BEHIND THE STATISTICS 2

Review of Final Judgments in Corruption Cases

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INTRODUCTION

This review aims at giving an objective view of judicial anticorruption performance and looking behind the official, quite impenetrable statistics.

This is the second review done by MANS, since the Tripartite Commission, composed of members of the courts, the prosecution and the police, publishes mere numbers.

We reviewed over 400 final first and second instance judgments posted by courts on their websites or obtained by invoking the Free Access to Information Law.

The judgments were reviewed based on the official classification of corruption offences including:

- Money Laundering, Criminal Code (CC) Art 268;
- Breach of Equality in Business Operations, CC Art 269;
- Causing Bankruptcy, CC Art 273;
- Bankruptcy Fraud, CC Art 274;
- Misuse of Authorities in Business Operations, CC Art 276;
- Fraudulent Balance Sheet, CC Art 278;
- Misuse of Assessment, CC Art 279;
- Revealing a Business Secret, CC Art 280;
- Revealing and Using Stock Exchange Secrets, CC Art 281;
- Misuse of Office, CC Art 416;
- Malpractice in Office, CC Art 417;
- Trading in Influence, CC Art 422;
- Passive Bribery, CC Art 423;
- Active Bribery, CC Art 424;
- Disclosure of Official Secret, CC Art 425;
- Abuse of Monopoly Position, CC Art 270;
- Misuse of Position in Business Activity, CC Art 272;
- Fraud in the Conduct of Official Duty, CC Art 419.

Part One looks into the statistics, and Part Two deals with the selective approach to criminal prosecution, while Part Three reviews the length of proceedings and the consequences of inefficiency on the part of judges and prosecutors. Part Four refers to dropping of charges, and Part Five focuses on acquittals. Penal policy is under review in a separate chapter, as well as covert surveillance measures supposed to be used to procure evidence of corruption. The next chapter deals with the impact of conviction as regards the confiscation of proceeds of corruption. A separate chapter deals with the liability of judges and prosecutors, and another with pardoning of persons convicted for corruption. The last chapter deals with access to court judgments.

EXECUTIVE SUMMARY

The official statistics on judicial anticorruption efforts are fictitiously doubled. The review of first instance judgments reveals that the official data include also the cases referring to offences not involving corruption, or some actions not constituting criminal offences.

Judicial performance is embellished by cases involving businesspeople, petty offences and corruption at the lowest level. Prosecutors more frequently and efficiently prosecuted the private sector employees than public officials and civil servants. The official statistics includes also the cases in which private sector individuals are prosecuted as officials, although they cannot have such a status. A considerable number of cases refer to petty crimes which cannot even remotely be linked with corruption. The specific cases show that state prosecutors do not launch proceedings whenever they become cognizant of corruption offences being committed, but act arbitrarily and selectively, particularly in cases involving public officials.

In the few cases in which public officials have been charged, convictions are much less frequent than in low-level corruption cases. When looking into the structure of the prosecuted persons from the public sector, it becomes evident that foresters are prosecuted more frequently than public officials, and convicted two times more often. Even the imprisonment sentences are pronounced more often to foresters than to public officials.

The penal policy for corruption offences is uneven, inconsistent and incomprehensible, hence unpredictable; thus, the outcome depends on the case law of the trial court or the individual judge. Too frequent amendments to the Criminal Code governing the misuse of office, accounting for the largest share of cases, and the differences in interpretation of such amended provisions in practice, assisted many a person accused of corruption to be punished more leniently or even go unpunished.

Rarely do courts pronounce imprisonment sentences for corruption offences, and lesser corruption is sanctioned more severely than the large-scale one, thus embellishing the judicial performance statistics. Imprisonment sentences were pronounced in all cases of active bribery, although it always involved petty corruption. On the other hand, imprisonment sentences were extremely rare in the misuse of office cases, predominantly sanctioned by suspended sentences, regardless of the amount of gains obtained and regardless whether it involved offences indicative of high-level corruption.

The proceedings in corruption cases last 19 months on average, often leading to statute of limitations or after several years of trial prosecutors would drop the charges without any explanation. Due to inefficient work of courts and non-performance of the official duty of prosecutors and judges, criminal prosecution becomes barred by time. This relieves of liability for corruption offences and incurs substantial costs to the budget and taxpayers. The review shows that in many cases prosecutors dropped criminal charges arbitrarily and in an unsubstantiated fashion. Dropping the charges in closing argument, offering no explanation, may be an indication of corruption and undue pressure on the prosecution office.

In three cases only the proceedings for corruption offences were launched based on evidence gathered through covert surveillance; hence, the excuses that the difficulties in proving and the inability to use covert surveillance measures were the reason for poor performance in curbing corruption are unacceptable. The specific examples, though, show that the authorities, the police in particular, use such powers to infringe upon the rights of those citizens who fight against corruption, thanks to the assistance given by courts.

The amounts awarded by courts as compensation for damages caused by corruption are many times lesser than the estimates given by prosecutors in indictments, particularly in cases involving corruption in the public sector. Again the focus is on the lowest-level corruption, with almost one in four corruption cases with awarding of damages, both in the public and in the private sector, involving foresters. At the same time, foresters paid almost two thirds of the total amounts awarded for corruption in the private sector or more than twice as much as all the convicted public officials put together.

No state prosecutor has ever been held disciplinarily liable, regardless of several initiatives launched by MANS on different grounds. Few judges have been dismissed, and many left the office upon personal request, suggested to do so by their superiors to hide the omissions in their work from the public eye. The testimonies given by judges prove that the Judicial Council has ignored the violation of laws and procedures in one of the courts.

Some civil servants avoid liability for corruption thanks to pardoning by the President who declared such documents a secret.

For over two years, many courts persisted in efforts to hide the final judgments for corruption offences. Following the two contradictory judgments by the Supreme Court, the practice of secrecy has finally changed.

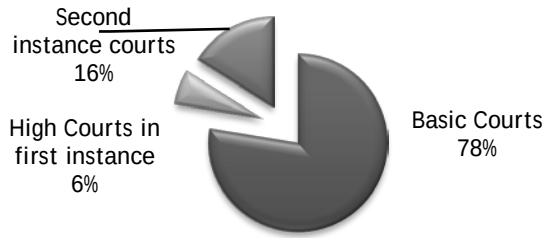
1. FIXING THE STATISTICS

The review of first instance judgments shows that the statistics on judicial performance in combating corruption have been fictitiously doubled by including in such statistics the offences which are not corruptive in their nature, or some actions which do not constitute crimes at all, as well as prosecuting private sector individuals as officials.

1.1. Fictitious increase of the number of cases

Following the efforts taken over several years, invoking the Free Access to Information Law (FAI Law), all Basic Courts made available to MANS all final judgments for corruption offences pronounced from the beginning of 2006 until the end of July 2012[1].

Basic Courts made available 322 judgments in total; as for the Podgorica High Court, the Bijelo Polje High Court and the Court of Appeal's judgments, these were downloaded from their respective websites, in total 26 first instance, and 67 second instance judgments.



Graph 1: Number of judgments by court

Nevertheless, close to 23% of all the cases made available by Basic Courts did not refer to corruption offences.

Firstly, courts are persistent in classifying the misuse of position in business activity as a corruption offence, although it is not officially classified as such[2]. Similarly so with malpractice in business, also not officially classified among corruption offences. Secondly, some courts made us available the judgments for violent behaviour, embezzlement, family violence, even illicit fishing, under the heading of corruption.
Thirdly, courts keep classifying economic crimes related to business activity as corruption offences, although most of them have not been recognised as such, either officially, or substantially.

Some **3%** of the cases refer to proceedings launched by state prosecution and carried out by courts for corruption cases, even when such **actions do not constitute criminal offences**.

> For instance, in a proceeding before the Podgorica-based Basic Court the prosecution charged a police officer with misuse of office for having issued an order, contrary to the Rules, to tow away a vehicle parked in a way endangering traffic. For as long as two years, the state prosecutor supported such indictment, and it took the court as much time to establish it did not constitute a crime. In its proceeding the Court

[1] Some courts failed to make available the judgments for the whole period covered; more details in Chapter 11
[2] The Tripartite Commission, in all justification, did not include this offence among the corruption offences. The list of corruption offences is given in the Introduction.

established that no intention as an essential element of a criminal offence was proven, and the defendant was acquitted.[3]

When some essential elements of a criminal offence are missing, then such crime does not exist and the defendant is acquitted since the act he was charged with does not constitute a crime.[4] However, the Court acquitted the defendant on this ground once when it was proven the defendant has not committed the offence charged with.[5] On this ground, the offence does exist, but there are no proofs the defendant has committed it.

Apart from incompetence, such view of the Court may also be indicative of intentional fixing of statistics, because with this the case is recorded as a corruption case instead of taking note that the action that gave rise to the proceeding did not constitute a crime to begin with. This is to hide the fact that for two years the prosecutor prosecuted for an action that does not constitute a crime.

> In another judgment[6] of the same Court the legal adviser at the Institution for Execution of Criminal Sanctions - Podgorica was acquitted because the prosecution dropped the charges. He was also charged with misuse of office of prolonged duration because in the civil cases representing the Institution he did not object to claims of workers who asked for labour-related payments, but rather proposed the hearing to be concluded for the sake of economy.
>
> According to the views of the state prosecutor, who upheld the indictment for three years, the defendant thus procured gains for others to the damage of the Institution for over 30,000 euros. Eventually, in the closing argument the state prosecutor dropped the charges concluding that the defendant's actions did not constitute a criminal offence, and that the Institution confirmed the employees that conducted judicial proceedings were entitled to compensation.

The question raised here is what led the state prosecutor to believe otherwise for full three years. Apart from incompetence, incurring substantial costs charged against the budget, such behaviour may raise suspicions of fixing the statistics on corruption cases, although this obviously did not constitute a crime.

> Similar conclusions may be drawn from the same Podgorica-based Court[7] pronouncing a suspended judgment to the owner and manager of a driving school for misuse of office. She was convicted for issuing two certificates of knowledge of traffic regulations to persons under 16, which is n contravention to the law.

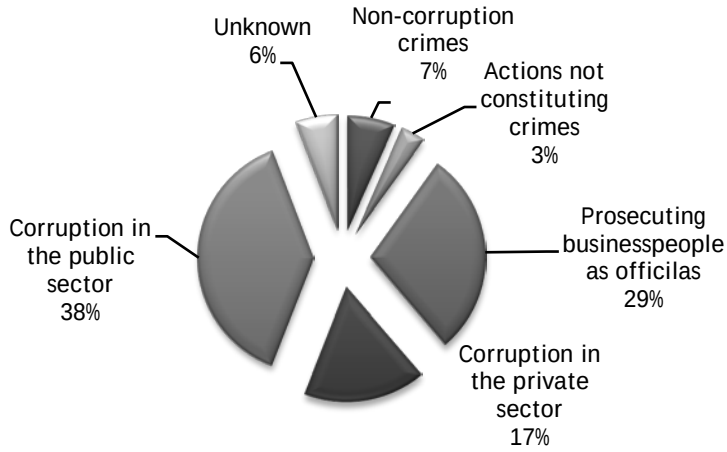
The Basic Court Podgorica treated the issuance of a certificate of knowledge of traffic regulations as misuse of office, and the same Court, in a proceeding against judges of the High Court Bijelo Polje, believed it to be a mere omission and acquitted the judges of charges of hiding the facts about prior convictions, leading to an unlawful judgment changing the prison sentence into a suspended judgment[8].

Almost one fourth of all cases refer to prosecution of business people as official persons. Under the current Criminal Code, **only public officials may be liable for misuse of office, not the private sector employees**. Accordingly, neither the acts of **malpractice in office** could be done by persons working in the industry.

[3] K.br.07/140 of 14 March 2007
[4] CPC Art 363(1)
[5] CPC Art 363(3)
[6] K.br.07/876 of 18 May 2009
[7] K.br.08/1570 of 26 January 2009
[8] More detailed information available in the case study in Chapter 9

Hence, the separation between the concepts of the public official and the responsible person was justified, since the use of one's position to procure gains for oneself or the company is often a legitimate goal in business activity. The **Tripartite Commission**, thus, in all justification, **does not classify misuse of position in business activity as a corruption offence.**

With the CC amendments from 2010, the perpetrator of misuse of office[9] may only be a public official[10]. The same amendments stipulate misuse of position in business activity[11] as a continuity of the misuse of office in cases when the perpetrator is the responsible person in a business entity[12].



Graph 2: Structure of the judgments made available

Hence, the analysis shows that the official data on the number of final judgments in corruption cases exceeds the actual number by almost 40%.

1.2. Fictitious increase of judicial performance statistics

Taking the official statistics, but excluding those offences for which it is clear even to lay people that they do not involve corruption, such as violent behaviour, family violence, illicit

[9] More details on all amendments to this criminal offence in "Behind the Statistics", pp. 75-78

[10] According to the CC Art 142(3), a public official is: 1) a person who performs official duties in a state authority; 2) an elected, appointed or designated person in a state authority, local self-government authority or a person who performs on a permanent or temporary basis official duties or official functions in these authorities; 3) a person in an institution, business organization or other entity who is delegated authority to carry out public functions, a person who decides the rights, obligations or interests of natural and legal persons or public interest; 4) and any other person performing official duties under a law, regulations adopted pursuant to laws, contracts or arbitration agreements, as well as a person who is entrusted with the performance of certain official duties or affairs; 5) a military person, with the exception of provisions of Chapter Thirty Four of this Code; 5a) a person performing in a foreign state legislative, executive, judicial or other public function for a foreign state, a person who performs official duties in a foreign country on the basis of laws, regulations adopted in accordance with a law, contract or arbitration agreement, a person performing official duty in an international public organization and a person performing judicial, prosecutorial or other office in an international tribunal.

[11] CC Art 272

[12] Until May 2010, responsible persons in a company may have been punished by imprisonment between six months and five years for misuse of office, or imprisonment between one and eight years if the gains procured exceeded 3,000 euro, and imprisonment between two and ten years if the gains procured exceeded 30,000 euro. The responsible officer in a business entity may be punished for misuse of position in business activity by a prison term from three months to five years, or two to ten years if the gains procured exceed 40.000 euros.

fishing, it becomes evident that in addition to the fictitious increase in the actual number of cases, the judicial performance statistics has also been pumped up.

Thus, we reviewed 388 final judgments in corruption cases, 316 first instance judgments and 72 second instance ones. In first instance cases, 146 referred to corruption in the public sector[13], and 170 to corruption in the private sector.

Graph 3: First instance proceedings: corruption in the public and the private sectors – by number of cases

The review of first instance judgments shows that prosecutors prosecuted more often the employees in the private sector on the count of corruption, than public officials and civil servants.

At the same time, greater efficiency of both the prosecution office and the courts in proceedings involving business people than in cases related to corruption in the public sector is evident, which embellishes the picture.

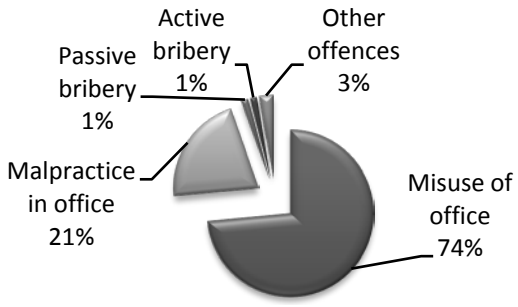
Even when prosecutors launch proceedings against **public officials**, these end up in **convictions much less frequently than those charged with lowest level corruption** – which pumps up penal policy statistics. Thus, it is much more likely for a forester convicted of corruption to end up in prison than a public official.

Moreover, **in one out of ten first instance cases a ranger**, or a forester, is charged with lowest level corruption, thus embellishing the official statistics.

A considerable number of cases refer to **sanctioning for petty crimes** which cannot even in the most stretched interpretation be linked with corruption. In such a way the prosecution office and courts make anticorruption efforts devoid of any meaning in an attempt to embellish statistics.

1.2.1. Break down of offences

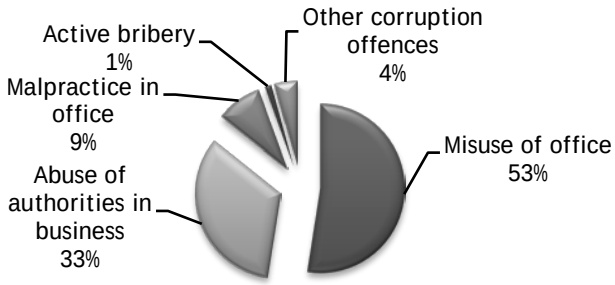
In almost three out of four cases referring to corruption in the public sector the defendants are charged with misuse of office, while one in five refers to malpractice in office.



Graph 4: First instance court proceedings for corruption in the public sector: Break down of offences – by the number of cases

[13] Six cases involved seven accused persons from the private sector, but for the sake of this review, all the cases that involved at least one civil servant or public official were classified as corruption in the public sector.

