs when private and public actors target certain state organs and functions using corrupt means to direct public policy decisions away from the public interest to further their own private interests, ultimately for financial gain. Impunity for corruption, and the creation of laws to further the private interests of particular groups or individuals at the expense of the public interest, are considered key drivers of state capture. Countries such as Montenegro, with decades of political domination by one political party, are more likely to be captured than those with regular changes of the ruling elite.

The selection of corruption cases for our research followed three criteria. The first was to include any corruption cases matching Transparency International's definition of grand corruption. This covers offences in Articles 15-25 of the United Nations Convention against Corruption (UNCAC) when committed as part of a scheme involving a high-level public official and comprising a significant misappropriation of public funds or resources, or severely restricting the basic human rights of a substantial or a vulnerable part of the population.

However, as a legal definition presents limitations for the exploration of a complex political phenomenon, we expanded the selection criteria to include cases showing a lack of autonomy, independence and impartiality in the judiciary, and cases that serve as an entry point for state capture.

The indicators for considering a case as an entry point for state capture include:

- when a member of parliament or official with the power of law-making or policymaking is involved in such capacity in criminal offences
- when a top-level decision-maker in a regulatory body is involved in such capacity in criminal offences
- when the alleged criminal offences involve a public official who obtained their position through a revolving-door situation
- when the conduct in any of the above three categories serves the interest of a legal person or a narrow group or network of connected persons, and not the interest of other actors in a sector, another social group or the public interest
- cases linked to tailor-made laws.

All three criteria have in common the involvement of at least one public official who has the power to influence or change policies and regulations. In most cases, the public officials have held roles of high responsibility in state-level institutions, such as ministries. However, given that the political reality in the Western Balkans and Turkey is characterised by the power of political parties and party members in certain municipalities, corruption cases involving powerful mayors or other local authorities were also included.

Tailor-made laws are defined as legal acts designed to serve only the interests of a natural person, a legal person or a narrow group or network of connected persons, and not the interest of other actors in a sector, another social group or the public interest. Although tailor-made laws seem to be generally applicable, they apply only to a particular matter and circumvent potential legal remedies that could be provided by ordinary courts.

Based on this definition, we asked the following questions in order to identify potentially tailor-made laws: who is behind the law? Were there any irregularities in the making or the approval of the law? Who benefitted from the law or who loses out?

We considered three types of tailor-made laws, those designed to: 1) control a sector or industry, or protect certain privileges 2) remove or appoint certain officials, and 3) reduce institutional power to exercise checks and balances by controlling personnel procedures, reducing the monitoring capacity of agencies or audits, preventing accountability, or weakening scrutiny by the media and civil society organisations (CSOs).

While not providing a comprehensive picture of the situation, this report offers a qualitative approach and builds on the best efforts made by Transparency International's chapters and partners in the region in identifying cases and laws and collecting detailed information. The collection of original data on cases and laws covers the past decade, in order to identify possible variations brought by changes in government after the elections. For this report, we collected data on 20 cases and 12 laws.

Our analysis considers several sources of information: primary data collected on corruption cases and tailor-made laws; previous assessments of corruption, state capture and the rule of law in the region by Transparency International's National Integrity System, the European Commission, the Group of States against Corruption and UNCAC; official documents; media articles; and specialised literature. The main challenges in developing this report related to the limited amount of information made publicly or proactively available, and poor implementation of the Law on Free Access to Information.

FINDINGS AND DISCUSSION

The judiciary

The judiciary in Montenegro is perceived as highly influenced by politics, weakened by a lack of transparency and inefficient in processing corruption cases, producing very poor results.

In 2015, several amended laws of major significance for the fight against corruption came into force. The jurisdiction of the High Court in Podgorica was established to adjudicate criminal offences of high corruption and the jurisdiction of the Special State Prosecutor's Office to represent indictments for such offences. The burden of proving the origin of the acquired means was transferred to perpetrators of criminal offences and related persons. Separate provisions were made for financial investigations and for the extended and permanent confiscation of pecuniary gain originating from a criminal offence. The State Prosecutor and the accused may also conclude an agreement on admission of guilt for all criminal offences of corruption.

According to the Montenegrin Law on Courts,[8] a higher court will decide cases related to high-level corruption if they involve:

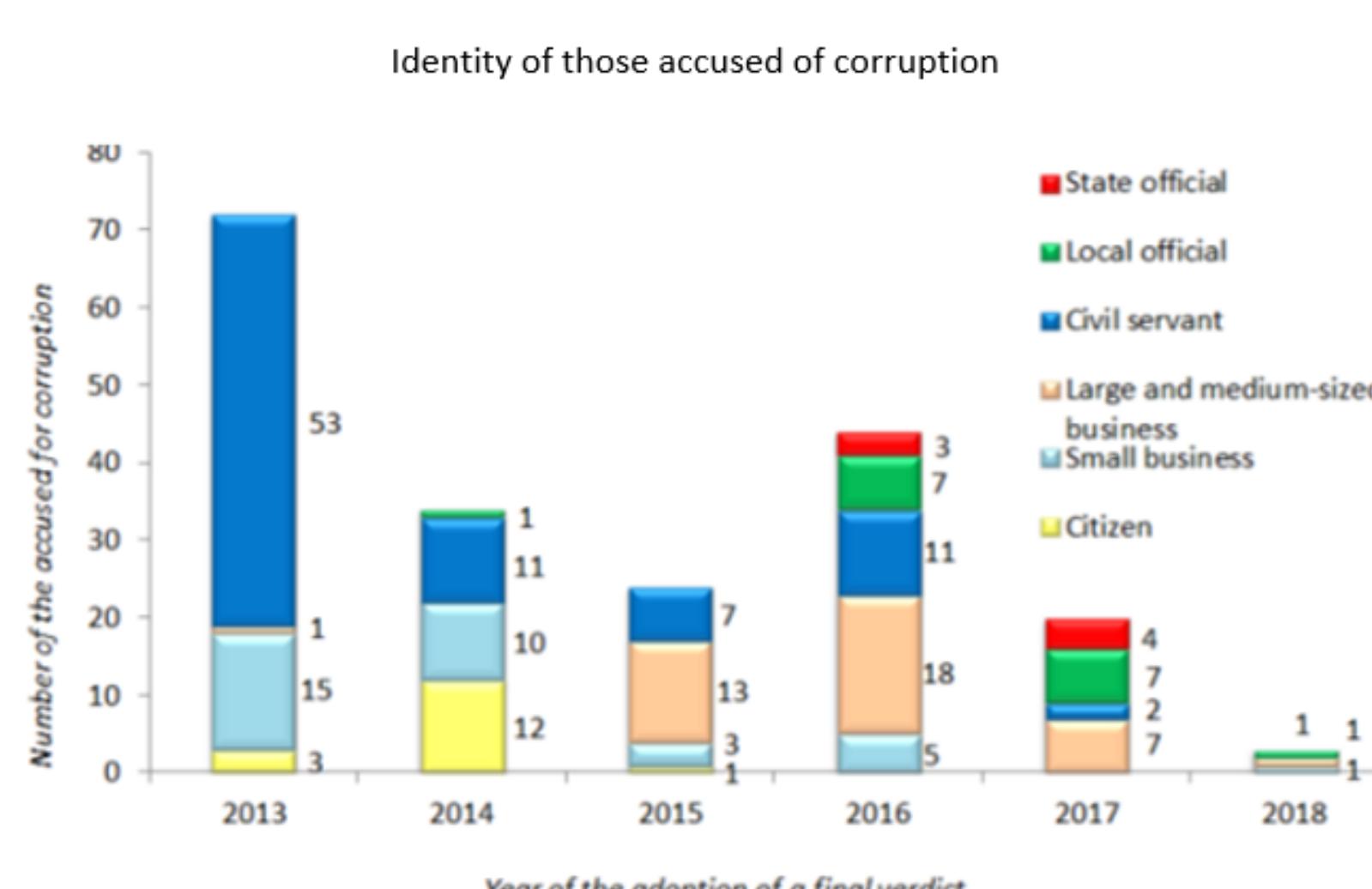
- a public official committing criminal offences of abuse of office, fraud in performance of official duties, trading in influence, inciting to engage in trading in influence, and active or passive bribery
- if proceeds exceeding €40,000 are obtained through criminal abuse of position in business operations, or of authority in the economy.

However, judges and prosecutors classify criminal offences as corrupt in different ways, therefore statistics from each are not comparable.[9]

Regular changes of law represent the primary obstacle in an effective fight against corruption. Since 2008, the applicable Criminal Code was amended 12 times, and the amendments were mostly in favour of perpetrators of corrupt criminal offences, with lasting consequences for judicial outputs in this area.[10] Any court procedure conducted since these legal provisions were passed, as well as subsequent proceedings pertaining to criminal offences committed before these amendments, must apply these provisions to the accused.[11]

There have been no amendments to the Criminal Code that address new forms of crime in the public sector, particularly in areas vulnerable to corruption, such as unlawful enrichment of public officials,[12] corruption in public procurement, privatisation and bankruptcy,[13] even though strong evidence in favour of such amendments can be found in international conventions and useful comparative experiences. Despite the numerous amendments, bribery in the public and private sectors has not been treated consistently, and for the same act, one person may be charged with two criminal offences with significantly different penalties.