As already said, a large number of cases involved business people charged with misuse of office, or malpractice in office. Looking at the private sector statistics only, over 60% of cases involve those offences.



Graph 5: First instance court proceedings for corruption in the private sector: Break down of offences – by the number of cases

However, prosecutors keep on prosecuting, and courts keep on adjudicating private sector employees as public officials, although they could not possibly have such a status. This fictitiously increases both the number of cases and people convicted for corruption offences, giving a false picture of judicial performance.

Case study 1: Company managers, electricians… pass as pubic officials

The Basic Court Plav passed a judgment[14] convicting **a founder and an executive director and one employee of a limited liability company** for misuse of office. This judgment was pronounced by the Court at the time when responsible persons in companies could not have been perpetrators of misuse of office[15], but the Court, nevertheless, treated the defendants as officials. The judgment makes it also clear that the Court and the state prosecutor treat company contracts and invoices as official documents, although these can be issued solely by public officials and their purpose is to prove certain facts within the performance of official duty.

The same Court passed a judgment[16] by which **an electrician** employed with the national power utility company EPCG was convicted of misuse of office for unauthorised collection of electricity bills, although he could not have had the status of a public official.[17]
Similarly, the Basic Court Berane convicted for misuse of office the **executive manager of a company**, although at the time when the state prosecutor raised the indictment[18] a responsible person within a company could not have been a perpetrator of this offence.

When raising the indictment, the state prosecutor fully neglected the amendments to the Criminal Code that led to such changes, and in its adjudication, the Court did the same. Therefore, this is another case which leads to a conclusion that neither the

[14] K.br.23/2011 of 01 July 2011
[15] See more in the "Behind the Statistics", 7.2.2. Legal Framework, pp 83, 84
[16] K.br.22/2012 of 21 June 2012
[17] CC Article 244(1) lays down: "Anyone who deceives another person or keeps him in deception by false representation or concealment of facts inducing him thereby to act or refrain from acting to the detriment of his property or property of another person with the intention to obtain for himself or another person illicit pecuniary gain shall be punished by a fine or a prison term up to three years"
[18] 31 December 2010

state prosecutor nor the Court know the CC proviisons or else they were intentionally creating false statistics of fight against corruption in the public sector.

This is not an isolated case as confirmed by the same Court convicting the head of a transport department in a company for malpractice in office[19], again treating him as a public official.

The above examples show that the same courts in some cases interpret law amendments to the benefit of the defendant and acquit them, while in others they pronounce imprisonment sentences.

Thus, for instance, the High Court in Podgorica pronounced an acquittal[20] in a case against two responsible persons in a company on the count of misuse of office. In the statement of reasons, the Court pointed out to the CC amendments from May 2010 and that a responsible person in a company ccould no longer be a perpetrator of this offence, and concluded that the actions taken by the defendants do not constitute a crime.

However, in other proceedings courts interpreted the above CC amendment in such a way to charge the defendants with another offence – misuse of position in business activity.

The Court of Appeals changed the judgment of the High Court Podgorica[21] in the legal qualification of the offence, convicting the responsible person in a company for misuse of position in business activity instead of misuse of office.[22] The same stand is held in the judgment by the Berane-based court.[23]

The judgment of the Court of Appeals shows that the CC amendments were subject to different interpretations and that at times they were used to the detriment of defendants to pump up statistics.

With this judgment[24] the Court of Appeals changed ex officio the Podgorica High Court judgment[25] convicting the director of a housing cooperative to a three-month prison term for misuse of office.

A day before the High Court passed the judgment the CC amendments entered into force[26] by which only a public official may be a perpetrator of misuse of office.

For this reason the Court of Appeals changed the judgment by convicting the defendant for another offence – misuse of position in business activity, also stipulated by the same CC amendments and which did not exist in the CC at the time of the commission, and thus pronounced a suspended instead of an imprisonment sentence.

Unlike this case, the "Behind the Statistics" publication[27] describes a case in which the Podgorica High Court acquitted two responsible persons in a company of such charges saying that according to the CC amendments they could not be the

[19] K.br.398/11 of 03 April 2012
[20] Ks.br.48/2009 of 07 July 2010
[21] Ks.br.37/09 of 14 May 2010
[22] Ksž.br.18/10 of 05 November 2010
[23] K.br.161/11 of 30 January 2012
[24] Ksž.br.18/10 of 05 November 2010
[25] Ks.br.37/09 of 14 May 2010
[26] Official Gazette of Montenegro 25/2010 of 05 May 2010 – entered into force on 13 May 2010
[27] Case study: It Both Is and Is Not an Offence, Chapter 7, p 80

perpetrators of the misuse of office and that, thus, their actions did not constitute a crime.

Hence, in this case the Court of Appeals interpreted the CC amendments to defendant's disadvantage, but also in the way that enabled classifying a non-corruption offence, the misuse of position in business activity, among the statistics for corruption-related offences.

Moreover, in some cases state prosecutors themselves reclassify offences due to the CC amendments, thus charging the responsible persons within companies with misuse of position in business activity instead of misuse of office.[28]

Contrary to that, in other cases it was possible for the state prosecutor, even after the CC amendments, to charge a responsible person within a company with misuse of office[29], but also for the court to convict such a responsible person of misuse of office.[30]

In addition, in some cases for the duration of which the Criminal Code was amended so as to make it impossible for the responsible persons to be perpetrators of misuse of office, both the state prosecutor and the court disregarded such amendments.

Hence, the Basic Court in Plav convicted for misuse of office an IT engineer employed in the business sector[31] and an electrician employed with the national power utility EPCG[32], and the Podgorica-based court[33] a manager in a furniture parlour.

1.2.2. Break down of defendants

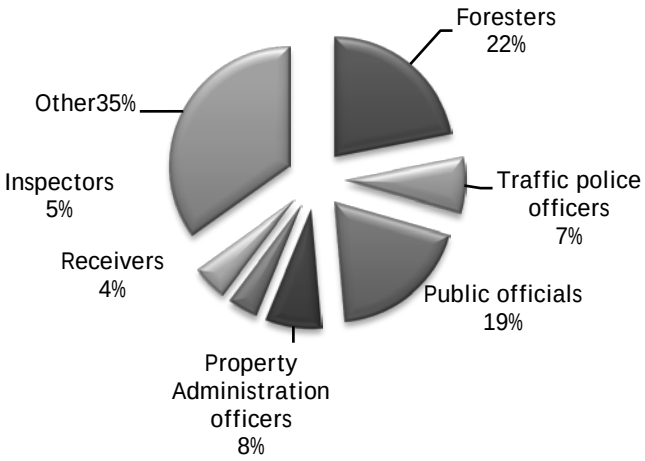
Somewhat larger share of persons from the private than the public sector have been prosecuted.

Graph 6: Share of defendants from the private and the public sectors

However, having a look at the public sector employees prosecuted on the count of misuse of office, reveals a surprising fact: **foresters are prosecuted more often than public officials**.

More precisely, **one in four proceedings involving public sector employees involved forest rangers,** and in Montenegro there are 17 times fewer foresters[34] than public officials[35].

[28] This is what the Basic Prosecutor in Podgorica did in a case heard before the Basic Court in Podgorica K.br.10/977
[29] Indictment Kt.br.300/10 of 31 December 2010
[30] Judgment K.br.19/11 of 03 June 2011
[31] K.br.23/2011 of 01 August 2011
[32] K.br.22/2012 of 21 June 2012
[33] K.br.09/1663 of 18 June 2010
[34] www.antenam.net/sajt/index.php/drutvo/6446-209-lugara-nadzire-sve-ume-u-crnoj-gori
[35] On 01 March 2013, the total of 3,538 public officials were on records, 1,420 of them state officials, and 2,118 local officials, www.konfliktinteresa.me/funkcioneri/funkcioneri.htm

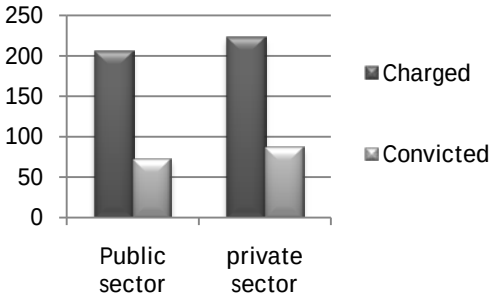


Graph 7: Break down of public officials and civil servants as defendants – by number of cases

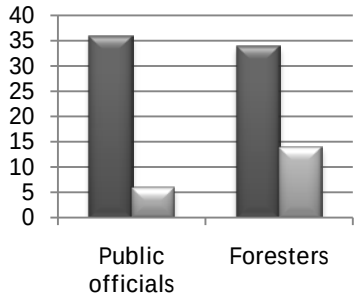
1.2.3. Persons convicted of corruption

The statistics on judicial performance in fight against corruption are pumped up by proceedings against business people who are convicted more often than public employees charged with corruption. The public sector statistics is again embellished by foresters convicted more often than public officials.

The data show that one in three persons from the public sector charged with corruption was actually convicted, as opposed to almost 40% in the private sector. Out of 36 public officials charged, 6 were convicted, while out of 34 foresters charged, 14 were actually convicted.



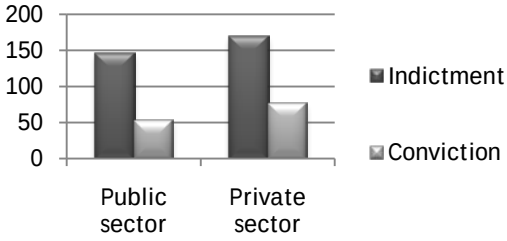
Graph 8: Number of persons charged and convicted in the public and private sectors



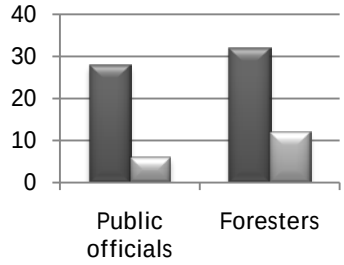
Graph 9: Number of charged and convicted public officials and foresters

Case data are also interesting. Convictions were brought in 1 out of 3 corruption cases in the public sector, and almost 1 in 2 in the private sector.

As regards corruption in the state administration, interestingly courts would convict only one in five cases involving public officials, while they did far better in cases against foresters with almost 40% of convictions.

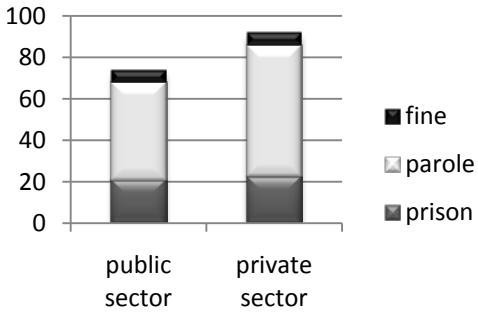


Graph10: Number of indictments and convictions in the public and private sectors

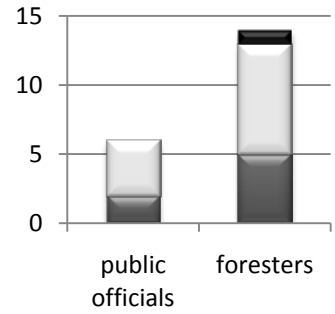


Graph 11: Number of indictments and convictions for public officials and foresters

Only one third of persons convicted of corruption were pronounced prison terms, with two thirds receiving only suspended sentences, with negligible number of fines. On this ground, there are no major differences between the private and the public sectors.



Graph 12: Breakdown of sanctions for corruption in the public and private sectors



Graph 13: Break down of sanctions for public officials and foresters

The review shows that even prison terms are pronounced more often to foresters than to public officials.

1.3 Petty crimes

State prosecution and courts make fight against corruption devoid of any meaning, and in an attempt to embellish statistics they are prepared to instigate proceedings and close cases which do not have even the remote resemblance to corruption.

The state prosecution offices and courts use the CC amendments adopted to fight corruption to sanction petty and bizarre actions causing damages that can solely be compensated for through civil law liability, i.e. in civil proceedings for compensation of damages.

Hence, the corruption case statistics include also a case in which in February 2010 a private company worker responsible for dispatching sand was charged with having received a bribe back in 1998 in the counter-value of 24.73 euros to deliver eight cubic meters of sand without a bill of lading or payment. Even the Court of Appeals was involved in this case that lasted for years and pronounced the final conviction in this case, although the Podgorica High Court acquitted him.

The statistics feature also a case in which three persons were acquitted for a corruption offence consisting of failure to control cattle, and one person was convicted of unlawful sale of 16 live lambs and four kids[36].

There is many a case concerning very small amounts of tax evasion, but the prosecution qualifies them as misuse of authorities in business activity. For instance, a businessman was charged with not having paid VAT to some dozen boxes of cigarettes amounting to around 75 euros[37]. One person was convicted of corruption for not having paid 50 euros of VAT and not having reported the import of insecticides, seeds of beans, beet root, celery[38]…

Thus even the cases of avoiding paying taxes to timber ranging between 19 and 108 euros are classified as corruption cases[39]. The length of proceedings is not negligible either; for instance, in one of such cases conducted for alleged tax fraud in the amount of 35 euros, it took 43 months to pass a judgement saying it was not a criminal offence to start with[40].

While the Prosecution Office is ignoring many an example of the misuse of official cars for private purposes, including state officials, in one case it launched a proceeding against a military person. This person was convicted of misuse of office for having used the official car to transport fire wood for personal use thus causing damages to the state in the amount of 70 euros[41].

The most bizarre case, nevertheless, involved a night guard who called sex lines at night and was convicted of corruption on the count of that.

Case study 2: Calls to sex lines – corruption

The Basic State Prosecution raised an indictment[42] against a night guard in a private company (Ltd.), charging him with the misuse of position in business activity for having used official telephone during the night shifts to call the numbers with non-geographical codes, the phone sex lines, thus causing damages to the employer of 907.35 €.

The Basic Court in Podgorica passed a judgment[43] by which this night guard was convicted (five months in prison, two years suspended sentence) for the above offence, thus causing the calls to sex lines to be included in the statistics courts and prosecution present as achievements in fight against corruption.

In any case, it makes no sense and one could not think the legislator aimed at focusing the criminal law interventions onto calls to phone sex lines. Also, it is hard to imagine that *ratio legis* for the CC amendments to curb corruption would be to provide incrimination for such actions.

Having in mind the principle that criminal law repression must be justified and necessary, and that the protection of human beings and other fundamental societal

[36] Kt.br. 1/10 of 8 April 2010
[37] Kt.br.439/07 of 24 December 2007
[38] 513/06 of 14 December 2006
[39] Kt.br. 93/06 of 5 December 2006, Kt.br.276/08 of 24 September 2008, Kt.br.42/07 of 23 March 2007, Kt.br.155/06 of 16 March 2006, Kt.br.105/08 of 7 April 2008, Kt.br.70/2008 of 30 May 2008
[40] Kt.br.105/08 of 7 April 2008
[41] Kt.br.07/1035 of 8 April 2008
[42] Kt.br.316/09 of 17 November 2010
[43] K.br.1050/10 of 29 September 2011

values are the basis and the limit of criminal law repression[44], only the protection of the most valuable personal and general assets would justify the criminal law reaction. That is why the criminal law is the last resort or *ultima ratio* in suppressing deviant behaviour.

It furthermore means that criminal law repression is never justified or necessary when the protection of values that are attacked or threatened may be exercised in some other way. In the case at hand it is beyond dispute that damages were caused to a private company through phone bills resulting from calls to sex lines. However, the compensation for such damages should be sought in civil proceedings.

It is almost incredible that the State Prosecutor and the Court would qualify such damages as a corruption offence. Both disregarded the provision of Article 133(1) of the Labour Law[45] stipulating that the employee is responsible for the damages caused to the employer at work or related to work, intentionally or through negligence. State Prosecutor and Court also disregarded the employment termination agreement established as evidence during the proceeding stating that the defendant and the employer both agreed about the employee's debt towards the employer, setting the timeframe within which the debt would be settled.

Hence, the State Prosecutor prosecuted, and the Court convicted of corruption, although it involved a typical civil law case, i.e. debt caused by damages the worker caused while working in a private company. Only someone lacking even the basic knowledge of criminal law or someone intentionally fabricating anticorruption statistics could qualify calls to sex lines from the official phone as a corruption offence.

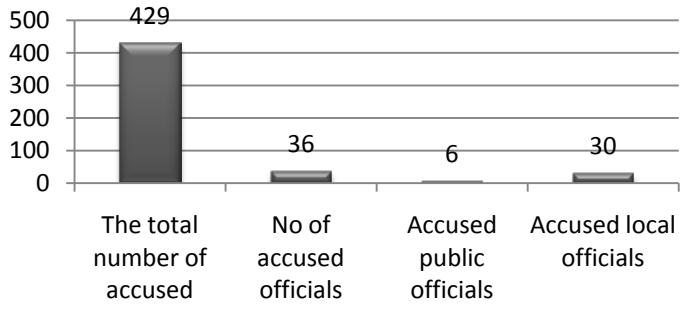
[44] CC Art 1
[45] Official Gazette of Montenegro 49/2008, 26/2009 and 59/2011

2. SELECTIVE PROSECUTION

2.1. Criminal (non)prosecution of public officials

Out of the 316 first instance judgments involving 429 persons charged with corruption offences, in only 28 cases the total of 36 public officials were charged, six of them state officials, and the rest local officials.

Or, to put it differently, out of all court proceedings for corruption offences, only 1.4% involved state officials.



Graph 14: Number of indicted state and local officials

The total of six convictions were brought against six officials, including one judge, two mayors and three directors of local public companies and institutions.

In two cases, public officials were pronounced imprisonment sentences, and the rest were suspended sentences.

The total damages these officials were charged with amounted to over 580,000 euros in 12 cases, while the damages awarded by the court amounted to 33,178 euros in two cases only, while in five cases the victims were referred to civil proceedings.

The specific cases show that state prosecutors do not launch criminal proceedings always when cognizant of corruption offence being committed, but take a different stand and a selective approach. State prosecutors fail to prosecute high-ranking officials as perpetrators, and when forced to prosecute, they do so against lower-ranked local officials then convicted on conditionals sentences by courts.

Case study 3: The untouchables

Basic Court Kotor pronounced a suspended sentence[46] to the public procurement officer of the Municipality of Budva on the count of misuse of office for failing, contrary to the Public Procurement Law, to publish a call for tenders, but followed the shopping method and enabled a private company be granted the deal, causing damages to the municipal budget of 15,130.08 euros.

The written evidence established in trial makes it evident that the Mayor of Budva requested from the defendant in writing to conduct the procedure the way she did. Nevertheless, the state prosecutor did nothing and showed no interest to instigate

[46] Judgment K.br.449/09 of 27 November 2009

proceedings to establish Mayor's culpability upon whose order the public procurement procedure was conducted unlawfully causing damages to the Municipality.

Interestingly, the Court established the defendant caused damages to the Municipality in the amount stipulated, but the municipal legal representative claimed the opposite during the trial, stating that the Municipality was not considering itself as a victim and that there were no damages sustained. Hence, notwithstanding that the Court established damages to public funds, there was no compensation for damages since the Municipality perceived it differently and did not claim any damages.

The second example refers to the case in which a director of a local public company was prosecuted upon the report of Mayor's commission and who was acquitted five years into the trial.[47]

Since he was charged with damages to the company by contracting public works without calls for tenders, the defence in this case provided evidence showing the two directors holding the office before him did the same, but at much higher rates.

One of these directors is the closest Mayor's aide and is now the Deputy Mayor of the Capital City Podgorica.

Instead of prosecuting both prior directors who contracted the same deals, without any tenders, at much higher rates than the defendant, the State Prosecution instigated proceedings against only one of them – the lower-ranked public official, but not against the closest Mayor's aide, now his deputy.

Due to the increased workload in the Basic Court Podgorica, this case was transferred to the Basic Court Cetinje which passed the judgment[48] and pronounced a suspended sentence (six month imprisonment, one year suspended sentence) for misuse of office.

This person was charged with the basic, the least severe form of the offence, punishable by 6 months to 3 years in prison, since the prosecution did not engage in proving damages to the public company, although it was established that the deals were contracted at higher rates than the market price.

On the other hand, the same prosecution office, in the initial proceedings, charged the defendant who contracted the same deals at lower rates with more severe form of the offence punishable by longer prison term, due to damages estimated in the report given by the commission established by the Mayor. Mayor's relative, also related to the prosecutor that launched the proceedings based on the commission's report, was onboard the commission.

Adding to this the fact that it was established in the procedure before the court that the commission's report was not supported by any evidence, the conclusion is that the State Prosecutor in his work acted as per the orders and wishes of the executive.

The thing which is particularly baffling and suspicious is the fact that the same Prosecution Office failed to prosecute the Deputy Mayor who in the same way and at the same rates contracted the same deals for which the lower-ranked official was prosecuted and convicted in Cetinje. Even more so since the state prosecutor had evidence that the defendant on trial before the Podgorica-based court contracted the

[47] See more details in "Behind the Statistics", Chapter 5, pp 52 and 53
[48] K.br.117/09 of 15 September 2009

same deals at lower rates, and even such dealings were deemed by the prosecutor as harmful and raised the indictment.

All the above further compromises the work of the Prosecution Office and casts serious doubts over its independence of the executive power.

Case study 4: Judges warn of the selective approach

The Basic Court in Podgorca acquitted two judges of the Criminal Panel of the High Court Bijelo Polje[49]. They were charged with misuse of office for having kept silent during the reporting and deciding upon the appeal that the defendant had prior convictions, thus pronouncing a suspended sentence instead of a prison sentence.

The judges against whom charges were brought, among other things, defended themselves by saying that **there were more similar, unlawful judgments and that prosecutors did not launch proceedings against those judges**.

The defendant, Judge Bošković stated that "when I prepared for defence, I sought 2009 cases and older and found 7-8 other cases in which the rapporteur judge was Atif Adrović with other members of the panel, and passed the same decisions as in the case at hand, and the prosecutor was not overzealous to take actions in such cases".

They highlighted the **selective approach taken by the prosecution office** and noted that the third panel member on the same case was not even charged, and quoted also a number of examples of other unlawful judgments:

"In as many as two decisions of the Court of Appeals in cases involving murder suspended sentences were pronounced, which could not possibly be pronounced, where the Supreme Court found the violation of the Criminal Code to the benefit of the defendant, both from May 2010", said the judge charged.

2.2. (Non)prosecution for false testimony

The examples show that courts and state prosecutors fail to take actions to initiate and launch criminal proceedings against persons for whom the court established they had given false testimonies, although these testimonies were the grounds for acquittals.

Public officials and responsible persons within state authorities, local authorities, public companies and institutions **are obliged to report criminal offences prosecuted ex officio they have been notified or have become aware of in the course of their duty[50]**.

The prosecution is obliged to prosecute when there is a grounded suspicion that a certain person committed a criminal offence prosecuted ex officio[51].

Case study 5: "He did not ask" twenty times

This study shows that courts also pass incomprehensible and illogical conclusions when acquitting for corruption offences, and also that they have a different

[49] Judgment K.br.10/474 of 06 June 2011
[50] Criminal Procedure Code (CPC) Art 254(1)
[51] Constitution Art 134, CPC Art 19, State Prosecution Law Art 17 and 19.

approach to defendants depending on their societal position and status they enjoy within the community[52].

In a procedure conducted before the Basic Court Ulcinj the state prosecutor charged a physician of the Public Health Care Unit with misuse of office, as a specialist in occupational medicine, in the procedure of verification of medical certificates needed for possession of firearms, for having carried out examinations of hearing and charged €10.00 for such services.

In the proceedings, the court established that the defendant had authorities to carry out such examinations, but it is quite interesting how the Court justified the acquittal regarding the charges and the evidence of charging citizens for such services.

However, if the defendant was authorised to carry out the said examinations, then it should not be qualified as misuse of office but as passive bribery.

During the proceedings as many as 20 witnesses quoted they gave money to the defendant for the examination. Nevertheless, the Court concluded that the defendant did not comit a criminal offence and had not procured gains, since "he did not ask for the money".

Gains may be procured even when not requested, just like passive bribery may be done by receiving gifts or other benefits, even when not demanded. Thus, the Court's conclusion that the defendant had not procured any gains when it was proven beyond dispute that 20 persons gave him money, is illogical and incomprehensible.

Moreover, in its judgment the Court concluded that certain witnesses entered the zone of criminal liability by giving the defendant the money he did not ask for.

Nevertheless, neither the Court not the prosecutor took any action to initiate or instigate criminal proceedings against such witnesses.

In addition, the court did not accept the testimony of the witness given during the investigation when such witness stated the defendant asked for the money, but accepted the changed testimony given during the hearing in which the witness said he "offered a gift" to the doctor and the doctor never asked for that. In the rationale of the judgment, the Court stated the testimony given by the witness during the investigation was not logical and that the witness was obliged to tell the truth, and thus in the main hearing he "explained" he was not telling the truth before.

Although he stated the testimony of the witness was illogical, the court failed to give explanations and reasons for such a conclusion. Following this reasoning, a witness is not obliged to tell the truth when giving testimony in the preliminary procedure – during the investigation, which is ill-justified or rather irrational and absurd.

Ultimately, the question raised is why the Court and state prosecutor fail to take actions to initiate and instigate criminal proceedings against persons for whom the Court established that they gave false testimony. As it is now, without giving any reasons why some statements are accepted and others are not, the Court, only arbitrarily attempts to justify the acquittal.

[52] Judgment of the Basic Court Ulcinj, K.br.39/10 of 01 September 2010

2.3. Same actions – different offences

The specific cases show that persons who did the same things are charged with different offences and thus pronounced different sanctions.

> For instance, the Basic Court in Rožaje convicted a forester to a seven-month prison term[53] on the count of misuse of office for not having guarded and patrolled the wood from which unknown persons felled and stole timber causing total damages of €14,237.85. With the same judgment the Court obligated the forester to compensate for the damages.
>
> The same Court had equal treatment for three night guards in a share-holding company charged with negligence in securing and observing customs office warehouse from which unknown persons stole €55,466.60 value of goods. The guards were obliged by the judgment[54] to compensate the Customs Administration for damages.

However, **although the actions taken were essentially the same**, failure to secure property, the **defendants were not charged with the same offences**.

The forester was charged with a more severe form of misuse of office that exists when the gains procured exceed 3,000 euros punishable by imprisonment between one and eight years.[55]

Contrary to that, the guards were charged with a lesser crime – malpractice in office[56] punishable by a fine or up to three years in prison, while the more severe form exists when damages exceed 30,000 euros.[57]

Since both indictments were represented by the same deputy state prosecutor, such cases show that **prosecutors arbitrarily define offences someone is charged with, on which at the end of the day the sentence depends**. Although both cases involved failure to secure property to whose detriment third persons carried out theft, the Court in both cases accepted different qualifications propounded by the prosecutor in the indictment, proving that Courts enable substantial variance in treatment of persons who find themselves in the same situation.

[53] K.br.5/11 of 04 March 2011
[54] K.br.76/11 of 17 June 2011
[55] CC Art 416(2)
[56] CC Art 417(1)
[57] CC Art 417(2)

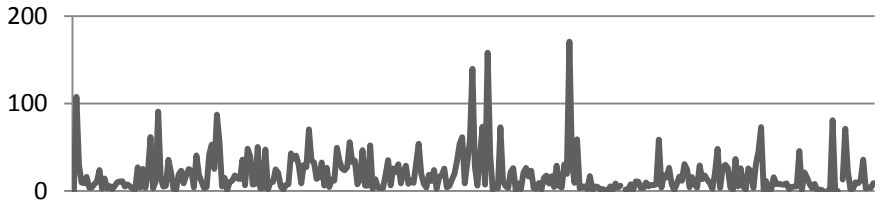
3. LENGTH OF PROCEEDINGS AND CONSEQUENCES OF INEFFICIENCY

The review of judgments shows that court proceedings for corruption take on average 19 months, and the longest first instance proceeding lasted over 14 years.

Actual examples lead to the conclusion that state prosecution office does not have adequate capacities available and/or does not have willingness to curb corruption, but also that courts take far too long in proceeding as per indictments not supported by evidence of defendants' culpability.

Due to prosecutors' and courts' inefficient work and failure to act ex officio prosecution becomes barred by time thus avoiding the liability for corruption offences, but also incurring substantial costs for the state budget and tax payers.

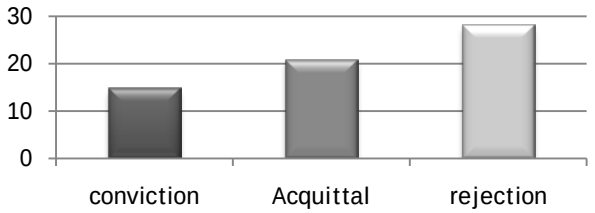
On average, first instance proceedings for corruption offences last 19 months. The longest first instance proceeding took 14 years, and the shortest only a couple of days, and all of them put together 460 years.



Graph 15: Length of first instance proceedings by the date of judgment

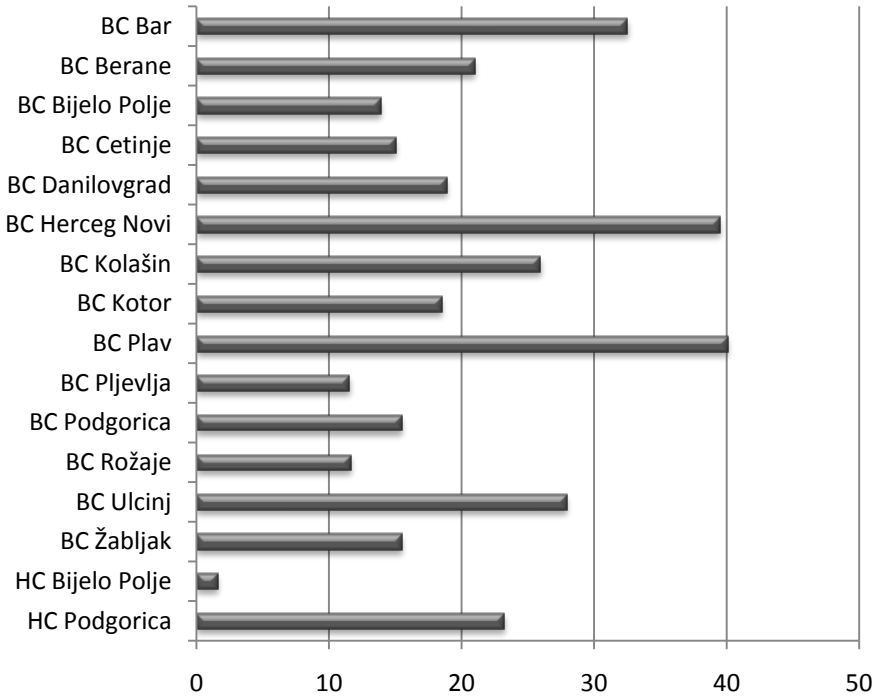
The proceedings for private sector corruption lasted on average over 20 months, as opposed to the public sector corruption – 16.8 months.

The longest average duration is attributable to the proceedings ending in rejections, almost 28.2 months, while those ending in acquittals took on average 20.8 months. The cases ending in convictions took the shortest, 14.7 months on average.



Graph 16: Length of first instance proceedings by the type of judgment

There are great variations in length of proceedings by courts, and those with the largest caseload, such as the Podgorica-based court, are not the least efficient.



Graph 17: Length of first instance proceedings by the court

On average the longest proceedings were the ones heard before the Basic Court Plav, which had only nine corruption cases, the shortest taking less than a month, the longest almost 140 months. It is followed by Herceg Novi with only two such cases lasting 21, and over 57 months, respectively.

By far the most efficient court is the High Court Bijelo Polje, acting as first instance court, with proceedings taking on average somewhat over a month and a half, mostly referring to active bribery.

3.1. It takes courts years to decide there was not enough evidence

In over 100 cases courts acquitted the defendants due to lack of evidence. On average such proceedings lasted 21 months, with the total duration of over 190 years. A number of specific examples show that long duration of proceedings is not justified.

> For instance, in late 2000 an indictment was raised against the head of communal services on the count of misuse of office dating back to 1994. Seven and a half years later, in mid 2008, the Basic Court Bijelo Polje passed an acquittal on the grounds of lack of evidence[58].
>
> The judgment[59] of the Basic Court Ulcinj shows that it took the **state prosecutor two years** of working on the case to **raise the indictment**, and **another four years to the court** to acquit the defendants **on the grounds of lack of evidence**.

[58] 620/07 of 15 May 2008
[59] K.br.333/07 of 19 October 2011

Hence, the first instance court took four years to decide on lack of evidence, without any doubt far too long and indicative of lack of competence and diligence in acting.

> A proceeding against the owner of a private company charged with failure to record goods in the company books with a view of illegal sale took five years before the Podgorica-based Basic Court. At the end of the day, he was acquitted of charges on the grounds of lack of evidence[60].
>
> Another judgment[61] by the Ulcinj-based court shows that the state prosecutor started working on the case in 2002, and raised the indictment in April 2003. However, the court passed an acquittal five years after the indictment was raised since there was no evidence of defendant's misuse of office he was charged with, although only two pieces of evidence were established before the court: one witness was heard, and the testimony of another witness given before the investigating judge was read.

In this case it took the **Court five years to hear one witness and read the testimony of another, to conclude there was lack of evidence** of the offence being committed.

3.2. Prosecutors unaware of offences, takes courts years to establish

It takes state prosecutors years to investigate cases not involving criminal offences, then instigate them before courts who take years before establishing it involved misdemeanours only. Acquittals pronounced after many years of trialling incur additional costs for the state budget.