MANS' analysis shows that the number of persons convicted for corruption is decreasing, with most of the proceedings referring to cases of administrative corruption.[14]



[8] Article 16, Law on Courts <http://www.katalogpropisa.me/wp-content/uploads/2016/11/Zakon-o-sudovima.pdf>

[9] According to the information we received from the Judicial Council and the Supreme State Prosecutor's Office, these two institutions classify criminal offences as corrupt in different ways.

[10] MANS, Behind the statistics: Summary of the analysis of legal framework and final judgments for corruption (Vol.4), Chapter A.3. Analysis of the legal framework, p.18,

<http://www.mans.co.me/en/wp-content/uploads/2018/12/BehindTheStatistics4.pdf>

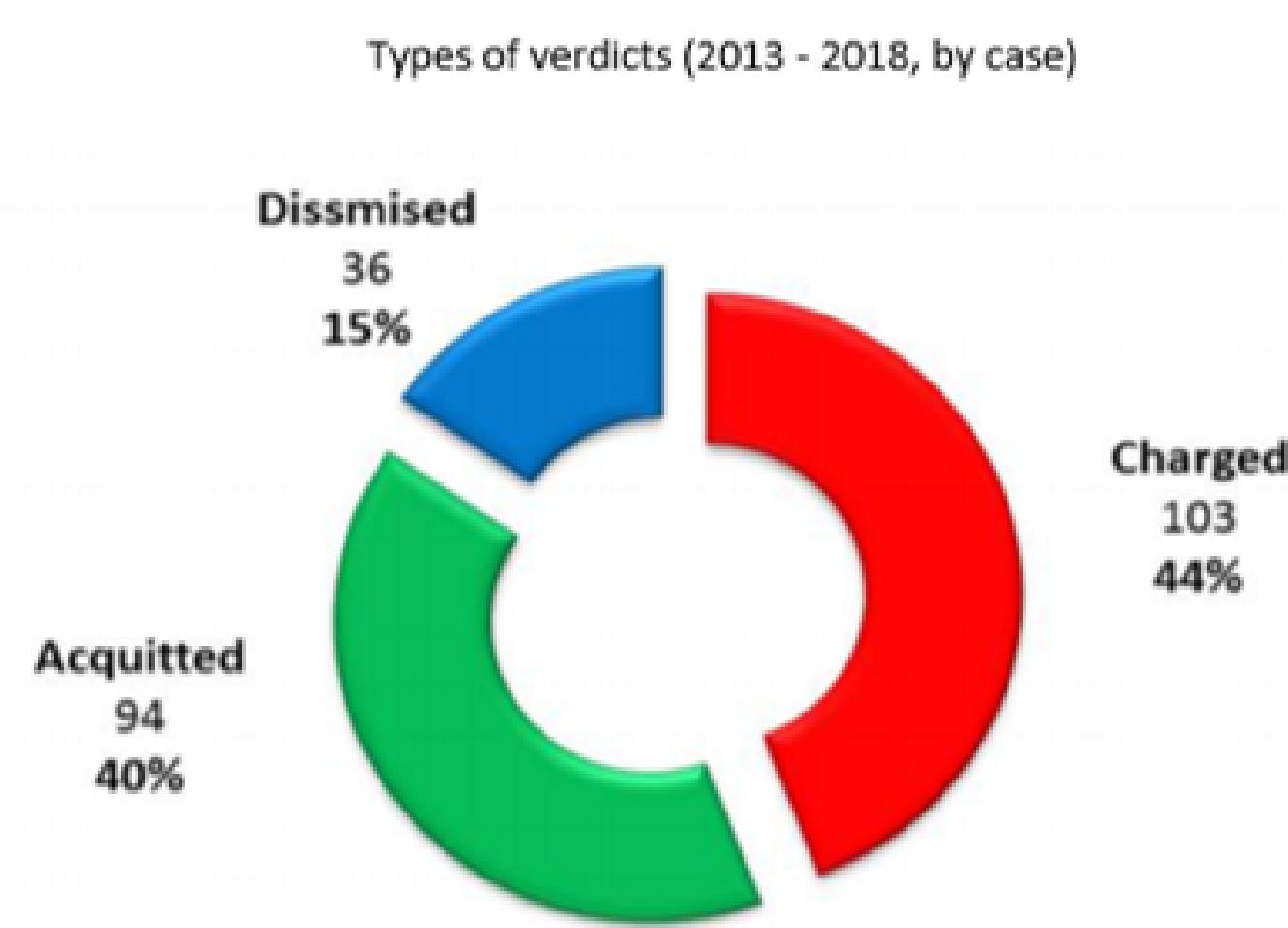
[11] Article 133, Paragraph 3 of the Criminal Code of Montenegro.

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

[13] Article 273 and 274 of the Criminal Code of Montenegro.

[14] MANS, Behind the statistics: Summary of the analysis of legal framework and final judgments for corruption (Vol.4), Chapter B.1.1., Who was charged with corruption?, p.42

There are no final judgements for many criminal offences with elements of corruption executed in the economy.[15] The State Prosecutor's Office failed to win more than half the cases of criminal corruption offences of which the accused were charged.



The same analysis concluded that the courts have most frequently pronounced sentences of one year's imprisonment for criminal offences involving corruption, and the most serious sentence pronounced was five years.[16] In 90 per cent of cases, the courts imposed a minimum sentence or penalty below the legal minimum.[17]

Public officials were rarely charged and even more rarely convicted. When they were, the courts issued milder sentences than to those convicted for corruption in the economy. In the past five years, six convictions have been issued to five public officials, all involving minimum sentences or sentences below the legal minimum.

Those accused of high corruption gained the most from signing admissions of guilt. No penalty under these agreements was above the legal minimum, regardless of the gravity of the criminal offence, the amount gained or the damages.

The courts have issued milder penalties for high-level corruption than for administrative corruption, and public officials have received more favourable treatment than other accused persons.

The courts have also appraised the same circumstances differently for different accused persons, in favour of public officials, some of whom were given suspended sentences when there were no legal provisions for this. The fact that bribing a traffic policeman is punished more severely than political corruption shows the extent to which the courts' penal policy is distorted.[18]

For example, while the courts do not take into account the amount of damage when deciding on the sentence for a public official, in the case of corruption in the economy, they impose more severe punishments, even for small damages, citing damages as a key factor determining the sentence.

Case study – More lenient sentences for corruption in the public sector than the private sector

In the case of two public officials, the former President of the Municipality of Bar, Žarko Pavićević, and his associate, the scale of damages caused by their criminal offences was not considered an aggravating circumstance by the court. Yet a businesswoman from the same municipality was sentenced to three times the punishment, despite causing three times less damage, with the explanation that the damages were an aggravating circumstance.

The High Court in Podgorica[19] sentenced Pavićević to one year's imprisonment for the most serious form of criminal abuse of office. At the time, the prescribed term of imprisonment was between two and 10 years.[20] The damages incurred by the Municipality of Bar amounted to almost €2 million (US\$2.4 million). The offence was also an ongoing crime, for which the Criminal Code prescribes more severe sentencing of up to 20 years in prison.

The same verdict also convicted the Executive Director of the Bar Development Institute, Danijela Krković, for the criminal offence of aiding an abuse of office, imposing a sentence of six months to five years. Imprisonment of between three months and five years was also sentenced for a long-term offence of forgery of official documents, despite the legal possibility of a sentence of up to 10 years. The court pronounced a suspended sentence to Danijela Krković.

[15] Sixty-three per cent of all offences for which a final verdict has been issued in the last five years relate to abuse of office, passive bribery or negligent exercise of official duties; 26 per cent of all acts for which a final verdict has been passed in the past five years relate to offences of abuse of position in business operations and abuse of powers in the business sector.

[16] Rajko Kuljača, former President of the Municipality of Budva ("Zavala" case) - Judgment of the High Court in Podgorica no. KS. 9/2013 of 17 July 2014. The penalty was halved by Judgment of the Appellate Court of Montenegro, no. KŽ-S. 21/14 of 16 December 2014.

[17] Svetozar Marović, former President of the Parliament of Montenegro, for whom a warrant was issued, was sentenced to a total of three years and ten months of imprisonment in two cases; Djordje Pinjatić, former member of the Parliament of Montenegro who served his sentence, was sentenced to one year, Nebojša Obradović, CEO of the Railway Directorate was sentenced to probation of three months; Goran Vrbica, President of the Basic Court in Cetinje, and Nebojša Marković, judge of that court, were sentenced to a year and a half and a year imprisonment.

[18] Decision no.19/2014 of 22.10.2014; An unemployed person was sentenced to three months in prison because he offered a bribe of €20 (US\$20) to police officers to not be prosecuted for the committed violation.

[19] Decision no. 23/2015 of 28.02.2017

[20] Article 416 paragraph 3 in relation to paragraph 1 of the Criminal Code

The court held as mitigating circumstances the facts that Žarko Pavićević was a family man, a widower and without previous conviction, and that Danijela Krković was a single mother of a minor child, also without previous conviction. In this verdict, the court ignored the fact that the benefit obtained by the commission of the offence exceeded the legal qualifying limit for the criminal offence of the most serious form of abuse of office. It also ignored the fact of Pavićević's official responsibilities, the number of criminal actions and his persistence in committing the criminal offence.