> For instance, after more than four years the Basic Court Berane acquitted the defendants charged by the prosecution with misuse of office since they took cash without travel orders thus causing damages to the company[62]. It took the Court four years to establish this was not a criminal offence.
>
> After more than three and a half years, the same court acquitted a defendant charged with misuse of authorities in business operation that consisted of failure to pay taxes on timber amounting to 34.87 euros. After 43 months the Court established it was not a crime.
>
> However, the Berane-based Court is not an isolated case, as confirmed by the example of the Basic Court Podgorica[63] which took two years to acquit a defendant of the misuse of office charges. After 25 months the Court established that issuing a passport to a person whose identity, as an applicant, was not previously established, nor was it established whether he was eligible for being issued a passport – does not constitute a criminal offence.
>
> The Ulcinj-based Court's judgments[64] shows that the state prosecutor started working on the case in 2003 involving an offence committed in 2001, and the **indictment was raised after more than two years** - in January 2006. After **more than two years** following the indictment, the Court passed an **acquittal** since the act he was charged with **did not constitute a criminal offence**.

[60] 10/977 of 21 April 2011
[61] K.br.61/03 of 07 May 2008
[62] Br 3/12 of 3 April 2012
[63] Br 09/191 of 20 March 2009
[64] K.br.19/09 of 29 May 2009

Moreover, the act that the state prosecutor charged the defendant with after more than two years of "working" on the case is envisaged by a separate law as a misdemeanour and does not constitute a crime, which only proves **the incompetence of state prosecution office**. Hence, the state prosecutor worked for two years on a case in order to raise the indictment for something not even incriminated as a criminal offence, but a mere misdemeanour, and it took the Court two years to establish that.

3.3. Barred by time due to inefficiency of prosecution and courts

The cases heard before the courts in Podgorica, Bar, Ulcinj, Berane and Cetinje lasted for many years and became barred by time due to inefficiency of judges and prosecutors. The longest such proceedings lasted almost nine years.

Case study 6: Both prosecutors and courts failed

The judgment by the Basic Court Ulcinj[65] shows that the defendant was charged with misuse of position in business activity committed in 1997, 1998 and 1999. The state prosecutor started working on the case two years after the commission of the offence, and it took him **another two years to raise the indictment**.[66]

Six years after the proceeding was instigated, the Court passed the judgment by which charges were **rejected due to statute of limitation – that occurred a year before adjudication**.

In this case both the state prosecutor and the Court failed to carry out their official duties, since it took the state prosecutor two years to raise the indictment for one offence, and the Court was unable to make the decision regarding the indictment for five years.

In addition, the state prosecutor remained with the indictment for another year since prosecution became barred by time, and the Court continued with the trial, which probably only increased the costs of the proceedings borne by the budget in such a case. Similar conclusions are drawn from a number of other judgments passed by the Basic Court Ulcinj, but also other courts.

Case study 7: Law amendments as a pretext for inefficiency

The judgments by the Basic Court Cetinje[67] leads to a conclusion that two persons have been charged with misuse of position in business activity, done in June and September 1996.

The State Prosecutor stated working on the case in 2004 – **eight years after the offence was committed**, and the **indictment**[68] was raised in 2009, **after five years of "working"** on the case. **A year after raising the indictment the prosecutor dropped the charges**, hence the Court rejected the indictment.
The state prosecutor stated that the accused were first charged with misuse of office, but with the CC amendments from May 2010, responsible persons within a business entity may no longer be held liable for this offence. Therefore, the state prosecutor

[65] K.br.137/10 of 01 December 2010
[66] Kt.br.167/02 of 16 November 2004
[67] K.br.519/09 of 28 February 2008
[68] Kt.br.6/04 of 09 November 2009

charged them with misuse of position in business activity, which was barred by time back in September 2006.

Nevertheless, it is obvious that since 2004, when the prosecutor first started working on the case, he had ample time to instigate criminal proceedings, as well as the Court to close the case before May 2010, when the CC was amended.

This inevitably leads to a conclusion that state prosecutors and the Court fail to perform their duties, but also that they use the CC amendments to cover for their omissions and conceal the fact that more than 14 years have elapsed between the moment of the offence commission and the defendants being charged for it, which only works in favour of persons committing corruption offences.

Case study 8: Charged for an offence barred by time

The judgment of the Basic Court Podgorica[69] shows that the state prosecutor started working on the case back in 1997, and took **11 years** to raise the **indictment** against a director of a private company charged with misuse of office. The offence the defendant was charged with was committed in the first half of 1995, 13 full years before raising the indictment.

Fifteen years after the commission of the offence the defendant was charged with, the CC was amended and excluded the responsible person in a company as a potential perpetrator of misuse of office. Hence the state **prosecutor amended the indictment**, and charged the defendant with **payroll taxes evasion**.[70]

Since this offence is punishable by up to three year prison term, the **Court rejected the indictment on the grounds of absolute statute of limitations** on criminal prosecution that occurred 10 years before the judgment was pronounced - mid 2001.

In this case the prosecutor not only failed to raise the indictment in due time, but while revising the indictment charged the defendant with an offence already barred by passage of time at the moment of the revision.

Case study 9: Unreasonably long proceeding eats away the indictment

The following case shows how unreasonably long proceedings work in favour of defendants charged with corruption offences, how with the passage of time indictments get "eaten away" with the prosecutor eventually dropping the charges against several persons on the count of several offences, how the Court acts with utter incompetence and unlawfully combines several laws which were in effect meanwhile, seeking in each the provisions more lenient for defendants and which "justify" the Court decision.

The Basic Court Kotor pronounced a two-year prison term to the once secretary to Tivat Local Council, which matched the time he spent on remand, and a suspended sentence to the head of the Land Registry from the same municipality (1 year prison term, suspended two years) on the count of misuse of office for having enabled the adoption of a decision unlawfully returning the titles over land to alleged owners, procuring 571,307.32 € worth of gains for them.

[69] K.br.10/1087 of 28 June 2011
[70] CC Art 264(1)

This judgment confirms that High State Prosecutor from Podgorica started working on the case in 1995, and in 1996 he raised the indictment initially covering nine persons on the count of misuse of office, several offences involving forged documents, forged official IDs, fraud and leading into verification of untrue contents.

For as many as eight years, the High Court Podgorica was unable to pass a judgment in the case, and thus, under the 2004 CC the case was transferred to the Basic Court in Kotor holding the jurisdiction under the new provisions. In its proceeding this Court made a ruling to stay the proceeding against three defendants on the account of statute of limitations for one offence they were charged with each.

Such rulings are indicative of poor legal knowledge, since proceedings may be stayed by a ruling on the account of statute of limitations only until the indictment has entered into force. Thereafter, in case of statute of limitations the Court is to pass a judgment rejecting charges on such grounds.

When prosecution becomes barred by time before the main hearing, then the proceeding is stayed by means of a ruling, and when it happens during the hearing, the Court is to pass a judgment rejecting the charges[71].
During the proceeding, the Court passed a ruling to stay the proceeding against five defendants because of statute of limitations on some of the offences, and after the prosecutor stated he was dropping the charges.

Such a decision is again indicative of the lack of legal knowledge on the part of the Court, since by virtue of Article 362(1) of the then valid CPC it was stipulated the Court would pass a judgment rejecting charges if it happened the prosecutor dropped charges some time during the main hearing.

In the same case, the prosecutor dropped the charges on the count of misuse of office against three defendants, since a financial expert witness, in March 2009 (13 years after raising the indictment) established that the offences did not procure major gains, thus constituting a lesser form of the offence, now barred by time. The judgment has no indication of the gains procured by these offences, but it does state that this was the reason why the prosecutor dropped the charges on the grounds of statute of limitations.

Again in this case, the Court, acting incompetently, passed a ruling to stay the proceeding instead of passing judgment rejecting the charges on the count of the prosecutor withdrawing from prosecution.

In reference to the punitive provisions, or the suspended sentence, the Court stated that they applied the CC valid at the time of the commission, and as regards the legal qualification of the offences, it referred to the new CC since it envisages lower minimum sentences.

Such actions of the Court are unlawful. The Court is obliged to apply the law more lenient for the defendant, but must not apply a combination of laws valid at the time of the commission and pick and choose the bits more in favour of the defendant.

[71] The provisions of the CPC then in force stipulated that the investigation was to gather evidence and data needed for deciding whether to raise an indictment or stay the proceedings (Art 249(2)), that the extra-procedural panel would stay the investigation by a decision in case of statute of limitations (Art 262(1)(3)), that the investigative judge would notify the state prosecutor when prosecution became barred by time, and that he would request from the panel to stay the investigation if the state prosecutor, within 8 days failed to inform him that he dropped the charges (Art 262(2)), that the panel, acting as per the objection on the indictment, stay the prosecution in case of prosecution being barred by time (Art 282(1)(3) and that the Court would pass a judgment rejecting the charges if the prosecution was barred by time (Art 362(3)).

Hence, the Court is to establish which law is more lenient taking into consideration all the facts and circumstances and then apply that law, not to make combinations of several laws to justify a more lenient sentence.

The state prosecutor persisted in charging two defendants with misuse of office and, fourteen years after the indictment, the first instance judgment was quashed by the High Court.

Case study 10: Eight years to decide on appeal

Inefficiency is not only a feature of Basic Courts, but the High Courts are also known to have caused prosecution to be barred by time by their failure to act, as shown by the Podgorica High Court judgment[72].

This judgment shows that in June 2003 the Basic State Prosecution raised an indictment against 18 persons, two of them charged with passive, and 16 with active bribery.

The Deputy Basic Prosecutor dropped the charges against two defendants on the count of active bribery, and the **Basic Court Ulcinj passed a judgment in this case a month after having raised the indictment,** in July 2003.

However, **it took the Podgorica High Court more than eight years to decide on the appeal** against this judgment, quashing the judgment by a ruling[73]. With the same ruling, in accordance with the amended provisions, the case was sent to the Specialised Department of the High Court, and the prosecution was represented by the specialised prosecution department for combating organised crime, corruption, terrorism and war crimes.

The Specialised Department of the Podgorica High Court passed the judgment several months afterwards, in May 2012, convicting one defendant for passive bribery, 14 defendants for active bribery, rejecting the passive bribery charges against one defendant due to statute of limitations, and rejecting the charges against two defendants since the prosecutor in Ulcinj already dropped the charges nine years before.

Given the time quoted in the indictment as the time of the commission and the sentence envisaged for the offences the defendants were convicted of, for 14 of them convicted of active bribery, the absolute statute of limitations occurred for 12 actions, while for 13 remaining actions the statute of limitation would occur at the latest in May 2013. Judging by the actions the court has taken to date, prosecution will be barred by time for all the defendants, with one possible exception.

[72] Ks.br.4/12 of 25 May 2012
[73] Kž.br.1553/11 of 18 November 2011

4. DROPPING THE CHARGES

The review of case law indicates that state prosecutors arbitrarily and without any explanation withdraw from prosecution for corruption offences causing substantial damages to the state budget. Dropping the charges during the closing arguments may also be indicative of corruption and undue pressure put on the prosecutor's office.

Prosecution dropped the charges against 74 persons in 56 cases. The total damages that these persons were originally charged with amounted to 960,000 euros. The longest such proceeding took almost 13 years, and on average the duration of proceedings in which prosecutors eventually dropped the charges was 28 months.

Case study 11: Dropping the charges in closing argument

The judgment of the Basic Court Podgorica[74] rejected the charges against the executive manager of a company for a graver form of misuse of authorities in business activity due to the state prosecutor's dropping of charges in his closing argument.

The prosecutor started working on the case in 2004 and it was not before 2007 that he raised the indictment charging the defendant with evading taxes in the amount of 20,060 euros.

Five years after he started working on the case, in his closing argument the state prosecutor dropped the charges without any explanation for such a decision.

Such a practice raises suspicions of undue influence on the state prosecutor and unacceptable incompetence and negligence, given that he worked on the case for five years, pressing charges for almost two years claiming that the state budget sustained damages.

The same conclusions can be drawn from the judgment of the same Court[75] rejecting charges against two defendants charged with false bankruptcy, again due to the withdrawal of the prosecution in the closing argument. The defendants were charged with committing the offence between 2003 and April 2004. The same year, 2004, the state prosecutor started working on the case and raised the indictment two and a half years afterwards, in late 2006.

Four and half years from having started to work on the case and two years after having raised the indictment, the prosecutor dropped the charges in his closing argument. Unlike the previous case, this time the prosecutor attempted to give the reasons saying that "it has not been proven that the defendants committed the said offence".

This state prosecutor's withdrawal is also controversial since it is unclear how the prosecutor reached the conclusion that the defendants did not commit the offence they were charged with after so much time, i.e. why did he press charges for two years and incurred costs.

The existence of material – written evidence is vital for proving this offence, and the prosecutor is obliged to base indictments on sound evidence. Hence, the prosecutor's conclusion of the lack of evidence in this case shows that the indictment was not

[74] K.br 07/1584 of 1 July 2009
[7575] K.br 06/1596 of 16 December 2008

based on valid proofs to start with and that he exposed the defendant to criminal prosecution for two years on arbitrary and uninformed grounds or else that he dropped the charges under undue influence or due to possible corruption.

Case study 12: Revised indictments set the defendants free

This study leads to a conclusion that state prosecutors are self-willed and act in the way that benefits the persons charged with corruption offences, thus raising serious suspicions of them being corrupt. Revising the indictment the prosecutor essentially made the decision in favour of the defendant since this case could never have reached the second instance court before the prosecution would be barred by time.

The Court of Appeals' ruling[76] reversed the conviction on the count of misuse of office by rejecting the charges solely because the prosecutor revised the indictment.

The original indictment stipulated the commission of the offence in its basic form between 01 April and 11 October 2004. Absolute statute of limitation occurred on 01 April 2010, or six years after the commission.

The state prosecutor in this case revised the indictment without any apparent reason and stipulated the time of commission to be between 01 January and 11 October 2004. Thus the absolute statute of limitation occurred on 01 January 2010, only three days after the first instance judgment, even before the judgment could have been served to the parties.

Case study 13: Dropping the charges after 13 years

The judgment[77] of the Specialised Department of the Podgorica High Court indicates that even high courts act inefficiently incurring costs for the budget, and that even the special prosecutor can drop the charges after 13 years.

In this case the indictment[78] was raised in 1998 on the count of a grave form of abuse of office through incitement committed in December 1997.

The Basic Court Kotor passed a conviction[79] on this count back in 2000, and the judgment was quashed by the High Court and the case transferred to the Specialised Department for Organised Crime, Corruption, Terrorism and War Crimes with the High Court Podgorica.

The judgment stated that the Court held the main hearing in absentia *"because it was expected to pass the judgment rejecting the charges"*, as envisaged by the CPC.[80] However, the indictment charged the defendant with the graver form of misuse of office punishable at the time by up to 10-year imprisonment, since the indictment quoted the gains procured or the damages to the state budget at 673,038.73 €.

[76] Ksž.br.4/2010 of 28 May 2010
[77] Ks.br.7/2011 of 31 May 2011
[78] Kt.br.96/98 of 02 June 1998
[79] K.br.274/04 of 07 April 2000
[80] Art 326 stipulates that, should there be conditions in place for postponing the main hearing for the failure of the defendant to appear, the panel may decide to hold the main hearing nevertheless if the body of evidence contained in the file prove conclusively that the charges must be rejected

Given the envisaged sentence and the stated time of the commission, the statute of limitation in this case would occur in December 2017.

Therefore, it is unclear and suspicious on what the court based its "expectation the judgment would reject the charges", just as it is unclear and raises suspicions on what grounds the deputy special prosecutor dropped the charges in May 2011, more than five years before prosecution could be barred by time. Apart from incompetence, such actions may be indicative of serious suspicions of corruption within the judiciary.

Case study 14: Misuse of office not a criminal office according to the state prosecutor

The following example shows that state prosecutors pass decisions which are not based in law, but raise suspicions as regards corruption among prosecutors or ignorance and incompetence to the extent absolutely intolerable in a body performing such a vital role in curbing crime.

Podgorica Basic Court passed a judgment[81] rejecting the charges against a police officer and a foreign national since the prosecutor in this case dropped the charges. The police officer was charged with misuse of office, and the foreign national the same, only through aiding.

In his closing argument, the state prosecutor dropped the charges justifying it with the amended CC provisions which do not envisage this act as an offence any more.

Contrary to what the state prosecutor claimed to be the reasons for dropping the charges, the offence the defendants have been charged with has always been criminalised in the CC. The provision governing this offence has been changed, true, but the basic form the defendants were actually charged with has always existed.

The withdrawal of prosecutor in the closing argument is additionally incomprehensible and raises suspicions given that the prosecutor dropped charges on 22 July 2007. There were no amendments to the CC in that year. Moreover, with the previous CC amendments from 2006, the only ones the prosecutor could have been referring to as the only ones in between the commission of the offence and the adjudication, the provision governing misuse of office was indeed modified, but to the disfavour of defendants.

More precisely, the CC amendments left out from the description of the offence the intention as a subjective element and the core form of the offence (that the defendants in the case were charged with) envisaged more serious punishment (imprisonment between six months and five years, as opposed to up to three years which was the case before). Thus, in this case the CC amendments could in no way have been used since it would be to the detriment of the defendants, and the law requires a more lenient provision for the defendants to be applied.

Hence, the withdrawal of the prosecutor in this case is almost certainly a reflection of corruption within the prosecution office or else deplorable ignorance.

[81] K.br.06/1107 of 22 February 2007

5. EXECUTIVE DECISIONS TAKE PRECEDENCE OVER THE LAW

The examples presented in this section indicate that Courts and state prosecution support unlawful actions taken by heads of state authorities and the executive showing not even the least interest to establish liability and the consequences caused by the law violation. According to such judgment, the laws do not hold true if agreed otherwise in the senior staff meeting, when ordered otherwise by the head, or when the Government adopts a conclusion or a memorandum contrary to the law.

Case study 15: The head or the law?

In the first example the prosecution had no interest in prosecuting the perpetrators of corruption offences but left it to the victims to pursue further in civil proceedings. In its acquitting judgment, the Court established the state authorities failed to enforce final court rulings as per the "agreement" reached at the staff meeting with the head of the authority.

In addition, the court failed to inform the prosecution of manifest irregularities established resulting in substantial damages and serious violation of rights of several persons although the court is obliged to report offences prosecuted ex officio.[82]

A criminal case was heard before the Kotor Basic Court against an official, employed with the Property Administration – Regional Office Budva, on the count of misuse of office. This case involved the adoption of several decisions on entry of titles over the same apartment and failure to observe a court ruling to register encumbrances. The state prosecution office showed no interest in investigating and possibly prosecuting this case, with the victim in the case pursuing the case further.

The Basic Court Kotor passed an acquittal[83], and established during the proceeding, and noted so in the judgment that the Property Administration did pass several decision allowing registration of titles over the same property, that certain decisions were abolished in agreement with the head of the authority and that, again in agreement with the head, it was decided not to enforce a court judgment imposing an injunction.

Explaining the reasons for acquittal, the Court established that "enforcement of the ruling" on entry into the electronic data base is not the task of the defendant, but of other clerks.

Nevertheless, it is disconcerting that neither the court, and certainly not the state prosecutor, had any interest to establish the liability for actions causing damages to others and creating legal uncertainty when it comes to data from public records. Moreover, the court and the state prosecutor obviously believe it to be acceptable for the head of a state authority to decide whether to act upon an enforceable court ruling or not.

[82] CPC Article 254(1) stipulates that officials and responsible persons in state authorities, local self government authorities, public companies and institutions are obliged to report offences prosecuted ex officio of which they have been notified or become cognizant of in the course of their duties.
[83] K.br.158/12/08 of 23 May 2012

Case study 16: The senior staff meeting or the law?

Another example shows that the Court and State Prosecution Office support unlawful actions by heads of state authorities and the executive, without even the least interest to establish the liability and the consequences resulting from the law violations.

Less than two months before the same Court also passed an acquittal[84] as per the charges against a communal inspector in Budva charged with misuse of office. The defendant was charged with failing to proceed as per the demolition order he passed himself, thus procuring the gains for the developer who subsequently legalised the building.

As with the previous case, the Court has again established that the head of Communal Police is to decide which actions are to be taken by inspector and which decisions to be enforced.

Contrary to this practice for the heads to decide when and which enforcement decision is to be followed through, Article 56 of the Law on Inspection Supervision[85], governing enforcement, stipulates:

- the supervised entity is obliged to enforce the decision within the timeframe stipulated therein[86];
- if the supervised entity fails to enforce the decision within the timeframe stipulated for the voluntary enforcement, the enforcement procedure shall commence[87];
- the inspector shall notify the supervised entity of the time and the method for the enforcement procedure[88] and
- the inspector shall monitor, or ensure enforcement of the measures pronounced[89].

These provisions were ignored both by the Court and the State Prosecutor, since they failed to take any action to verify how heads of authorities decide on "priorities", or which decision is to be enforced, and which is not. The legal basis for such actions of heads of authorities does not exist, and hence it turns out that the state prosecutor is not interested to investigate into abuses and overstepping of authorities by the persons managing state authorities, services and institutions.

Moreover, the Court accepted the defendant's arguments stating that back in 1996 he started working as an inspector and that it was even back then they would be passing enforcement decisions not bearing a date, that such undated documents were delivered to the head who would take them to the Ministry, and at their senior staff meeting they would "agree" on priorities for enforcement. In addition, the Court established that later such decisions on "priorities for demolition" would be made at the municipal senior staff meetings and in Mayor's offices, that it was the place to decide which buildings "should be demolished".

Such an institutional practice and case law are indicative of the possibility for selective demolition of buildings, and thus putting up with and even instigating high-

[84] K.br.371/11/11 of 30 March 2012
[85] Official Gazette of the Republic of Montenegro 39/2003 and Official Gazette of Montenegro 76/2009 and 57/2011
[86] Art 56(1)
[87] Art 56(2)
[88] Art 56(3)
[89] Art 56(4)

level corruption, but also the possibility for undue political influence, control, even blackmail of all owners of illegal buildings.

Case Study 17: The memorandum or the law?

The third example indicates that the Court and the State Prosecution Office tolerate and accept the suspension of laws by the executive, even ask from the judicial bodies to apply such unlawful documents, leading to courts passing acquitting judgments for corruption offences.

Less than a year before, the same Court, and the same judge, passed another acquittal[90] as per the indictment against a civil engineering inspector of the Ministry for Spatial Development and Environmental Protection charged with misuse of office, and also the failure to take actions with a view of enforcing a demolition order he passed himself.

In this case, Court established that enforceable decisions are not implemented as per letters to the Mayor of Budva. The Court even noted in the judgment that the Ministry passed a conclusion authorising the Minister to sign a "Memorandum of Understanding" introducing a moratorium on demolition of illegal buildings built before 01 September 2008, but put in charge the Ministry of Justice and the Ministry of Interior to notify judicial authorities and the Administrative Inspection of the Government Conclusion introducing demolition moratorium.

Thus, the executive do not only suspend laws, but inform judicial authorities thereof for them to start applying executive acts, not laws. Instead of judicial authorities (State Prosecution first and foremost) taking actions with a view of prosecuting persons overstepping authorities and suspending laws, in actual fact judicial authorities act as per notifications by the executive and do not apply laws.

The judgment states that Article 167 of the Law on Spatial Development and Construction of Structures stipulates:

"...that the buildings, built before the adoption of the present Law, will be legalised, according to the planning documents, if it is feasible..."

Contrary to what the Court quoted, the actual Article 167 of the Law on Spatial Development and Construction of Structures stipulates:

"Buildings built without construction permits until the day the present Law enters into force, which do not fit into planning documents, shall be removed in terms with this Law."

Hence, this provision of the Law does not mention legalisation of illegal buildings according to planning documents, as quoted by the Court in the judgement. It would mean that planning documents are to be made to accommodate illegal buildings and their drafting should consider only the possibility of fitting in the illegal buildings. To the contrary, according to this provision illegal buildings must be removed if they do not fit into the planning document, which means the buildings need to be in line with the plan or otherwise be removed, and not vice versa as stipulated by the court – to consider the possibility of legalising such buildings when drafting plans.

[90] K.br.177/11/10 of 13 May 2011

6. UNEVEN PENAL POLICY

The review of court judgments shows that penal policy for corruption offences is uneven, inconsistent and incomprehensible, and thus unpredictable, with the outcome depending on the case law of the specific trial court or even single judge. The examples are so numerous, both with basic and with high courts, that one inevitably begins to think there is no higher instance taking care of aligning the case law.

Far too frequent Criminal Code amendments as regards criminalisation of misuse of office, the one that accounts for the largest share of cases, and the difference in interpretation of such amendments in practice, helped the defendants charged with corruption to be punished with lesser sentences or even go unpunished.

The specific examples show that courts mostly pronounce prison sentences to those charged with petty corruption, and in rare cases involving pubic officials pronounce suspended sentences most often. Thus high-level corruption is favoured.

Courts punish more severely for lesser corruption offences than for graver ones, and thus active bribery is always punished by imprisonment, while misuse of office by suspended sentences. With this, courts encourage perpetrators of serious corruption offences by sending the message that major corruption does pay, and that the only way of ending up in prison is to offer some police officer a couple of euros for traffic violations.

Judgments for passive and active bribery show that prosecutors prosecute, and courts adjudicate mostly in cases where the amounts of money involved do not exceed several dozens of euros. Even in such cases the penal policy is uneven, with the duration of the prison sentence mostly depending on the time the defendant has already spent on remand, i.e. of the length of the court proceedings, and less of the circumstances referred to by law as decisive in choosing the type and the amount of criminal sanction.

Huge differences in penal policy among, but also within, courts are also caused by different treatment of extenuating circumstances. Some examples show that even the same judges have different measures when deciding on the punishment, with the same circumstances sometimes taken, sometimes not, as extenuating.

Finally, the case law to a large degree discourages citizens form reporting passive bribery, since the prosecutors prosecute, and courts convict to imprisonment sentences for active bribery.

6.1. Misuse of office

Over 60% of all first instance proceedings refer to this offence, and **one in three** leads to an **acquittal**.

6.1.1. Law amendments as an impediment to anticorruption efforts

Too frequent CC changes as regards criminalisation of misuse of office have greatly prevented the main function of a CC – to curb crime, or in the case in question – to curb corruption in the public sector and in the exercise of public authorities.

As already explained in the "Behind the Statistics" publication, since 2003 when Montenegro's CC was adopted, the provision criminalising misuse of office changed four times. Among them, as many as three times the essence of this offence changed, and one was without any particular importance since it increased the maximum sentence for the gravest form of this offence from 10 to 12 years. In any case, these frequent changes have certainly worked in the interest of persons charged with commission of this offence with prominent corruption features.[91]

A particularly favourable feature for people engaging in corruption is offered by the CC amendments in 2003 and 2010. Under the first modification valid between January 2004 and August 2006, in order for this offence to exist it was required to prove the intention of the offender to procure gains for him or others or to cause damages. The second amendment from May 2010 introduced the element of unlawfulness; hence, in order for this offence to exist, it is necessary to establish whether the offender acted without authorisation or in contravention to laws.

The inability to prove intention or unlawfulness would mean that, under such provisions, there is no misuse of office as an offence, regardless of the damages caused and its amount or the violation of rights. Each proceeding that was conducted while these CC provisions were in force imposed the obligation on the part of the Court to apply them to offenders guilty of such corruption, given that such provisions were more lenient to them.[92]

Not only that these provisions do not help in curbing corruption, but to the contrary enable avoiding liability for corruption, as has been confirmed by the 2006 CC amendments which left out the intention as a subjective element in the essence of the offence was left out of its description, as well as the working version of the Law amending the CC from December 2012 envisaging the deletion of unlawfulness from the description of commission.

However, the most disconcerting are the motifs prompting the executive to propose, and through the majority in the legislature, eventually adopt, provisions which are manifestly in the function of protecting corruption n the public sector and avoiding liability of the persons accused or who could be accused of misuse of office.

Namely, **misuse of office is an offence with pronounced corruption features recognised by laws for many decades. Hence, it is not a new type of crime which would call for a new response from the legislator, or the new description of its commission not known to laws and case law even before.** Thus the executive as the law sponsor, and the Parliament as the legislature, should give the reasons why they changed the law to the benefit of offenders of this crime known to the laws, legal theory and case law for many decades.

Furthermore, **comparative experiences have no other example of such substantial changes in the description of misuse of office five times in less than 10 years. Also, the legal systems in the region do not have provisions proposed by the government in Montenegro, and endorsed by the Parliament.**

For instance, the Criminal Code of Serbia[93] in the description of misuse of office as an offence[94] does not contain intention or unlawfulness. Moreover, intention as an important

[91] See more in the "Behind the Statistics" (pp 75-79)
[92] See more in the "Behind the Statistics", Chapter 7.1.3. Law Amendments as an Obstacle in Fight against Corruption (pp 78)
[93] Official Gazette of the Republic of Serbia 85/2005, 88/2005, 107/2005, 72/2009 and 111/2009
[94] Art 359.

element of this offence was deleted from the prior CC of Serbia[95] back in 1990, while unlawfulness never featured in its description. In addition, the legal system of Bosnia and Herzegovina, Croatia, Republika Srpska and Kosovo do not feature unlawfulness as an element of the misuse of office.

Thus, these CC changes, regardless of the short time of their validity, continue to cause harmful consequences in curbing corruption in the public sector, since their application extends beyond their validity to any offence done before or for the duration of their validity by being more lenient for the offender.

Practice shows that even some well-justified amendments led to court judgments rejecting charges for offences which refer to denial of public revenues, as taxes and contributions evasion.

Such judgments which are in favour of persons charged with actions which denied public revenues were passed **because of the absurd interpretation of state prosecutors that it does not constitute an offence**, leading them to drop charges. This raises an issue whether state prosecutors monitor the CC changes and whether they know why certain provisions are changed or deleted, and whether they are competent enough to recognize criminal offences and to qualify them properly.

The deletion of the CC Article 276(1)(3)[96] shows that CC amendments practically worked in favour of the accused. It refers to misuse of authorities in business activity as an offence, where one item was deleted (3) that described the offence as denial of public revenues. As shown in the first "Behind the Statistics" publication, this change is justified, since it involves the offence described under the heading of taxes and contributions evasion.

Nevertheless, after this change in the Code, judicial authorities stayed the proceedings launched on the count of denying pubic revenues, without ever considering the possibility of prosecuting under the tax evasion heading. This further raises the issue how, before the law changed, they made the distinction between the offence stipulated under paragraph 3 and tax evasion, with substantial difference in the sanctions envisaged[97].

> Thus, the Basic Court in Bijelo Polje stayed the proceeding[98] for this offence since the state prosecutor, after having raised the indictment and before the man hearing, dropped the charges because the CC Art 276(3) was deleted, leading the prosecutor to conclude that denying public revenues is not a criminal offence.
>
> The Basic Court in Bijelo Polje passed a judgment[99] rejecting the charges for the reason of withdrawal of the prosecutor before the conclusion of the main hearing. The reason for the state prosecutor to drop charges was again the CC amendment deleting Art 276(3). Although the state prosecutor stated in the indictment that the defendant "failed to calculate and show outbound VAT" thus denying the public revenues in the amount of €16,835.42, the state prosecutor in this case did not consider this might constitute taxes and contributions evasion as a criminal offence.

[95] Official Gazette of the Republic of Serbia 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 and 21/90 and Official Gazette of the Republic of Serbia16/90, 49/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/2002, 11/2002, 39/2003 and 67/2003

[96] See more in the "Behind the Statistics", Chapter 7.2.2. Legal Framework, p 83 and 84.

[97] See more in the "Behind the Statistics", Chapter 7.2.2. Legal Framework, pp 83.

[98] Decision K.br.7/10 of 17 September 2010

[99] K.br.256/10 of 21 September 2010

Case law 18: Acquittal based on invalid law

Courts would acquit defendants of charges based on the law amended years before the commission of the offence, and the case study shows that in some cases courts even decided there was no corruption involved since the defendants did not know the persons for whom they procured illicit gains.

The Basic Court in Podgorica acquitted two judges of the criminal panel of the Bijelo Polje High Court[100] charged with misuse of office.

Apart from the above manifest violations of the law and notwithstanding the evident consequences in the form of enabling the accused to escape imprisonment, the Basic Court acquitted the defendants by concluding that it stems from their defence and evidence established "*that the intention of the defendants was not directed towards the commission of a crime*". Moreover, manifest unlawful actions in the work of the Court and the explanation it constituted "standard practice"[101], was accepted as the reason for the acquittal of the accused judges.

In its acquittal, the Court concluded that the accused judges did not know the defendant for whom they unlawfully reversed the imprisonment sentence into a suspended sentence and that thus they "had no reason" to help him.

Such a stand taken by the Court is absurd and not founded in the provisions. It would mean that in corruption cases it is necessary to prove that the perpetrator and the person obtaining gains necessarily know each other and that the acquaintance is the only "reason" for "assistance", or corruption.

The Basic Court noted that for the existence of misuse of office as an offence, apart from direct intention, the intention to procure gains to oneself or others or cause damages to others or seriously infringe upon the rights of others is also needed, which has not been proven in the above case.

However, the intention as the subjective element of the offence was left out of the description of commission by the 2006 CC amendments[102], three years before the commission of the offence the defendants were charged with and five years before the Court passed the judgment.

6.1.2. Favouring high-level corruption

Some **56%** of misuse of office cases involved **corruption in the public sector**, but **only 11% involved public officials**, because prosecutors mostly prosecute local officials from the lowest hierarchical levels.