Conversely, the High Court in Podgorica sentenced the executive director of a private company in Bar to three years in prison[21] for the most severe form of the criminal offence of misuse of position in business activities. This offence caused damages of €600,000 (US\$710,000). Previously, the High Court had imposed a six-year prison sentence. The court did find mitigating circumstances, in that the accused had no previous convictions, in her family and material history, and that she was a married mother of two children. However, the court held as an aggravating circumstance that the gain or damage obtained significantly exceeded the threshold necessary for the qualification of the criminal offence. This is contrary to all cases where public officials or members of an organised criminal group have been convicted of corruption, confirming that these aggravating circumstances apply only to persons who are not public officials or members of a criminal group, in cases not involving high-level public-sector corruption or organised crime.

The courts of second instance further lighten the penal policy of the first instance courts in case of public officials. From 2013 to 2018, All High Court judgments imposing several years of imprisonment for high-level corruption were revised by the Appellate Court, which reduced the penalties.

The failures and improper conduct of the State Prosecutor's Office also have additional influence on the extremely mild penal policy for criminal offences of high corruption.

Case study – The “forgetful” prosecutor

Gross negligence by the Special State Prosecutor aided the accused in a high-corruption case and prevented the court from imposing a stricter punishment. Mild sentences were imposed and aggravating circumstances were ignored because of the prosecutor's mistake, yet he did not appeal against the judgement of the court of first instance.

In the case[22] covered above, Žarko Pavićević was indicted in November 2015 by the Special State Prosecutor's Office[23] with misuse of the office of President of the Municipality of Bar, causing the municipality to suffer damages of almost €2 million (US\$2.4 million) to the benefit of Pavićević's company, Zavod za izgradnju Bara JSC, and the beneficiaries of a loan for the construction of a facility to be built by the company. Pavićević guaranteed that the Municipality of Bar would reimburse the loans granted by the Prva Bank of Montenegro for construction of a facility by his company, which was not completed within the deadline. To this end, Pavićević was issuing blank bills of exchange on the basis of which over €1.5 million (US\$1.8 million) was charged from the account of the Municipality of Bar.

Pavićević also legally committed the municipality to guarantee the repayment of his company's loan with the Prva Bank of Montenegro, issuing blank bills of exchange for that purpose, which charged €400,000 (US\$480,000) from the account of the Municipality of Bar. Nearly €2 million (US\$2.4 million) was obtained through these offences, exceeding the €40,000 threshold to qualify as the more serious form of this criminal offence.[24] Pavićević and his assistant Danijela Krković were charged with the more serious form of offence, punishable by imprisonment for a term of 2-10 years. [25]

However, while presenting his closing arguments, the State Prosecutor “forgot” the property gain obtained through the criminal offence. This significantly improved the position of the accused, as they were charged with only the basic form of the criminal offence, which covers a gain of up to €3,000 (US\$3,500). Instead of being sentenced to 2-10 years' imprisonment, the prosecutor's closing argument meant they were punished only for the basic form of criminal offence, with a sentence of six months to five years.

As a result, Pavićević and Krković received only mild sentences, despite damages to the municipality of €2 million (US\$2.4 million). In addition to the omission in his closing arguments, the Special State Prosecutor did not appeal against the judgement, also disregarding the aggravating circumstances which the court had ignored.

[21] Verdict of the Appellate Court of Montenegro, decision no.36/13 of 25.12.2013

[22] File no: Ks. 23/2015 of 28 February 2017

[23] File no: Kt-S.71/15 of 19 November 2015

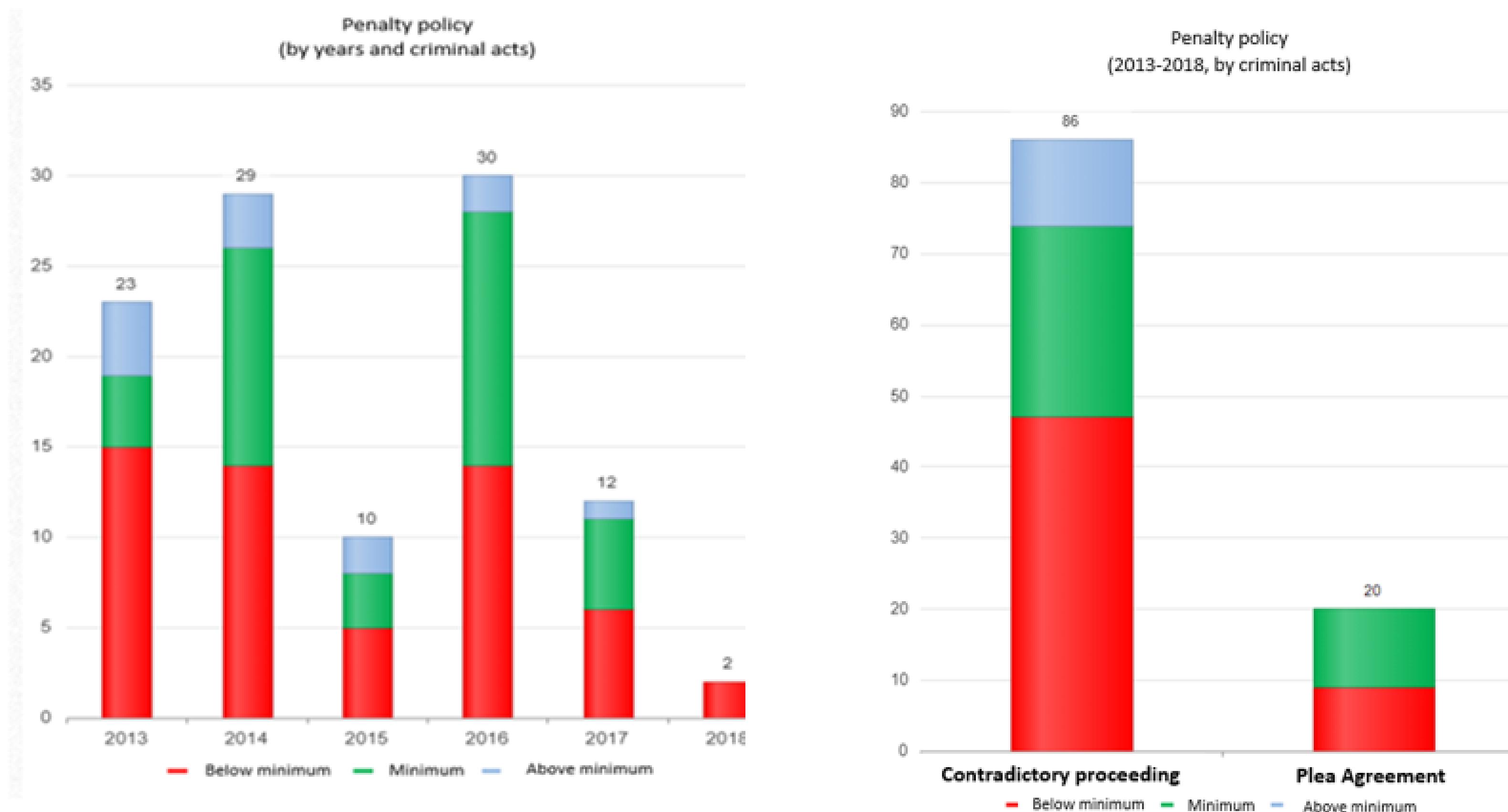
[24] File no: Kt-S.71/15 of 19 November 2015

[25] File no: Kt-S.71/15 of 19 November 2015

Plea Agreements

Provision for plea agreements was introduced into Montenegro's legal system in 2009 with adoption of the Criminal Procedure Code, and has been implemented since 2010. Plea agreements have further reduced the penalties for those convicted of high corruption, even in cases involving damages of many millions. Through plea agreements, the negotiation of punishments below the legal minimum for serious criminal offences of corruption has become the rule, not the exception. The courts simply confirm the extremely mild sentences that the State Prosecutor's Office agrees with the accused, without analysing whether this is in accordance with the law.

Available statistical data[26] shows that the courts imposed penalties at or below the statutory minimum to all state officials convicted of corruption. Only in the case of Svetozar Marović[27] (see below) did the accused receive a minimum sentence[28], while in all other proceedings, the sentences were below the minimum.



The conclusion of plea agreements has not helped improve the results in financial investigations, which remain extremely modest. The State Prosecutor's Office still has not managed to confiscate property from those convicted for corruption who confessed to criminal offences and then left the country to avoid prison terms and confiscation of property.[29]

This has further reduced public trust in the judiciary. A leading example is the so-called "Zavala case".

Case study – The Budva Affair

A significant part of the contribution by the Special Prosecutor's Office to the fight against corruption is linked to the "Budva affair", in which several public officials were convicted, mainly due to the signing of a plea agreement. Almost a third of all criminal judgements involving elements of corruption in a five-year period relate to the Budva affair.

Criminal investigations against Svetozar Marović, former President of the Parliament of Montenegro, and members of his criminal group were launched on August 13, 2015[30]. Two days later, implementation of the Criminal Procedure Code began, enabling plea agreements with the accused for the most severe corruption crimes.

The initial results in the affair were very modest, and after the arrests of Svetozar Marović and his son Miloš, negotiation of plea agreements started.

A total of 21 defendants were convicted for 32 criminal offences, with only two[31] acquittals, of one criminal offence each. In the end, 12 of the accused concluded plea agreements, while some were also convicted in earlier court proceedings. However, in these agreements, the State Prosecutor's Office agreed exceptionally lenient sentences, which were confirmed by the courts. These were below the legally prescribed minimum, despite the large scale of damages caused or benefits gained, which were determined by the verdicts.

[26] <http://www.mans.co.me/pravosudje-kaznena-politika/>

[27] Long-time Vice-President of the ruling Democratic Party of Socialists of Montenegro, former President of the Parliament of Montenegro and President of the State Union of Serbia and Montenegro.

[28] Decision 69/16 of 21.09.2016

[29] MANS, Behind the statistics: Summary of the analysis of legal framework and final judgments for corruption (Vol.4), What was seized based on the results of the financial investigation? p.88

[30] <https://www.slobodnaevropa.org/a/budva-ponovo-na-udaru-tuzilastva/27187115.html>

[31] Aleksandar Tičić, formerly employed in the Municipality of Budva and Miodrag Minić, Executive Director of the company "Slav Inn" DOO Podgorica.

The final verdicts given on the basis of plea agreements lack reasons for such low sentences, and do not correspond to the public functions of the accused, nor those within the criminal group. For example, the head of the criminal group received a more lenient sentence than one of its members. For the most of prominent members of the group, the courts interpreted circumstances as mitigating too benevolently, and in some cases, without basis. Aggravating circumstances for some of the defendants were also interpreted by the courts more leniently than prescribed by law, and sometimes they were not taken into consideration at all.

The Marović family began selling property in Montenegro immediately after the first convictions for the Budva affair. Immediately after launching its financial investigation, the State Prosecutor's Office concluded an agreement with Miloš Marović, and later on with his father Svetozar. At the proposal of the State Prosecutor's Office, they were released from detention.

The damage caused to the Municipality of Budva in many of these procedures has not been properly estimated, because the municipal lawyer, who had once been hired by one of the members of the Budva criminal group, did not claim any damages to the municipality.

The results of the financial investigation are extremely modest. The property under order of seizure by the State Prosecutor's Office is no longer registered as owned by the Marovićs. The State Prosecutor's Office carried out concrete measures relating to the Marovićs' personal property only in July 2017. In the meantime, the family sold the property and fled to Serbia to avoid imprisonment. Thanks to the delay in execution of the prison sentence, which was approved by the Basic court in Kotor upon the motion of the State Prosecutor's Office, Miloš Marović managed to obtain Serbian citizenship, while Svetozar left Montenegro the day after his release.

In determining a sentence, as per article 42 of the Criminal Code, a court must first take into account the limits of the prescribed sentence. This should be one of the main starting points. A court should also consider the purpose of punishment, and then, in assessing the mitigating and aggravating circumstances, determine the exact sentence. The Criminal Code does not limit mitigating and aggravating circumstances, but points to the most important circumstances that a court must take into account when determining the sentence.

The regular way to determine a sentence is when a court defines it within the prescribed range of punishment for a particular criminal offence. Mitigation of a sentence is not a regular way to determine its length, and should take place exceptionally and exclusively under conditions provided for by law. Contrary to the provisions of the Criminal Code, in cases we analysed, mitigation of a sentence took place without foundation, without explanation and often for reasons not reflective of circumstances relevant to the sentencing – especially not for mitigation. In the rare cases in which public officials are found guilty of a criminal offence, the courts use sentence mitigation as a rule.

The legal basis for mitigating the sentence in these cases is contained in Article 45, paragraph 3 of the Criminal Code, which prescribes that the court may impose on a perpetrator a punishment below the limit laid down by law provided that particularly mitigating circumstances are established. It must also be assessed that a mitigated sentence will be sufficient to achieve the purpose of punishment.

Case study - Mitigating circumstance - father of a member of the criminal organisation

In the trial of Svetozar Marović as the organiser of a criminal group, the court states that in favour of the defendant, they valued his full admission of the criminal offence, the fact that he was a family man and father of two children, and that he had no previous convictions. It considered these factors as mitigating circumstances, in particular because there were no aggravating circumstances.

Without basis, these findings by the court reduced the defendant's responsibility for his actions, despite the great damage they caused. The fact that the accused was a family man with children cannot itself be mitigating, especially as the children were adults who did not live with him, and he had no obligation to support them.

In addition, immediately prior to issuing this verdict, the same judge^[32] issued a verdict^[33] convicting Svetozar Marović's son, Miloš, as a member of the criminal organisation. This meant that a mitigating circumstance for the organiser of the criminal group was that he was the father of a group member.

It is obvious that those are not mitigating circumstances at all. The court gave no reason why it considered them sufficiently mitigating to reduce the sentence below the prescribed minimum. The agreement was not in accordance with the interests of justice, nor did the agreed sentence correspond to the purpose of the punishment. The verdict only roughly stated that the sentence was acceptable. It also completely ignores the purpose of punishment – to discourage others from committing crimes. The court did not consider the fact that the gains from the crime amounted to €19 million (US\$23 million), exceeding the statutory qualifying limit for the criminal offence of the most severe form of abuse of office. Nor did it consider the importance of the function and duties that the accused performed, the number of offences and his persistence in committing criminal offences. Instead, it simply stated without basis that there were no aggravating circumstances.

[32] President of the High Court Boris Savić
[33] Decision 56/26 of 29.08.2016

Surveillance Measures

In cases of high-level corruption, where the public budget was robbed of millions, the State Prosecutor's Office does not request the use of secret surveillance measures to facilitate the collection of evidence. Instead, these measures are almost exclusively applied in cases of corruption at the lowest level.

Judicial practice shows that the prosecution service has not shown any willingness to put under secret surveillance measures persons against whom it is investigating the most serious crimes of corruption. Instead, it signed plea agreements with the accused, imposing inappropriately low sentences. Such passivity of the prosecution is worrying. By using surveillance measures, it could have collected evidence of the defendants' guilt, and to use in financial investigations and for confiscation of assets in cases where there were no results. The police and the State Prosecutor's Office have shown that they have the capacity to apply these measures, but they do so almost exclusively in cases of petty corruption.

Case study - Tapping police officers, but not officials

According to the verdict of the High Court in Podgorica,[34] sentencing the former President of the Municipality of Bar, Žarko Pavićević, to one year in prison, he was abusing his official position from late 2007 until mid-2015. In November 2015, the prosecution filed an indictment. Although it was established that Pavićević diverted €2 million (US\$2.4 million) from the budget of the Municipality of Bar through corruption, the prosecution did not ask for secret surveillance measures, and Pavićević was never subject to such measures.

In the verdicts against the organiser and members of the Budva criminal group, who by committing corruption crimes caused damages against the state of tens of millions of euros, secret surveillance measures were used to collect evidence only in one case. Other members of the group, including its leader, Svetozar Marović, were not subject to these measures and their conversations and communications were not recorded.

Yet secret surveillance and recordings of telephone conversations and other remote communications can provide evidence for corruption and convictions, as proven by the verdict of the High Court in Podgorica of June 2016,[35] in which traffic policemen were convicted for receiving bribes of €10-100 (US\$12-119) in order not to prosecute drivers' traffic violations. In this proceeding, the court based its convicting verdict on evidence obtained by secret surveillance. The police officers were sentenced to a one-year prison term[36] – the same as Žarko Pavicević.

Secret surveillance measures were also successfully used in another High Court case in Podgorica in February 2013,[37] in which traffic policemen were convicted of bribery of €35-150 (US\$42-180). The conviction was also based on secret surveillance, and police officers were sentenced to prison terms ranging from six months to two years.[38]

Withdrawn Prosecutions

Charges rejected on the grounds that the State Prosecutor had withdrawn from prosecution or due to expiry of the statute of limitations indicates incompetence and arbitrariness of the State Prosecutor's Office in raising indictments, and ineffectiveness of the judiciary in conducting proceedings.

Two thirds of the verdicts rejecting charges were adopted due to the prosecutor's dismissal of charges. This indicates that the State Prosecutor's Office has no capacity to prove corruption charges before the court, and that charges are raised without valid evidence, incurring costs to the state budget. Nearly one-third of dismissals occurred due to the statute of limitations, which shows that the judiciary acts in an untimely manner and that proceedings are conducted for an inappropriately long time. This leads to the rejection of charges and unnecessary costs for the judiciary.

After several years of conducting proceedings of corruption cases, state prosecutors have arbitrarily withdrawn charges without providing any specific reasons. Instead, they issue general statements that the accused did not commit the criminal offences or that there is no evidence. Such actions incur large costs to court budgets.

For example, in one case, due to the incompetence of the State Prosecutor's Office and ineffectiveness of the judiciary, a charge of 44 criminal offences was rejected.[39] In another, the prosecution withdrew[40] from the case[41] after five years of trial, without stating any reasons.