The penal policy of courts in such cases is not harmonised, but the courts are rather harsher against persons charged with petty corruption than the public officials. Courts do not assess equally the extenuating circumstances, where, as a general rule, people charged with petty corruption are worse off.

[100] Judgment K.br.10/474 of 06 June 2011
[101] More details in the study case: Judges about themselves – law violation "a standard practice"
[102] Official Gazette of the Republic of Montenegro 47/2006 of 25 July 2006

Case study 19: Staff to jails, officials on suspended sentences

As a rule, in the few cases where public officials were found guilty of misuse of office, courts pronounced much more lenient sanctions than to civil servants with much lesser scopes of competences and responsibilities. Likewise, the treatment of directors of private companies is less stern than of their staff. In brief: the case law favours high-level corruption.

In a criminal case against **a public company director**[103], the Cetinje-based Court pronounced the sentence of a six-month prison term, suspended one year for misuse of office. In this case, first the prosecutor charged the defendant with the least severe form of the offence **never attempting to establish the damages** sustained by the public company and qualifying the offence accordingly.

Then the Court pronounced the very **minimal sanction** for the least severe form of the offence, **with further mitigation by pronouncing a suspended sentence.**

Berane Basic Court[104] sanctioned a **forester** without prior convictions, charged with misuse of office, to an unconditional **imprisonment** of **three months** together with a 200 euro fine for failing to record felling of 7.89 m³ of timber, causing the Forest Administration the **damages of 709.25** euro.

Some courts took the fact that someone was performing a public function, proven to be misused, as an extenuating circumstance.

For instance, in the case against the former Speaker of the Local Council in Šavnik, the Basic Court in Žabljak reduced his sentence, justifying it by saying that he is "a reputable person who held the office of the Speaker of the Local Council, and such circumstances are deemed to be particularly extenuating and are taken as a ground for reducing the sentence.

The Podogorica Basic Court judgment is a good example proving that courts have a harsher treatment of people who are not public officials and that such cases are used to embellish the statistics.[105]

In this case, the Court convicted a **bus conductor** employed with the Public Transport to **45 days in prison** for misuse of office and forged official ID, for having used **false tickets** sold to passengers **procuring gains** of **105 euros**. At the time of adjudication, the defendant was 63 years of age, no prior convictions, a family man with three children, and seven years elapsed since the commission of the offence, no aggravating circumstances, and the total damages caused somewhat over one hundred euros.

[103] K.br.117/09 of 15 September 2009
[104] Judgment K.br.267/11 of 09 May 2012
[105] K.br.09/1333 of 03 December 2009

6.1.3. Suspended sentences even for repeated offenders

The incomprehensible and uneven penal policy and unlawful mitigation of sanctions by its type, without offering any reasons or justifications for doing so, is evident in a number of judgments.

> For instance, the Basic Court in Cetinje[106] pronounced a suspended sentence (one year prison term, two years suspended sentence) against a member of the Management Board and the Deputy Director for general and legal matters in a share-holding company for misuse of office procuring gains of €26,780.00.
>
> Both defendants had **prior convictions**, one for the same misuse of office offence, as noted in the judgment. However, such aggravating circumstances were not taken into account or statement of reasons why the Court believes the purpose of punishment would be attained by a suspended sentence pronounced to persons with criminal records.

Even more drastic is the example of the Kolašin-based court that first convicted a person to a suspended sentence, and when the offence was repeated, the Court pronounced even lesser a sentence – a fine.

> The Basic Court in Kolašin[107] convicted the head of the local office for registration of nationals on the count of misuse of office for unlawful entry of two persons in the Register of Nationals. He was convicted to three month prison term, one year suspended sentence, stating as extenuating circumstances his age, no prior convictions, fair conduct before the Court.
> The same person was charged again with the same offence, unlawful entry of five persons in the Register of Nationals, on 30 March 2009, while still on suspended sentence. The same Court passed a judgment[108] punishing the same person for the same offence now with a 1.200 euro fine, referring to the age of the defendant and the fact he is a family man.

6.2. Active and passive bribery

There are only 16 final first instance judgments on this count involving 19 persons, none of them a public official. All the persons charged were eventually convicted, two for passive bribery, and the rest for active bribery. Only four were convicted to suspended sentences, all by the Basic Court Kotor. Prison sentences were pronounced for 15 persons, although nine of them were charged with an attempt to offer bribe not exceeding 50 euro of worth.

6.2.1. Severity of sanction not dependant on the amount of bribe

A number of specific examples show that the criterion for passing the decision on the gravity of sanction apparently was not the amount of bribe involved.

> **Case study 20: Guesstimating imprisonment terms**
>
> The Podgorica High Court convicted[109] a Montenegrin national with completed primary school for offering a **30 euro bribe** to a police officer to avoid being reported for

[106] K.br.60/07 of 14 October 2009
[107] K.br.50/08 of 4 October 2008
[108] K.br.74/09 of 15 May 2009
[109] Ks.br 44/09 of 3 March 2010

passing through a red light when driving intoxicated. The defendant had prior convictions, for another offence, and the "Court did not attach particular importance" to that circumstance, but thanks to extenuating circumstances, the fact that the defendant is the father of two and unemployed, pronounced **three month imprisonment**. The prosecutor appealed against it asking for a more severe punishment, but the Court of Appeals rejected the appeal and assessed that the sentence pronounced was proper[110].

On the other hand, the High Court in Bijelo Polje[111] convicted a foreign national with primary school education who offered **a five euro bribe** to a police officer to avoid reports for non-valid documents and a broken speedometer. The Court took note of the extenuating circumstances, no prior conviction, being unemployed, with members of close and extended family in a very difficult financial situation. He was sentenced to **six month** prison term – **twice the sanction pronounced to the defendant in the first case with prior convictions and who offered to police officers six times more.**

A student, working as a driver, also got **a longer sentence** for attempting to give to a police officer **three times smaller amount of bribe** than in the first case – **10 euro** to avoid being reported for a broken windshield and a failure to post a sticker stating the maximum allowed speed for the vehicle.

He was convicted by the High Court in Bijelo Polje[112] to **four month imprisonment**, taking into account the extenuating circumstances of no prior convictions, being the father of two, the victims not joining in prosecution, and no aggravating circumstances. The sanction was upheld by the Court of Appeals[113], the same one that in the first case upheld a lesser sentence to a person with prior convictions and noted "further mitigation of the prison sentence or pronouncing a suspended sentence, and given the degree of defendant's criminal liability seen in commission of an offence **with direct intent**, would not serve the purpose of punishment".

The High Court in Bijelo Polje convicted[114] a foreign national **to seven months in prison** for attempting to bribe police officers with **50 euros** to avoid being reported for overtaking where not allowed. The Court took note the defendant's clean record, the fact that he is a family man, father of four, as extenuating circumstances, while the aggravating circumstance was "**persistence** in attempting to give a gift to an official not to perform an official duty". **For this he was sentenced to more than twice the prison term than the person in the first case**, for whom neither the High Court Podgorica nor the Court of Appeals found the interference with the duty of police officers and threats to be an aggravating circumstance. Namely, the Official Note of the Police Directorate[115] quoted by the judgment stipulates the following: "For the whole time while being taken to the station, he threatened to kill them, insulted them and spat on them".

However, **the same Court of Appeals**[116] **rejected the appeal** of the defendant to reduce the seven-month prison sentence to a pensioner with secondary school education, who offered 50 euro bribe to a police officer to avoid being reported for speeding, failure to produce a driving licence and drunken driving. On the occasion,

[110] Ksž.br 11/10 of 6 May 2010
[111] Ks.br.7/09 of 25 May 2009
[112] Ks.br.20/09 of 24 February 2010
[113] Ksž.br. 14/10 of 15 June 2010
[114] Ks.br. 17/09 of 28 December 2009.
[115] Ku.br.968/09 of 7 July 2009.
[116] Ksž.br. 12/09 of 19 November 2009.

the Court of Appeals upheld the Bjelo Polje High Court judgment[117] justifying it by saying the defendant was persistent in attempts to bribe "and through such **persistence showed impudence and disrespect** for police officers, and thus in the opinion of the second instance court deserved even to be punished more severely", but it was not possible to increase the sentence since the prosecutor did not lodge an appeal.

The example of a Podgorica High Court judgment[118] confirms that the amount of bribe is not a criterion for deciding on the length of prison term; here a woman, a pensioner, was convicted to **seven month imprisonment** for having offered a planning inspector **200 euros** to avoid making reports and ordering the demolition of foundations for a building without a construction permit.

On the other hand, the Basic Court in Kotor[119] convicted to a **six month** prison term a student who offered **500 euros** to a police officer in order to avoid being arrested for possession of hashish.

While all the courts that heard the bribery cases adjudicated in such cases with great expedience, it took the Kotor-based Court months, even years, to close such cases. It took this Court 26 months to end a case involving a 10 euro bribe offered[120], or 25 months for 20 euros offered[121]. Unlike other courts always pronouncing prison sentences for such offences, only the Kotor-based Court pronounces suspended sentences.

6.2.2. Imprisonment term depends on the length of proceeding

Many an example shows that courts pronounce imprisonment sentences dependant on the time already served on remand.

Case study 21: Exactly 37

The Basic Court in Ulcinj pronounced to a foreign national the unsuspended **imprisonment** sentence of **37 days** for **active bribery**, for offering a police officer **10 euros** to avoid being reported for traffic violations[122]. In the rationale of the judgment, the Court unlawfully stated as an aggravating circumstance for the defendant the fact that "such offences are on the rise".

Since the defendant in this case was pronounced an imprisonment sentence lasting **as many days as already served on remand**, it leads to a conclusion that the sentence depends on the speed with which the court closes such a case, which is impermissible. Although the upward trend for some offences may have an impact on the penal policy or the interventions by the legislature, it certainly must not be an aggravating circumstance for the defendant as stated in this judgment, since it means he is being punished more severely for something others have done that he cannot be charged with.

[117] Ks.br. 12/09 of 03 July 2009. The extenuating circumstances included the family circumstances (father of five) and the age (56), and the aggravating the persistence in efforts to bribe the official and prior convictions, with the Court noting that he relevance of prior suspended sentence diminished due to passage of time.
[118] Kts.br.8/10-2 of 22 December 2011
[119] K.398/06 of 30 January 2008
[120] K.244/09/07 of 08 July 2009.
[121] K.114/09 of 23 June 2009.
[122] Judgment K.br.30/08 of 27 February 2008

The prosecution failed to raise an indictment[123] against a foreign national charging him with **active bribery**, for having offered to police officers **10 euros** not to seize 35 kg of walnuts and 10 kg of honey for which he did not have any documents and which were not declared for clearance. The Specialised Department of the Podgorica High Court convicted this defendant to **two-month imprisonment, corresponding exactly to the time actually spent on remand**.

6.2.3. Changed victim's testimony – prison to some, freedom to others

Uneven case law may end in either imprisonment or acquittal in the same situations.

For instance, the Court of Appeals passed a judgment[124] upholding the judgment of the Bijelo Polje High Court[125] and acquitted one customs officer of charges for asking a 500 euro bribe not to report a citizen of the Republic of Serbia for a customs offence.

The judgment stated that the victim, after one year and five months following the event, before the investigative judge in Zaječar, Serbia, changed his prior testimony of being requested a bribe. Therefore, the Court believed not to hold enough evidence to establish in all certainty the defendant actually did commit the offence.

It is only understandable and logical that the Court may not convict for passive bribery solely based on the testimony of one person, which changed dramatically during the proceedings, and in absence of any other evidence to corroborate that. However, only 24 days later, the same Court of Appeals, had a totally different approach.

This Court passed a judgment[126] reversing the acquittal by the Bijelo Polje High Court[127] and convicted a border police officer to six month prison term for active bribery.

In this case the Court of Appeals concluded that the defendant asked for 50 euros to let in the country a Serbian national with unregistered vehicle. Unlike the previous case, now the Court of Appeals did not take into account that the victim changed his testimony after eight months form the event again before an investigative judge in Serbia (Novi Pazar) and claimed that the defendant never asked for the money. Moreover, in this case another five witnesses supported the defence, but it did not help the defendant to escape imprisonment.

6.2.4. Incentives for non-reporting

In most cases referring to active bribery, reports were filed by officials, usually traffic police officers, who were offered bribe. On the other hand, the case law largely works to discourage citizens from reporting passive bribery.

Case study 22: Two months in prison for reporting corruption

Bijelo Polje High Court convicted[128] two persons, one for active bribery to six-month prison terms, and the other for passive bribery to two months. The defendant

[123] Kt.S.br.4/2011 of 14 February 2011
[124] Ksž.br.23/12 of 17 May 2012
[125] Ks.br.2/11-10 of 21 April 2011
[126] Ksž.br.12/12 of 05 June 2012
[127] Ks.br.5/11-10 of 15 July 2011
[128] Judgment Ks.br.7/11 of 12 December 2011

convicted of active bribery actually reported this case and the court proceeding revealed that corruption would not have been detected had it not been for her report.

Nevertheless, two years after she had reported corruption, the High Court convicted her to an imprisonment sentence. Half a year later the Court of Appeals reversed the judgment[129] and acquitted the defendant charged with active bribery of sanction.

Hence, the defendant who decided to report corruption has been exposed to two and a half years of criminal prosecution and threat of prison sentence.

When comparing such actions taken by the High Court with cases in which courts pronounce suspended sentences inventing extenuating circumstances, it becomes evident that it is more likely of some courts sending to prison someone reporting corruption than someone who is corrupt or who damaged the state budget for substantial sums of money.

6.3. Comparisons of penal policy for different offences

Courts are unwilling to suppress more serious forms of corruption and high-level corruption, and with its incomprehensible and illogical penal policy they encourage perpetrators of graver corruption. The case law for corruption offences thus sends the message to perpetrators that they would be punished more leniently for a more serious case of corruption and that they will end in prison only if they offer a couple of dozens of euros to an official.

Criminal offences with pronounced corruption elements are certainly the misuse of office[130], then active bribery[131] and passive bribery[132].

The basic form of the misuse of office is punishable by imprisonment ranging between six months and five years or between one and eight years if it has been proven that the gains procured exceed the value of 3,000 euros and imprisonment ranging between two and twelve years if the gains exceed the value of 30,000 euros.

For taking bribe to perform an act that an official should not perform or not to perform an act that he must perform, the legislator envisaged the imprisonment sentence between two and twelve years, while for active bribery to perform an act the public official would have to perform anyway or not to perform an act which otherwise must not be performed is punishable by imprisonment between two and eight years. When passive bribery takes place in relation to detection of a criminal offence, instigating or conducting a criminal proceeding, pronouncing or enforcing a criminal sanction is punishable by an imprisonment sentence between three and fifteen years. In addition, the passive bribery after the performance, or failure to perform an official or other act, and in reference to it, is punishable between three months and three years.

For active bribery or solicitation to perform an act the public official should not perform or not to perform an act that must be done, the legislator envisaged the imprisonment sentence ranging between six months and five years, while passive bribery or solicitation to perform an

[129] Judgment Kžs.br.26/12 of 11 June 2012
[130] CC Art 416
[131] CC Art 423
[132] CC Art 424

act that the public official must do anyway or not to perform an act that anyway must not be performed is punishable by imprisonment up to three years.

With envisaged sentences the legislator gives a clear indication of gravity of offence; accordingly, among the three offences with most pronounced corruption elements, the least severe offence is active bribery, as shown by the table below with the data on envisaged sanctions.

Offence	Sanction			
Misuse of office	0.5 to 5 years[133]	1 to 8 years[134]	2 to 12 years[135]	
Passive bribery	2 to 8 years[136]	2 to 12 years[137]	3 to 15 years[138]	3 months to 3 years[139]
Active bribery	0,5 to 5 years[140]	up to 3 years[141]		

Table 1: Sanctions envisaged for corruption offences

Contrary to this and quite inexplicably and unreasonably, in active bribery case courts pronounced imprisonment sentences only, although it always involved petty corruption. In addition, in practice imprisonment sentences were very rare for misuse of office, predominantly punished by suspended sentences, regardless of the value of gains procured and regardless whether it involved offences indicative of high-level corruption.

In addition, the largest number of cases linked with active bribery was proven based on statements of public officials who were offered bribe. Almost in all such cases the defendants were eventually convicted.

On the other hand, it is much more difficult to prove the misuse of office cases. Criminal offences can normally be proven by the existence of material evidence at the time of pressing charges, possibly even witnesses. Therefore, it remains unclear how it is possible to have such

[133] CC Art 416(1): *A public official who misuses his office or authority, oversteps the limits of his official authority or refrains from performing his official duty and thereby obtains for himself or another person undue advantage, or causes damage to another person or severely violates the rights of another person.*

[134] CC Art 416(2), *Where the commission of the offence under para. 1 above resulted in pecuniary gain exceeding three thousand euros.*

[135] CC Art 416 (*3), Where the value of pecuniary gain exceeds thirty thousand euros*.