[34] Decision no.22/15 of 28.02.2017

[35] KS. br.8/2014 of 20.06.2014

[36] Verdict of the Appellate Court of Montenegro Decision no.15/14 of 22.10.2014

[37] Decision no.27/11 of 01.02.2013

[38] Verdict of the Appellate Court of Montenegro Decision no..25/2013 of 24.06.2013

[39] File no: Ks. 3/14 of 22 July 2014

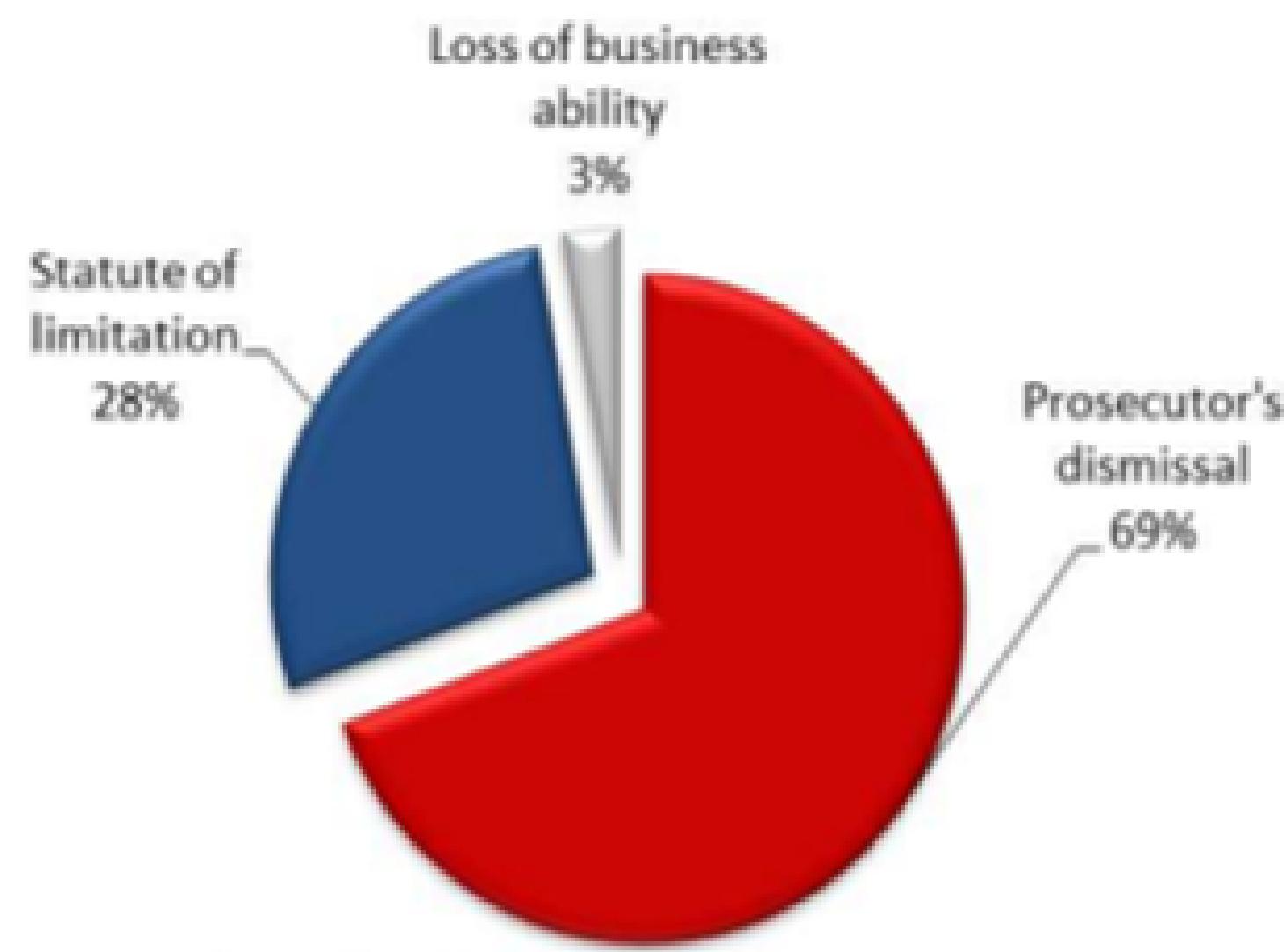
[40] 12 March 2013

[41] Indictment of the Basic State Prosecutor's Office of Bijelo Polje no Kt. 421/2007 of 19 November 2008

The adoption of new laws did not increase the accountability of the judiciary. In practice, neither judges nor prosecutors suffer consequences due to incompetent or untimely work. The number of disciplinary proceedings against judges and prosecutors is low and fails to correspond to the level of the problem, especially in cases of crimes involving corruption.

No state prosecutor has been disciplined[42] in any of the numerous cases where they dismissed the prosecution after many years of judicial proceedings. At the same time, the Prosecutorial Council classified information on the disciplining of state prosecutors as secret,[43] to protect their privacy.

Reasons for adoption of dismissals (2013 - 2018, by offenses)



Access to information on judicial outcomes in the fight against corruption is limited, because the judiciary and the prosecution hide information about their work. In this way, public oversight is limited and judiciary responsibility for dealing with cases of corruption is reduced. Final verdicts in corruption cases are published on court websites, but much important data has been removed from them, under the pretext of protecting the privacy of the accused, although these court proceedings were open to the public.

Anonymisation of final verdicts protects the privacy and interests of persons legally convicted of criminal offences, including those of high corruption and organised crime. For this reason, the data on the accused natural persons and companies, lawyers of the accused and the representatives of the injured parties, legal representatives and shareholders of companies, court experts and interpreters, as well as all other persons or companies mentioned in the proceedings, is deleted or anonymised. In some verdicts, data on the amount of damage caused by criminal offences, and even the names of the damaged state institutions, were deleted.

This prevents public oversight of the courts, because the qualification of the criminal offence and the prescribed sentence depend on the level of damages, and this often impacts the determination of a sentence. Hiding this data makes it impossible to verify whether the prosecutor and the court have properly qualified the criminal offence, and whether the prescribed sentence or punishment agreed with the prosecution is fair and in accordance with the law.

D. Z. podizao novac, koji su prisvajali okrivljeni A. i L. i to po iznosima od: 9.12.2009.godine iznos od eura, 31.12.2009.godine iznos od eura, 8.02.2010.godine iznos od eura, 8.03.2010.godine iznos od eura, 9.04.2010.godine iznos od eura, 11.05.2010.godine iznos od eura, 9.06.2010.godine iznos od eura, 8.07.2010.godine iznos od eura, 9.08.2010.godine iznos od eura, 10.10.2010.godine iznos od eura, 11.10.2010.godine iznos od eura, 9.11.2010.godine iznos od eura, 9.12.2010.godine iznos od eura, 28.12.2010.godine iznos od eura, 15.02.2011.godine iznos od eura, 10.03.2011.godine iznos od eura, 13.04.2011.godine iznos od eura, 25.05.2011.godine iznos od eura, 15.06.2011.godine iznos od eura, 12.07.2011.godine iznos od eura, 10.08.2011.godine iznos od eura, 12.11.2011.godine iznos od eura, 31.10.2011.godine iznos od eura, 8.11.2011.godine iznos od eura, 12.12.2011.godine iznos od eura i 29.12.2011.godine iznos od eura, i tako sebi pribavili imovinsku korist u ukupnom iznosu od eura, dok su preostala sredstva sa računa D.z. u ukupnom iznosu od eura, neosnovano uplatiti po osnovu poseta i doprinosa na navedeno isplaćena zarada, pa su na taj način namijeli Štetu F. Z.C. G u ukupnom iznosu od eura.

Excerpt from the verdict no. Ks.br.1/15 of the High Court in Bijelo Polje of 25.06.2015. - SECRET DATA ON THE AMOUNT OF DAMAGE

konkretnom radio o državnom projektu, te da radnje optuženog Pavićevića treba sagledati iz tog ugla, a što prvostepeni sud nije učinio.

Međutim, po nalaženju ovog suda, ovakvi navodi žalbe branionca optuženog Pavićevića ne stječe. Naime, Vlada Crne Gore je učestvovala u predmetnom projektu izgradnje stambeno-poslovnog objekta na način što je na predlog Ministarstva prosvjete i nauke o modelu finansiranja predmetnog objekta donijela Zaključke od 01.03.2007.godine, kojim je zadužila navedeno ministarstvo, Fond zdravstva, Direkciju javnih radova i opštini Bar da sa bankom potpišu ugovor o međusobnim obavezama što je i učinjeno zaključenjem Ugovora od 08.08.2007.godine. Takođe, prvostepeni presudom je utvrđeno da je Vlada u cilju završetka predmetnog projekta opredjelila sumu u iznosu od 210.000 evra. Međutim, po nalaženju ovog suda, a nasuprot navodima žalbe branionca optuženog P., navedene činjenice i okolnosti ne mogu predstavljati opravdanje za postupanje optuženog P.Z., kod činjenice da je optuženi P.Z., kako je to pravilno utvrđio prvostepeni sud, postupao suprotno Statutu O.B. i na taj način prekoracio granice svojih službenih ovlašćenja čime je pružljena štetna O.B. u iznosu kako je utvrđeno dopunom nalaza vještaka finansijske struke.

Žalbom branionca optuženog P.Z. se ukazuje da je projekt oko izgradnje predmetnog objekta počeo u mandatu ranijeg predsjednika O.B., da je Vlada prihvatile predlog Ministarstva prosvjete i nauke o modelu finansiranja predmetnog objekta, kojim predlogom je konstatovano da je O.B. spremna da da mjenično jemstvo do završetka izgradnje predmetnog objekta i tehničkog prijema, te konačno da je na osnovu

Excerpt from the verdict no. Kž-S br.16/2017 of the Appellate Court in Podgorica, 08.11.2017. - SECRET NAMES OF THE DAMAGED STATE INSTITUTIONS

[42] Articles 108 and 109 of the Law on State Prosecutor's Office: A warning and a fine to the amount of 20 per cent of the salary of the judge, lasting up to the three months, shall be imposed for minor disciplinary offences, a fine to the amount of 20-40 per cent of the salary of the prosecutor, lasting for a period of three to six months and a ban on promotion shall be imposed for severe disciplinary offences, while dismissal shall be imposed for the most serious disciplinary offences.

[43] The Prosecutorial Council rejected a request by MANS for copies of all decisions of the Disciplinary Council by decision number: 05-1-37-2/18 of May 23, 2018

In some cases, the names of judges[44] or prosecutors[45] were also removed from the verdicts. In a case of corruption in the judiciary, the Supreme Court even erased data on the sentence from its final verdict. Therefore, the public cannot know the Supreme Court's penal policy, nor its attitude towards corruption in the courts.

Vrhovni sud Crne Gore, u vijeću sastavljenom od predsjednice suda Vesne Medenice, kao predsjednice vijeća, sudija Petra Stojanovića, Svetlane Vujanović, Stanke Vučinić i Radula Kojovića, kao članova vijeća, uz učešće samostalnog referenta Indire Muratović, kao zapisničara, u krivičnom predmetu protiv optuženih G. V. i N. M., zbog krivičnog djela zloupotreba službenog položaja iz čl.416 st.3 u vezi st.1 i čl.23 Krivičnog zakonika, odlučujući o žalbama optuženog G. V. i njegovih branilaca D. Dj. i Z. Piporovića, advokata iz Podgorice i optuženog N. M. i njegovog branjoca P. Dj., advokata iz Podgorice, izjavljenim protiv presude Apelacionog suda Crne Gore Kž.S.br.2/17 od 10.04.2017.godine, u sjednici vijeća održanoj dana 12.09.2017.godine u prisustvu optuženih i njihovih branilaca, donio je

P R E S U D U

Uvažavaju se žalbe optuženih G.V. i N. M. i njihovih branilaca, pa so preinačava prosuda Apelacionog suda Crne Gore Kž.S.br.2/2017 od 10.04.2017.godine samo u dijelu odluke o kaznama, tako što se optuženi G. V. i N. M., zbog krivičnog djela zloupotreba službenog položaja iz čl.416 st.3 u vezi st.1 i čl.23 Krivičnog zakonika primjenom čl.45 i 46 Krivičnog zakonika osudjuju, i to: optuženi G. V. na kaznu zatvora u trajanju od... .) godino, a optuženi N. M. na kaznu zatvora u trajanju od) godino i... .) mjeseci.

Excerpt from the verdict no. Kž.S.I.br.2/17 of the Supreme Court in Podgorica 12.09.2017 - Secret data on the sentence.

[44] Verdict no. Ks.br. 9/2015 of the High Court in Podgorica, 28.01.2016
[45] Verdict no. Ks.br.1/13 of the High Court in Bijelo Polje, 11.04.2013

TAILOR-MADE LAWS

Tailor-made laws establish and maintain control over a particular sector, industry or decision-making process, in order to achieve an illegal gain for a certain entity, as well as to reduce state institutions' ability to perform their oversight functions.

For nearly three decades, the Parliament of Montenegro was dominated by the Democratic Party of Socialists (DPS) and its political allies. This enabled the political elite to capture the decision-making process and, to a large extent, neutralise Parliament's control function. There are numerous examples of how Parliament was used merely to verify government decisions, without any opportunity to properly assess them against the public interest.

Most such laws and policies are adopted without the proper public consultations that could provide a true assessment. Parliament has frequently had to discuss legal proposals in a shortened procedure, preventing quality discussion – for example, the last parliamentary session before summer or New Year holidays.

Such laws have been used to legalise previously illegal behaviour or – most commonly – to provide grounds for creation of future monopolies and benefits for a closed circle of entities close to the ruling elite. Some laws favoured sectors with pre-existing monopolies, such as the Law on Lottery, while others created legal conditions to enable financial gain to a very specific group of entities.

The process of integration and harmonisation of the Montenegrin legal framework with EU standards has sometimes been used to introduce tailor-made laws, due to the provisional application of EU directives, such as the new Law on Energy.

The typology of laws varies according to sector or theme, from amendments to existing legislation to favour private interests, to the adoption of new laws and so-called *lex-specialis*, introducing new legal forms into the country's legislation.

Sectors vulnerable to tailor-made laws in Montenegro predominantly relate to management of natural resources, such as energy or land, but also cover public procurement, spatial planning and different state concessions. These are all sectors with potential to generate enormous benefit for the privileged individuals or entities close to the ruling elite.

Montenegro still lacks institutional safety mechanisms that could prevent such laws coming into force. To date, there is no proper screening of proposed laws within parliamentary committees that could provide a clear picture of the potential risks from a law becoming tailor-made. The majority of initiatives for recognising a certain law as tailor-made are raised by civil society and the media, through advocacy campaigns, participation in public consultations and media reports.

Several examples show how particular tailor-made laws came into force and their consequences for Montenegrin public interest.

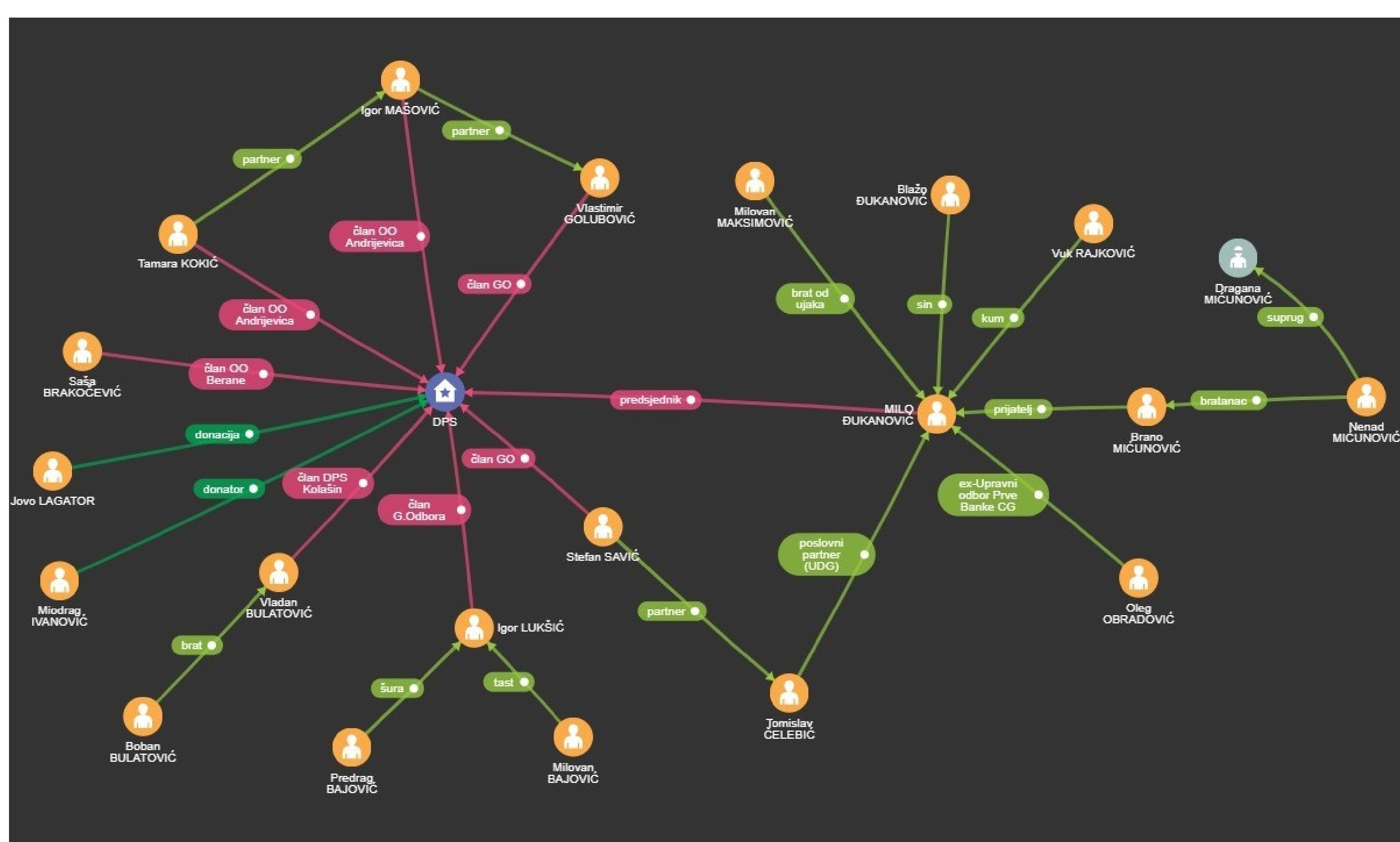
Example 1 - Law on Energy

In 2016, Montenegro's government proposed changes in the Law on Energy[46] to allow sustainable energy companies to receive subsidies directly from the end users of electricity. During the discussion in the parliament, the ruling political party rejected amendments proposed by opposition parties that could prevent such practice.