[136] CC 423(2): *A public official who directly or indirectly solicits or receives a gift or any other undue advantage, or who accepts a promise of gift or any undue advantage for himself or another person for agreeing to perform an official or other act which he must perform, or not to perform an official or other act which he must not perform.*

[137] CC Art 423(1): *A public official who directly or indirectly solicits or receives a gift or any other undue advantage, or who accepts a promise of a gift or any undue advantage for himself or for another person for agreeing to perform an official or other act which he must not perform, or not to perform an official or other act which he must perform.*

[138] CC Art 423(3): *A public official who commits the offences under paras 1 or 2 above in relation to detection of a criminal offence, initiating or conducting of criminal proceedings, pronouncing or enforcing of a criminal sanction.*

[139] CC Art 423(4): *A public official who after performing an official or other act or after refraining from performing an official or other act as envisaged by paras 1, 2 and 3 above, or in conjunction with such acts, solicits or receives a gift or other undue advantage.*

[140] CC Art 424(1): *Anyone who gives, offers or promises a gift or other undue advantage for himself or for another person to a public official or another person for agreeing to perform and official or other act he must not perform or not to perform an official or other act he must perform or anyone who intercedes in bribing a public official in the manner described above.*

[141] CC Art 424(2): *Anyone who gives, offers or promises a gift or other undue advantage to a public official or other person for agreeing to perform an official or other act he must perform or not to perform an official or other act he must not perform, or anyone who intercedes in bribing a public official in the manner described above.*

huge differences in the success rate of indictments, when it is to be expected that the material evidence collected and assessed by the prosecutor would be more reliable than the testimonies of witnesses.

6.4. Extenuating circumstances

Judges treat the extenuating circumstances differently leading to huge differences in penal policy among different courts, but also within courts. The examples show that the same judges have different standards in setting sanctions, with even the same circumstances sometimes being regarded as extenuating, sometimes not.

The CC art 54(4) envisages as follows:

"When determining whether to impose a suspended sentence, the court shall take into account the purpose of the suspended sentence and give particular consideration to the perpetrator's personality, his personal history, his behaviour after the commission of the criminal offence, the degree of guilt and other circumstances under which the offence was committed."

Case study 23: The young, the old, family people, convicts, pensioners, grey economy, worker assistance, fair attitude...

The Basic Court in Plav pronounced two **suspended sentences** for two managers of a private firm charged with two offences each: misuse of office and forging official documents[142]. As reasons for a suspended sentence, the judge in this case quoted the first defendant to be young, married, a father of one, and for the other defendant that she is young, married, mother of two, no prior convictions, and that both confessed the offences and expressed regret and remorse.
Moreover, the Court pronounced a suspended sentence to the first defendant notwithstanding his **two prior convictions on suspended sentences**. "Justifying" the third suspended sentence the Court claimed these were no sentences, but reprimands.

Although the Criminal Code defines both the suspended sentence and the judicial admonition as warning measures, the Court should have taken into account the prior life of the defendant, and thus should have reached the conclusion that warning measures prove to be ineffective in his case.

The fact that it is unacceptable to pronounce suspended sentences to a person who has already been pronounced such a sentence on two prior occasions was confirmed by the legislator with the 2010 CC amendments[143] expressly stipulating a suspended sentence may not be pronounced to a perpetrator who has already been pronounced two suspended sentences before.

Contrary to that, the same court, even the same judge[144] pronounced an unsuspended **three month imprisonment sentence to an electric technician** once employed with Montenegro's power utility company EPCG convicted of misuse of office. This technician was sentenced to a prison term for having, **without authorisation, taken from the victim 520 euro** on the account of outstanding electricity bill, and retained the amount for himself. Although the defendant paid back the said amount to EPCG

[142] Judgment K.br.23/2011 of 01 August 2011
[143] Official Gazette of Montenegro 25/2010 of 05 May 2010
[144] Judgment K.br.22/2012 of 21 June 2012

before the conviction, and although he was a family man, father of five, unemployed, who pleaded guilty expressing regret and remorse, this did not help him to avoid imprisonment.

The Basic Court Ulcinj in its judgment[145] for misuse of office took as extenuating circumstances the family circumstances and the attitude of the victim not to join in the prosecution, while the age of the defendant, 59 at the time of the commission, and 60 at the time of adjudication, was taken as particularly mitigating, concluding that he was "an elderly man".

In addition to the fact that the opinion of the victim may be taken as an extenuating circumstance only if it stemmed from actions taken by the defendant (true remorse, compensation for damages, etc.), it is utterly incomprehensible how the court could have regarded as particularly extenuating the fact that the defendant was "an elderly man" aged 60. Particularly so given that he was still employed, as noted by the Court in the same judgment.

Hence, again in this case the Court did not assess the circumstances which should have been taken into account when pronouncing sentences if applying the CC properly.

For the Basic Court in Kotor[146], the fact that the defendant is retired is regarded as an extenuating circumstance. Namely, the Court is of the opinion that a criminal offence is of lesser societal impact given the accused **retired** meanwhile.

The societal danger of an offence is the legislative motif of incrimination, or the criminal policy criterion for determining which behaviours will be incriminated. It is almost absurd to even discuss whether the subsequent retirement of an accused may have any impact whatsoever on the degree of danger for the society for the offence he committed before retirement.

The Podgorica Basic Court judgment[147] pronounced a suspended sentence for the Chair of the Executive Board, the Executive Manager and the Financial Manager of a company on the count of misuse of authorities in business activity. The judgment established the defendant procured gains for the company worth 169,264.51 euros, causing the damages in the same amount to the state budget for lost taxes and contributions.

Justifying the more lenient sentence pronounced, the Court referred to have taken as extenuating circumstances the fact that the defendants admitted the commission, the **fair behaviour** during the hearing, family circumstances, the circumstances of the offence commission, i.e. **unfair competition from the companies in the grey economy**, the motif for commission being **betterment of the financial standing of staff,** and no prior convictions.

Out of the seven circumstances mentioned and deemed as extenuating and the reason for a suspended sentence, two can certainly not qualify as mitigating, two were incomprehensibly misquoted by the Court, and only two actually existed to the benefit of the defendants.

[145] K.br.198/09 of 05 May 2010
[146] Br 242/08 of 10 July 2008
[147] K.br.258/07 of 15 October 2007

Namely, the fair conduct during the trial may not be regarded as an extenuating circumstance for a lesser sentence, since all defendants and all parties to the proceedings are obliged to that, and the court has legal means, and is obliged to apply them, if someone fails to act "orderly" and if violating the rules of procedural discipline. In addition, unfair competition in the grey market may not be an extenuating circumstance, since it leads to a conclusion that noncompliance of other persons works to the favour of those who also broke the law and denied public revenues. With such stands, the Court directly encourages the grey market, and denial and evasion of taxes and other public revenues.

Hence, in the case at hand, none of the defendants confessed the commission nor provided any statements that would help shed light on the case, so the stand of the Court that their confession is an extenuating circumstance is incomprehensible. The admission of guilt may be an extenuating circumstance only if it fully and considerably contributes to resolving the case, which did not exist in this case.

In its judgment, the Court established that the defendants acted with the intention of procuring gains to the company, which they eventually did, €169,264.51 worth. That is why the conclusion from the judgment that the motif of the defendants was to improve the material status of staff is incomprehensible and contradictory. This would mean that denying public revenues would be in the interest of and aim at improving the material position of staff, which is absolutely illogical and absurd.

Companies end all employers to that matter are obliged to pay remuneration to their staff for their work, but are also obliged to pay payroll taxes, and the payment of these is also in the interest of the employees.

Thus, the conclusion that denying payroll taxes may be in any way to the benefit of staff is unacceptable and utterly incompetent, and it is particularly disconcerting that such a conclusion led to a more lenient sanction.

Finally, in the case at hand, only two extenuating circumstances existed for the defendants, namely family circumstances, as married men, and no prior convictions.

In the rationale to the judgment, the Court is obliged to give a response why the decision is logical and reasonable, and what it is based on. This obligation of the Court holds also true for the justification of the sanction, and thus basing the decision on the reasons on which it cannot be based and on the reasons which manifestly do not exist, show indubitably that the decision is unlawful leading to reasonable doubts into the reasons and motifs of the Court in passing such a decision.

7. COVERT SURVEILLANCE MEASURES

In three case only, the criminal proceeding involving corruption offences was launched based on evidence gathered through covert surveillance measures. Hence, the justifications that the difficulties in proving and inability to apply such measures were the reason for poor performance in combating corruption are unacceptable.

The new Criminal Procedure Code (CPC)[148] extends the scope of offences for which covert surveillance measures may be ordered. According to the previous CPC, such measures could have been ordered solely for offences punishable by imprisonment of at least 10 years and for organised crime offences. According to the new CPC[149], the covet surveillance measures may be ordered, inter alia, for corruption offences, as shown below.

Offence	Covert Surveillance
Money Laundering (CC Art 268);	all forms
Breach of Equality in Business Operations, CC Art 269	No
Causing Bankruptcy, CC Art 273	No
Bankruptcy Fraud, CC Art 274	all forms
Misuse of Authorities in Business Operations, CC Art 276	para 2
Fraudulent Balance Sheet, CC Art 278	No
Misuse of Assessment, CC Art 279	all forms
Revealing a Business Secret, CC Art 280	para 2
Revealing and Using Stock Exchange Secrets, CC Art 281	para 3
Misuse of Office, CC Art 416	paras 2 and 3
Malpractice in Office, CC Art 417;	No
Trading in Influence, CC Art 422	all forms
Passive Bribery, CC Art 423	all forms
Active Bribery, CC Art 424	all forms
Disclosure of Official Secret, CC Art 425	all forms
Abuse of Monopoly Position, CC Art 270	No
Misuse of Position in Business Activity, CC Art 272	para 3
Fraud in the Conduct of Official Duty, CC Art 419	paras 2 and 3

Table 2: Covert surveillance measures – an overview of authorities from the old and the new code

In organised crime, corruption, terrorism and war crime case, this Code has been applied since 26 August 2010; hence, covert surveillance measures now may be ordered for the above corruption cases. The CC Art 159 empowers the Prosecution Office to order some such measures, while other are to be ordered by the investigative judge, at the prosecutor's proposal.

The "Behind the Statistics" publication describes that in corruption proceedings covert surveillance measures were used in two cases only, heard before the Podgorica High Court, and in only one case the evidence collected through covert surveillance was actually used in proving corruption.[150] In judgments made available to us afterwards there is only one more such case to prove corruption by using covert surveillance.

[148] Official Gazette of Montenegro 57/2009 of 18 August 2009
[149] Art 158(3)
[150] More details in "Behind the Statistics", Chapter 6.1.6. Covert Surveillance Measures in Proving Corruption, pp 65 and 66

Hence, in 388 first and second instance judgments in corruption cases, only three cases involved covert surveillance:

The first case[151] involved 11 persons for several offences, including active and passive bribery. Establishing evidence, the Court listened to a tape recording of three conversations concerning one of the 11 defendants, and read transcripts of conversations recorded as per the orders of the investigative judge. However, the judgment in this case was not based on the evidence procured through covert surveillance. Moreover, such evidence was without any relevance in the proceeding and the Court disregarded them in the judgment.

The second case[152] involved five persons charged with active and passive bribery. Establishing evidence, the Court read the Police Directorate's report on covert surveillance measures applied with photographic and video recording of persons, buildings and vehicles, the final covert surveillance report was read with transcripts and text messages contained in the telephone communications between the accused and audio recordings of telephone conversations heard. In the judgment declaring them guilty, the Court referred to the above evidence obtained through covert surveillance and based the conviction, inter alia, on such evidence.

The third case, the Court of Appeals' judgment[153] points to the establishment of evidence in the case before the Podgorica High Court[154] listening to wiretapped telephone calls among the defendants charged with several misuse of office and passive bribery offences. The total gains procured through these offences, confiscated by the judgment from the six defendants, amounted to 8,650 euros. The convicting judgment refers to evidence collected through covert surveillance.

The negligible number of corruption cases in which evidence was successfully obtained through covert surveillance may lead to a conclusion that such measures are almost never used in practice, which may be indicative of lack of will and incompetence of the prosecution and the police to curb corruption by applying such measures.

Otherwise, the conclusion would be that covert surveillance measures are, in fact, applied, but without much success even against persons not engaging in corruption, hence, the material thus gathered is not used in court proceedings.

Case study 24: Priority cases – supervise citizens or detect corruption?

There is a huge room for misuse of authorities by state prosecutors and infringement upon the fundamental human rights of persons against whom the covert surveillance measures would be applied contrary to the provisions of this Law. Namely, whether to impose some of the covert surveillance measures depends solely on the state prosecutor's assessment and thus it suffices he would believe organised crime or corruption cases are involved to be able to order such measures.

Thus, the question that may be asked concerns also the legal validity of that evidence the state prosecutor collected through covert surveillance if it is established during

[151] Ks.br.19/09 of 17 February 2010
[152] Ks.br.14/2009 of 5 July 2010
[153] Ksž.br.3/12 od 04.04.2012. godine
[154] Ks.br.3/10

the proceedings that the offence investigated did not involve organised crime or corruption.

This case study shows that authorities, first and foremost the police, with the support of courts, infringe upon fundamental rights of citizens instead of using covert surveillance to fight corruption.

The "Behind the Statistics" publication[155] drew attention to the fact that the Police Directorate, through the mobile operator M-tel, had a direct and uncontrolled access to data bases on communication among citizens, thus violating the right to privacy enshrined in our Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In mid January 2011, the NGO MANS lodged a complaint with the Pogorica Basic Court against the Police Directorate and M-tel to nullify their mutual agreement by which the police had uncontrolled access to data of private citizens. Given that over five months the Court failed to take any action as per the complaint, we approached the Chief Judge of the Basic Court with the request to speed up the proceeding.

However, the Chief Judge dismissed the request as unfounded[156] stating:

> *"that in this case the Court took actions in continuity, and that it was manifest the hearing as per the matter at hand could not have been scheduled during the holidays"*.

Be it said that courts take collective annual leave in August each year, and thus it remains unclear why the Chief Judge believed that **as regards this case the Court was on leave from January, when it received the complaint, until the end of July, when he made such a decision**.

In late August the same year, acting upon the appeal of plaintiffs, the Chief Judge of the Podgoica High Court ordered this case to be handled as a matter of priority.[157]

Subsequently, the Basic Court scheduled a hearing and in early October passed the judgment[158] nullifying the Agreement between the police and M-tel as being in contravention to the Constitution of Montenegro and the European Convention on Human Rights. Justifying the judgment, the Court quoted the case law of the European Court of Human Rights (ECHR) confirming that interference with the right to privacy, as made possible to the police by the Agreement, is contrary to the Convention.

On 18 November 2011, the Police Directorate appealed against the judgment, and on 25 November the plaintiffs provided to the Court their response to the appeal by the police.

The provision of CPC Art 373(1) envisages that the first instance court, upon receiving the response to the appeal or upon the expiry of the term for responding to the appeal, will submit the appeal together with the response, if filed, to the second instance court not later than within 8 days.

[155] More details in "Behind the Statistics" Part II – An Overview of the Success of Anticorruption Reforms, pp 93 - 101
[156] Ruling Su.VIII br. 26-8/2011 of 27 July 2011
[157] Ruling VI Su. br.148/11 of 31 August 2011
[158] P.br.164/2011

Hence, the case file had to be submitted to the High Court Podgorica, as the second instance court in this case, not later than on 03 December 2011.

Although the Chief Judge of the Podgorica High Court already ordered the case to be handled as a matter of priority, the same Court took no action as per the appeal for months.

In late September 2012 the plaintiffs filed with the Chief Judge of the High Court a new motion for speeding up the proceeding, reminding him that over a year before he passed such a decision deeming this case to be of priority and that the High Court was handling the case for almost 10 months at the time.

In early October the Podgorica High Court passed a decision[159] terminating the proceeding on this legal matter given that meanwhile the Police Directorate had lost its legal capacity.

The Police Directorate lost the status of a legal person on 11 July 2012, since when it continued operating under the umbrella of the Ministry of Interior. Hence, over **seven months since it received the case file, the High Court had it at its disposal to resolve a case of "high priority", but apparently had no interest or willingness to handle it.**

Immediately after the judgment, on 07 October 2012, plaintiffs filed a motion to continue the suspended proceeding, and press charges against the state of Montenegro instead of the Police Directorate. Later that month the High Court continued the suspended proceeding.[160]

When the statutory limits have expired for the decision of the Chief Judge of the High Court as per the new motion to speed up the proceedings, in late January 2013 the plaintiffs lodged an appeal to the Chief Judge of the Court of Appeals. In doing so the plaintiffs proposed launching a proceeding to establish the responsibility of the Chief Judge of the High Court Podgorica, as envisaged by law.[161]

On 11 February 2013, the Chief Judge of the Court of Appeals passed a decision[162] ordering the Podgorica High Court judge who was in charge of the case to start handling the case within 15 days and present the case to the panel session, and to notify the Chief Judge of the Court of Appeals within 7 days of the actions taken.