The government rationale was that Montenegro needs to harmonise its legal framework with the EU Directive on the use of energy from renewable sources,[47] in order to achieve relevant goals for renewable energy. While the EU Directive specified that countries should encourage production of cleaner energy, the government transformed that into an obligation with additional benefits for those producing energy from renewable sources. They guaranteed that the state would buy everything they produced, regardless of the country's current energy needs, status of privileged producer and the tax for renewable sources, paid directly by consumers through their electricity bills.

Most of these companies produce energy from small hydropower plants that do not significantly contribute to achieving clean energy goals set out in the relevant EU directives.[48] During 2019, one part of these subsidies was terminated,[49] but the companies kept their privileged status on other grounds.

An investigation conducted by MANS in 2017[50] showed that most of the owners of small hydropower companies that are already producing electricity, or intend to do so, are directly related to President Milo Đukanović or his party. At that time, the government had approved the construction of over 50 small hydropower plants.



Scheme: Network of small hydropower plants

The Đukanović family entered the electricity business when two concessions were granted to a company owned by the president's son, Blažo Đukanović. Two more hydropower plants will also be built by Milovan Maksimović, Đukanović's cousin, while Vuk Rajković, Đukanović's best man, is linked to a company which has been granted concessions for four hydropower plants.

Beside his family members, business partners of President Đukanović are also involved in the electricity business. Concessions for several hydropower plants have been granted to companies related to Tomislav Čelebić, and also to Oleg Obradović, one of the key actors in the Telecom privatisation bribery affair[51] and former Board President of First Bank of Montenegro owned by the brother of the Milo Đukanović.

[46] Law on Energy <http://www.katalogpropisa.me/wp-content/uploads/2017/07/Zakon-o-energetici.pdf>

[46] Law on Energy <http://www.katalogpropisa.me/wp-content/uploads/2017/07/zakon-o-energetici.pdf>
[47] 2009/28/ EU Directive on the promotion of the use of energy from renewable sources, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0028&from=EN#d1e1755-16-1>
[48] Energy production report of the Montenegro Energy Market Operator, https://energy.cetec.me/documents/175_misao-na-operatorki-iz-jestoi-cluh-a-n

[48] Energy production report of the Montenegrin Energy Market Operator, <https://www.cotee.me/index.php/desavanja/175-mjesecni-energetski-izvjestaj-sluzbe-zajednice-i-vek-za-oktobar-2019-godine>

[49] Government of Montenegro, 2019, <https://www.gov.me/vijesti/200599/od-1-juna-se-ukida-naknada-ya-OIE1.html>

[49] Government of Montenegro, 2015, <https://www.gov.me/vijesti/200555/od-1-julja-se-akcija-naknaduju-za-3121.htm>

[50] Investigation energy sector captured by private interests, <https://www.mans.co.me/en/energy-sector-in-the-network-of-private-interests-of-dukanovic-and-his-party/>

[51] <https://balkaninsight.com/2015/11/18/montenegro-charges-two-in-telekom-bribe-case-11-17-2015/>

[51] <https://balkaninsight.com/2015/11/18/montenegro-charges-two-in-telekom-bribe-case-11-17-2015/>

A consortium involving Obradović, along with Ranko Ubović and Aleksandar Mijajlović, will build the largest number of hydropower plants. In addition to six currently operating, Obradović has been granted concessions for a further 13 plants. By 2017, Obradović's existing small hydropower plants had received €3.5 million (US\$4.2 million).

The government has granted permission for the construction of two small hydropower plants to the company "MN Power",^[52] owned by the wife of Nenad Mićunović, a nephew of the controversial businessman Branislav Mićunović^[53] from Nikšić, who has been indicted in Italy for international cigarette smuggling.

In 2017, a hydropower plant owned by the Kronor company also started operations.^[54] Two businessmen in the construction sector, Žarko Burić and Željko Mišković, are at the helm of Kronor, as well as Predrag Bajović, who is married to a sister of the former Prime Minister, and a member of the Main Board of the DPS, Igor Lukšić.

Lukšić's father-in-law is also involved in the electricity business, as well as several other members of the DPS Board, Stefan Savić, a member of Montenegro's national football team, is one of the DPS board members who has received a concession for small hydropower plant.^[55]

This network of people and companies linked with state leaders has also spread locally. It also involves members of DPS municipal boards in Berane, Andrijevica and Kolašin. At that time, citizens were paying fees for the operation of two hydropower plants owned by Igor Mašović, a member of the DPS Municipal Board in Andrijevica. Igor Mašović is the brother of the then-Mayor of Andrijevica, Srđan Mašović. Of the concessions granted at that time, almost half were made to individuals and companies directly related to Đukanović and the DPS.

In addition to its obvious economic impact, the law had a significant impact on the environment and on local communities in which the small hydropower plants were placed. The construction of the power plants devastated small rivers, predominantly in the less developed northern part of Montenegro.

This initiated numerous protests by local groups of CSOs, advocating for a moratorium on hydropower construction.^[56] In several instances, they succeeded in stopping the construction of new plants,^[57] but the moratorium was not introduced. The government declared that it would review existing contracts,^[58] but the companies are still enjoying the benefits of this tailor-made law.

Since then, the Law on Energy has been amended several times, but the key benefits for these companies have not been removed.^[59]

In addition, in the past decade, the government and Parliament adopted laws limiting space for protecting the public interest and civic rights, while also allowing for poor transparency, discretionary decision-making and the abuse of power for the benefit of a few. Such laws include the amended Law on Spatial Planning and Construction of Objects, which transfers decision-making powers from local governments to the Minister for Spatial Planning. Likewise, the Law on Expropriation of Property was presented as removing business barriers, but deprives private owners of the right to freely enjoy their property, as guaranteed by the Constitution of Montenegro.

Example 2 - Law on Spatial Planning and Construction of Objects

In 2017, Montenegro's government introduced an amended Law on Spatial Planning and Construction of Objects,^[60] which was adopted by Parliament the same year. One of the law's key shortcomings was the government's obvious intention to centralise decision-making on spatial plans, granting permits and land management.

These proposals were criticised by CSOs and experts^[61] during public consultations, but the government rejected most of the comments and suggestions for improvement of the law.

By facilitating the absolute centralisation of decision-making and control of spatial development, the proposed law opens the door wide to corruption. In European Commission documents, spatial planning in Montenegro has already been characterised as very susceptible to corruption.^[62] The new law required that this process be managed by an even narrower circle of decision-makers, reducing oversight and the number of people corrupt interests would need to influence.

[52] <https://www.dan.co.me/?nivo=3&rubrika=Vijest%20dana&clanak=654512&datum=2017-10-30&najdatum=2018-07-14>

[53] <https://balkaninsight.com/2013/02/07/cigarette-smuggling-trial-against-montenegrins-starts-in-italy/>

[54] Operation permit for Kronor power plant, <https://mrt.gov.me/ResourceManager/FileDownload.aspx?id=287470&rType=2>

[55] Contract for concessions, https://www.gov.me/ResourceManager/FileDownload.aspx?rid=411689&rType=2&file=17_186_06_08_2020.pdf

[56] <https://www.slobodnaevropa.org/a/2994231.html>

[57] <https://www.slobodnaevropa.org/a/prva-pobjeda-mje%C5%A1tana-protiv-malih-hidroelektrana-u-crnoj-gori/30223773.html>

[58] <https://investitor.me/2019/10/17/premijer-najavio-raskidamo-6-ugovora-za-gradnju-malih-hidroelektrana/>

[59] 2020 Amendments to the Law on Energy, https://www.gov.me/ResourceManager/FileDownload.aspx?rid=407220&rType=2&file=1_177_11_06_2020.pdf

[60] Law on Spatial Planning and Construction of Objects, <https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/250/1532-9716-27-1-17-5-23.pdf>

[61] <https://www.dan.co.me/?nivo=3&rubrika=Drustvo&clanak=594426&datum=2017-04-13> <https://www.vijesti.me/vijesti/politika/85364/jelusic-prijedlog-zakona-podsjeca-na-projekat-ekoloske-drzave-u-kojoj-se-sada-smece-nalazi-na-svakom-koraku>

[62] https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/montenegro_report_2020.pdf

By proposing such a law, the government completely took over the authority for planning and development. This is in conflict with the Constitution,[63] because it abolishes the jurisdiction of municipality in terms of spatial planning. This law also contradicts the European Charter of Local Self-Government,[64] as it limits the rights of local authorities.

The amendment came soon after the government was unable to authorise the business plans of certain companies, due to resistance from local governments, which claimed that such plans went against the public interest.

After the law was adopted, the government was able to bypass any resistance at local level, and more easily accommodate any development plans, even if not in line with local community interests. The law serves only the centralisation of the government's decision-making powers, and the needs of potential investors.

Example 3 - Law on Expropriation of Property

In 2018, the Parliament of Montenegro adopted the Law on Expropriation of Property,[65] which defines the conditions under which the government may request owners of private property to sell their land to the state. Such laws are normally used for the development of government projects and projects of undisputed public interest. However, some of the changes to the previously amended Law on Spatial Planning and Construction of Objects stipulated that the construction of luxury hotel facilities and resorts should be considered as in the public interest.

The law stipulates that Montenegro's government can take over a property even if the state does not succeed in negotiating a price with the private owner. In such cases, the owner can seek court protection, but it does not prevent the government from entering the private property.[66] Bearing in mind the capacity of the Montenegrin judiciary, these court cases could last for years if the owner does not agree to the price of the land defined by the government. This law clashes with the Constitution of Montenegro, which protects citizens' right to freely enjoy property ownership.

This law was brought into force after several attempts by the government to develop the remaining unspoiled parts of the Montenegrin coast, which failed due to a number of private owners who were not ready to sell their land in order for it to be offered to an investor by the government. The most obvious example is the case of the government's plans for mass urbanisation of Buljarica Bay.[67] The plans were opposed by a local community owning parts of the land that government planned to offer for public tender.[68] The same group of citizens also opposed the Law on Expropriation of Property, but Parliament adopted it regardless.

Adoption of this law provided the government with a very powerful tool for attracting investors, and with enormous opportunity for abuse of power.

[63] Article 113 of the Montenegrin Constitution, <http://www.skupstina.me/images/documents/constitution-of-montenegro.pdf>
[64] Article 4 of the European Charter of Local Self-Government, <https://rm.coe.int/168007a088>
[65] <https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/499/1789-11283-23-1-18-4-9.pdf>
[66] Article 29a of the Law on Expropriation of Property.
[67] <https://www.slobodnaevropa.org/a/sporna-prodaja-atraktivne-uvale-buljarice/27782111.html>
[68] <https://www.bokanews.me/featured/nase-ognjiste-sudovi-ne-zele-ispitaju-visemilionske-tendere-savjet-privatizaciju/>

ACHIEVING AND MAINTAINING STATE CAPTURE

The cases presented in this study back up the claims that Montenegro is a captured state, where the judiciary is focused on absolving state officials from responsibility in cases of high-level corruption, and the law-making process serves as a tool for preserving the privileges of those who have, over time, accumulated political and economic power.

The judiciary

Processing high-level corruption cases with “useful” flaws in cases involving state officials defines the Montenegrin judiciary as an institution captured by the strong political influence of the ruling elite, and conditioned by numerous benefits provided by the government. Judges and prosecutors are rarely challenged over their decisions, and with almost no responsibility for them, continue this interest-based approach to the executive. This has enabled the ruling regime to persist for decades, continuing to further weaken the state institutions in charge of enforcing the law.

Tailor-made laws

Achieved through elections, political dominance over the legislative branch of power has also enabled the ruling elite to adjust the legal framework to serve the protection of their private and political interests, as well as those of individuals and entities supporting their politics. Weak public participation and poor parliamentary screening of proposed laws, with almost no proper discussion, have contributed to the legalisation of numerous ill practices and the adoption of policies that serve only a few.

These practices are significantly impacting the process of EU integration in Montenegro. The reforms are cosmetic, with no serious impact on the privileges and benefits that the ruling elite enjoy in the system of state capture. Preservation of power at all levels of government was for decades a sole state policy, most frequently justified as being on account of the public interest. Over time, this has resulted in poor rule of law, where corruption has become the rule, not the exception.

CONCLUSIONS

State capture still represents a serious threat for Montenegro and the democratisation of its society. It is embedded deep in national institutions that are captured by political influence, for decades designed to serve the party, not the public interest. This has proven especially dangerous in institutions responsible for combating corruption and organised crime, such as the police, prosecution services and the courts.

State capture has hampered the country's progress in law enforcement at all levels, ultimately slowing – and in some sectors, reversing – the cycle of reforms. In consequence, the process of EU integration as a driving vehicle for democratisation of the country has been slowed down, and does not provide clear benefits for the citizens of Montenegro.

The examples presented in this report clearly describe the severity of state capture in Montenegro. The judicial cases show that the prosecution of high-level corruption involving state officials does not uphold the rule of law and the democratic principle that everyone is equal. Instead, it preserves the political power of the ruling elite, through court proceedings that fail to comply with the basic principles of punishment.

A weak system of accountability within the judicial system has left it intact for decades to serve the political elite. There is still poor transparency in the work of judges and prosecutors, preventing the public from properly overseeing their actions and calling for accountability responsibility.

Similarly, tailor-made laws have been embedded in the Montenegrin legal framework to serve the interests of the ruling elite and privileged individuals and entities. The process of adoption of such laws is stripped of real public consultation and discussion, while efforts to oppose them are severely disabled by the political majority in Parliament. Enforcement of such laws has already severely impacted the public interest, including in economic, environmental and civic terms.

Lack of political will and deeply embedded corruption and political influence are continuously reducing opportunities for ending state capture. However, in August 2020, after 30 years Montenegro experienced the first change of government, which now faces increased pressure to deliver long-awaited and promised implementation of key anti-corruption reforms. This will also require a strong civil society and free media to monitor future developments and prevent backsliding in implementation of reforms.

However, these reforms are limited to the executive and legislative branches of power. The judicial system might remain unchanged for longer as mandate of judges and prosecutors is not election-dependent.. This will significantly slow down new reforms, but it will not shut them down completely. The new political majority brings the chance for Parliament to become a proper oversight body, which is essential for reducing the possibilities of tailor-made laws.

RECOMMENDATIONS

This report demonstrates that significant changes need to be introduced in the judicial processing of grand corruption, including a more efficient system of checks and balances, and improved transparency and access to information on the work of the judiciary. To prevent tailor-made laws, a more efficient system to scrutinise laws during their adoption process must be introduced, as well as opening law-making to the widest possible public consultation.

The judiciary

The first recommendation related to the judiciary is to draw on lessons learned in other countries and ensure personal and systemic changes within the judiciary, especially at the highest levels.

In order for the judiciary to stop maintaining state capture in Montenegro, its capacity to efficiently process criminal offences must be strengthened, especially those of grand corruption involving state officials. Stronger investigative measures and amendments of the Criminal Code are needed as tools for more efficient investigations and fewer unconfirmed indictments. This is especially important for the application of the plea agreements that are predominant in cases involving state and political officials, in order to avoid lenient punishments and misuse of this arrangement.

Clear, transparent and binding guidelines for courts need to be introduced in order to prevent the continuation of the practice of imposing sentences that are significantly below the statutory minimum for the most serious crimes of corruption, which cause significant damages to public funds.

A more efficient liability system must also be established within the judiciary to prevent its use for state capture. This report shows that violations of laws and procedures by prosecutors and judges are tolerated. Their omissions in favour of defendants for serious crimes of corruption face impunity.

A solid system of checks and balances for the evaluation of judicial work is essential for sending out the message that unlawful behaviour is no longer tolerated within institutions in charge of fighting corruption and organised crime.

Transparency in judicial work and free access to information are among the key factors needed for proper public oversight of the judiciary. Enforcement of the Law on Free Access to Information is very weak, with internal steps taken by prosecutors and judges to deny access to information on their work, as well as to court documents and prosecutors' files, even when investigations and trials are completed.

Access to final court verdicts is allowed formally, but is significantly undermined by court decisions to anonymise the key information in these documents. Such practice must be reversed and the public provided with full access to court verdicts. This will enable true public oversight of the judicial system, reducing the opportunities for illegal behaviour by prosecutors and judges, and removing them from the machinery of state capture.

Law-making

The role of Parliament is undisputable in creating an environment with zero tolerance to tailor-made laws. The government must also conduct proper public consultations, open to all interested stakeholders.

We propose the adoption of a special law requiring the government to list all benefits provided to legal entities by each proposed law.

When it comes to preparation of laws, the government and its agencies must invest extra effort into mobilising citizens, CSOs and other stakeholders, by organising a truly open participation process. This process should no longer be formal in order to satisfy legal obligations, but a wide open process that will draw on the potential of CSOs and community groups, experts and academia in order to present the best possible legal norms. Such a process will minimise the impact of lobbying for particular legal solutions, and reduce the opportunities for laws to be tailor-made.

Parliament should also carry out more detailed scrutiny of legal proposals submitted for discussion and adoption. Although legal bills are checked by several committees before adoption, there has so far been no separate screening process in Parliament as to whether some laws should be considered as potentially tailor-made. So far, tailor-made laws that have been passed have been harmonised with domestic legislation, but not always with EU directives.

The obligations under Negotiation Chapter No. 8 defining the Competition policy^[69] could serve as a starting point for assessment and harmonisation with EU standards. They could to a large extent enable filtering of legal provisions to flag any proposed legislation as tailor-made.

In addition, parliamentary bodies should conduct a more serious assessment of all stakeholders affected by a proposed law, as well as all actual and potential beneficiaries of certain legal norms which could be perceived as being biased or favourable to them.

[69] https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership/chapters-of-the-acquis_en



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