The Chief Judge of the Court of Appeals established the violation of the right to trial within reasonable time and failure of the High Court Chief Judge to act in the manner and within the terms set in law, but did not launch a proceeding to establish his liability.

In the letter to the legal representative of plaintiffs[163] the Chief Judge of the Court of Appeals stated that the High Court Chief Judge asked the trail judge for clarification on 07 February 2013, and thus concluded that he acted as per the plaintiff's motion.

[159] Gž.br.6120/11-11
[160] Ruling Gž.br.4797/12-11
[161] Article 6 of the Law on Protection of the Right to Trial within Reasonable Time stipulates that failure of the chief judge of a court to act in the manner and within the time stipulated by the present law shall constitute a ground for instigate the proceeding to assess his liability.
[162] IV-2 Su.br.1/2013 - II
[163] IV-2 Su.br.1 - 8/2013 - II of 11 February 2013

These quotes by the Chief Judge of the Court of Appeals demonstrate that judges show solidarity in their mutual protection and avoiding liability even when unlawful actions are detected and even when the existence of legal requirements for questioning their liability is beyond dispute. It is quit absurd and incomprehensible that the High Court Chief Judge would act as per the control motion eight days after the appeal against his failure to do so and when the Chef Judge of the Court of Appeals, and not the High Court Chief Judge any more, had the competence to act as per the motion.

The decision of the Chief Judge of the Court of Appeals, ordering taking actions as per the case, shows that the High Court judge Snežana Vukčević received the case file on 12 March 2012, at the same time with another 60 cases from 2011.

Checking the information posted on the Judicial Council's website[164] it becomes evident that this judge was appointed as a High Court judge on 23 February 2012[165], being a first instance court judge in the Basic Court in Podgorica prior to that.

Hence, this judge was appointed to the High Court more than two months after the case file was sent to the High Court. It means that this case was assigned previously to another judge and after more than two months, contrary to the law, it was reassigned to judge Vukčević or, again unlawfully, this judge was intentionally given this case and for some reasons her appointment was awaited to assign it to her.

In any case, it is beyond doubt that this case was not assigned to this judge in strict accordance with the law.

Moreover, the actions taken by judge Vukčević make it certain that in this case she did not meet even the minimum guarantees to decide independently and that she **conscientiously violated the law to the detriment of plaintiffs**.

Namely, in his decision the Chief Judge of the Court of Appeals established that, given the annual workload for judges, judge Vukčević could have dealt with all the 2011 cases for less than three months. Hence, judge Vukčevič could have safely dealt with all the 2011 cases by the end of May 2012, being appointed as the High Court judge on 23 February 2012.

Instead of handling this case as a matter of priority even before the cases filed before it, **during four months judge Vukčević started handling as many as 38 received after the said case**.

The Chief Judge of the Court of Appeals established that by 11 July 2012, until when there were no hindrances to act as per the case since the Police Directorate still had legal capacity, judge Vukčević heard as many as 10 cases from 2011 filed with the High Court after the said case, but also 28 2012 cases. Hence, between the end of February and July 2012, judge Vukčević heard as many as 38 cases unlawfully, i.e. before the said case.

Finally, according to the Court of Appeals, on 07 February 2012 judge Vukčević *"clearly expressed her view that she did not deem this case as a priority, claiming at the same time that she did table it for the panel session held on 05 February 2012,*

[164] www.sudovi.me
[165] Su.R.br.69/12 of 23 February 2012

but that no ruling was made since there was a need to obtain certain data (which is not confirmed by the case file, nor by the list of sessions held)".

The Civil Procedure Code does not envisage the possibility for the second instance court at the panel session to postpone the session for hearing a case received a year and two months before *"for the reasons of a need to obtain certain data"*.

Since there is no evidence of that in the case file, it is evident that judge Vukčević tried to deceive the Court of Appeals or that she unlawfully collected some data to the benefit of the defendants in this case.

Article 33a, items 1 and 2 of the Law on Courts stipulates that it is regarded as judges are negligent of their duties if over a longer period of time they fail to take cases by the order in which they were received and if they fail to schedule hearings in the assigned cases or in any other way delay the proceedings.

The Chief Judge of the Court of Appeals established that judge Vukčević over a longer period of time handled cases which were received afterwards and that she failed without any justification to present the case before the panel, i.e. delayed the proceeding. However, again in the case nothing has been done to establish judge's liability, as yet another encouragement for further unlawful actions.

On 20 March 2013 plaintiffs were delivered the ruling of the Podgorica High Court[166] quashing the Basic Court judgment and returning the case for retrial, more than two years after having lodged the complaint.

The assessment of nullity or unlawfulness of the agreement between the police and M-tel is a matter of law and the court should know how to handle the matter. Hence, the Podgoica High Court did not have the reason to return the case for retrial, but should have passed a decision on the matter of law, or the application of substantive law. Hence, the conduct of High Court judges, particularly judge Snežana Vukčević, seems as intentional prolongation and continued violation of fundamental human rights.

Along the Constitutional Court which keeps avoiding for almost five years now to put on the agenda an initiative launched by MANS for constitutional review of the CPC provision enabling the police, without any court order, to collect data on citizens and infringe upon the right to privacy, the above actions of the Basic Court, the High Court and the Court of Appeals contribute to the impression that Montenegrin courts intentionally tolerate the violations of fundamental human rights.

Given the above and the negligible achievements in applying covert surveillance measures in corruption cases, it becomes evident that state authorities, the police primarily, abuse authorities and with the support of courts infringe upon the fundamental human rights of common citizens instead of fighting crime.

[166] Gž.br.4797/12 - 11 of 15 February 2013

8. COMPENSATION AND CONFISCATION OF PROCEEDS OF CORRUPTION

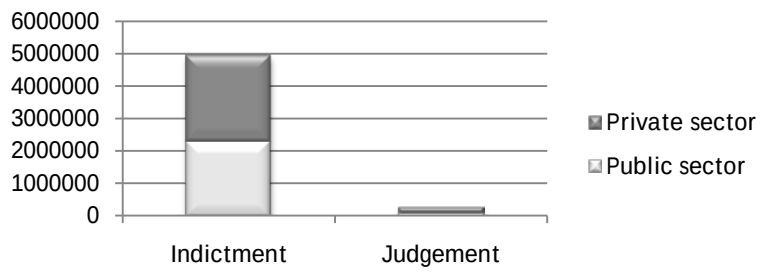
The amounts courts adjudicate as compensation for damages caused by corruption are several times lower than the estimates quoted by prosecutors in indictments, particularly in cases concerning the public sector. This means that prosecutors overestimate damages in indictments, looking for more severe qualifications, to fictitiously show they are fighting corruption that causes more serious damages to the budget. Or else prosecutors assess damages well, but are unable to prove them, i.e. courts do not accept evidence and award damages of exceptionally small amounts.

As regards corruption in the public sector, paradoxically prosecutors assess much more frequently the amount of damages in the cases involving lowest level corruption than public officials. Thus, for instance, convicted foresters paid twice the amount of damages as compared to public officials.

Foresters account for almost two thirds of all the cases in which courts award compensation for damages of corruption. Appallingly, the convicted foresters account also for two thirds of awarded amounts in all public corruption cases.

In almost **60% of first instance cases,** the prosecution charged the defendants with the damages of almost five million euros.

The damages were awarded only in 31 cases, or **in one out of six cases** in which prosecutors asked for damages, with total damages awarded being less than 300,000 euros, or only **6% of the amount** quoted in indictments.



Graph 18: Total amounts of damages from indictments and judgments in the public and in the private sectors

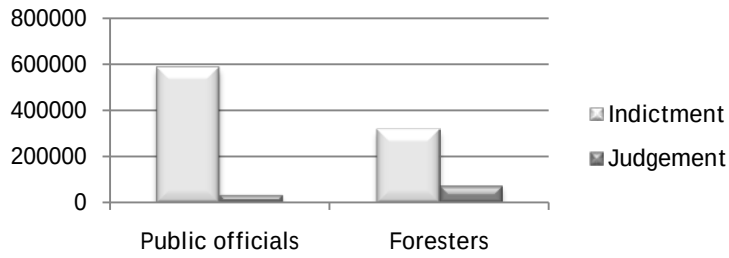
When it comes to corruption **in the public sector**, the prosecutors quoted in the indictment the amount of damages in **over 50% of cases** and the total assessed amount was around 2.3 million euros.

The courts, nevertheless, awarded damages only in **one out of seven cases** in which damages were asked by the prosecution in the total amount of 113,000 euros or less than **5% of the amount** assessed by prosecutors.
In cases involving **public officials**, the prosecution was found to quote the amount of damages much less frequently, or in less than **43% of the cases** as opposed to the average of 60%, while the total estimated amount was less than 590,000 euros.

In two cases only or in **one out of six** in which damages were assessed in the indictment, the court obliged public officials to compensate for such damages, in the total amount of some 33,000 euros or **5.6% of the assessments** by prosecution.

Convicted **foresters** paid twice the amount of damages caused by corruption compared to public officials. Prosecution charged them with damages in almost **90% of the cases** in the total amount of almost 320,000 eura.

In **one in five** cases in which prosecutors quoted the amount of damages, the court confirmed that in judgments, and the total amount awarded was less than 73,500 euros, or **23%** of the estimates.



Graph 19: Total amount of damages assessed in indictments and awarded to officials and foresters

Most of the cases in which courts award damages caused by corruption in the public sector concerns foresters. Moreover, almost one in four court cases for corruption, either in the public or in the private sectors, where damages were awarded for corruption, involved foresters.

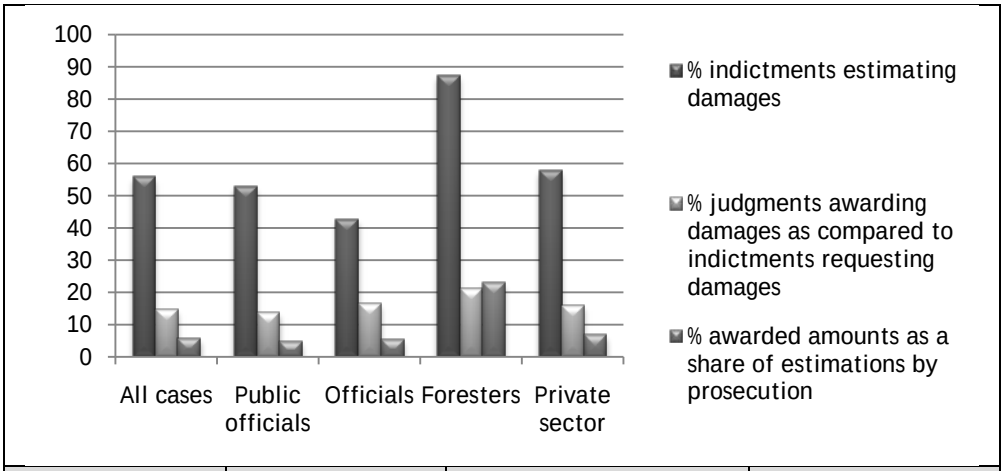
At the same time, foresters paid almost two thirds of the total amounts awarded for corruption in the public sector, or one fourth of the total amount of damages awarded in the public and the private sectors.

Graph 20: Number of judgments ordering compensation for damages for corruption in the public sector

Graph 21: Total amounts of damages awarded for corruption in the public sector

Finally, as regards corruption in the **private sector,** in almost **60%** of indictments the prosecution quoted estimated damages in the total amount of over 2.6 million euros.

A bit more than **one in six** such cases damages are awarded in the total amount of 180,000 euros or less than **7%** of total amounts estimated by the prosecution.



	% indictments estimating damages	% judgments awarding damages as compared to indictments requesting damages	% awarded amounts as a share of estimations by prosecution
All cases	56	15	6
Public sector	53	14	4,9
Officials	42,8	16,7	5,6
Foresters	87,5	21,4	23
Private sector	58	16,6	6,9

Graph 22 and Table 3: *Differences in frequency of indictments and judgments ordering damages caused by corruption and the amounts awarded in the public and the private sectors, among officials and foresters*

Case study 25: (Non)filing property claims

A judgment of the Basic Court in Podgorica[167] makes it clear that the prosecutor in the case did not propose to hear the victim, nor has the court during the proceedings called or heard victims, although it could and had to do so even without the prosecutor's demands. Thus, the prosecution and the Court denied the rights of the victims to file property claims which should have been granted, given that the Court established the exact amount of damages to be €169,264.51.

In addition, at the time of adjudication, state prosecution was taking care of the property rights of the state[168]; hence, the prosecutor had a clear obligation to take actions to compensate for the damages incurred to the state budget. The failure to perform this duty also constitutes one of the forms of commission of misuse of office as an offence.

Contrary to this failure to perform an official duty and failure to recover as much as €169,264.51 lost from the budget, the same Court took a different approach in the case when this amount was much lower.

[167] K.br.258/07 of 15 October 2007
[168] The 2009 State Assets Law transferred this responsibility to the Protector of Property Rights of Montenegro

The Court passed a judgment[169] convicting a manager of a company for the same offence – misuse of authorities in business activity, on the same count of failure to pay payroll taxes, with the amount of damages this time being €600.04. In this case victims were heard and the Court granted the Tax Administration's claim in its entirety in the amount of €600.04.

Case study 26: Court does not know the calculus

In other cases courts would frequently fail to establish the amount of damages, or proceeds of crime, but would rather unjustifiably refer the parties to the civil proceedings. Thus, courts cause damages to the state budget since they postpone, and sometimes even prevent the recovery of funds for which the budget was damaged through the commission of offences. Moreover, in some cases the amounts of damages or proceeds of crime are the fundamental facts on which the qualification of the offence the accused are charged with depends.

The Basic Court Bar in its judgment[170] noted[171] **that the defendant failed to pay the sales tax, but instructed the Public Revenues Directorate to collect such amount in civil proceeding since it was not converted in the then valid currency - euro.** Court further noted that an administrative procedure was conducted within the Public Revenues Directorate as regards the calculation of taxes, and the Court had no evidence how the procedure ended, or whether the defendant paid sales tax and in what amount.

Nevertheless, the Court never stated what it used as a basis of establishing the amount of taxes due, but only reiterated that the factual description of the indictment shows it involves the amount of 39,948.40 DEM. The qualification of the offence depends on the amount of taxes due[172], hence the court was obliged to establish the amount beyond any doubt. Furthermore, given that the amount must be established precisely in order to properly qualify the offence, it is clear that the court had no grounds to refer the victim to the civil proceeding to recover the funds due to the state budget.

Also, the explanation that the amount was not converted to the currently used currency, euro, is quite unreasonable given that the court could have done the conversion without any need to stall the proceeding. Moreover, the legal qualification of the offence depends on such conversion, since the Criminal Code stipulates the amounts of taxes due in euros. Particularly incomprehensible is the fact that the Court stated it was unaware of the amount of taxes actually paid by the defendant, or the amount due, but nevertheless convicted the defendant of a graver form of the offence existing in cases when the amount due exceeds 10,000 euros. The Court also noted that the establishment of evidence to that effect would "prolong the proceedings", which is quite incompetent, even hypocritical given that the **prosecutor started working on the case 8 years before, and that the court**

[169] K.br.06/1399 of 23 December 2008
[170] K.br.205/08 of 02 July 2009
[171] After four years of working on the case the state prosecutor raised an indictment for misuse of office, but the court convicted the defendant of payroll tax evasion.
[172] The basic form of this offence exists if the outstanding tax debt exceeds 1,000 euros, a more serious form if it exceeds 10,000 euros, and the gravest if it exceeds 100,000 euros

proceeding alone took 4 years[173]. Court is obliged to assess damages when the qualification of the offence hinges on that, and eight years of working on the case should have given ample time to establish that fact.

Case study 27: Foresters and warehouse keepers pump up the statistics

Unlike the previous cases described above showing that prosecutors and courts **did not even try to assess the amount of damages for the state budget for years,** and thus possibly enable the collection of such damages in the criminal proceeding, the following example shows that courts **take a different approach with defendants of lower societal standing**.

Namely, the Basic Court in Rožaje convicted a forester to a seven month prison term[174] on the count of misuse of office for failing to guard and make rounds of the forest from which unknown perpetrators felled and stole timber worth €14,237.85 with the same judgment, the forester was obliged to compensate for the damages. Hence, when the defendant is a forester, courts do establish the amount of damages without any fears of "delaying the proceeding" by doing so, use the amount to charge the defendant with graver form of the offence, and obligate him to compensate the damages.

The same Court had an equal approach to three guards at a share-holding company charged with failure to secure a customs warehouse which led to €55,466.60 worth of goods being stolen by unknown perpetrators. The guards were obliged by the judgment[175] to compensate such the damages to the Customs Administration.

Interestingly, the guards were charged with a lesser offence – malpractice in office[176] punishable by a fine or imprisonment up to three years, while the graver form exists when damages sustained exceed €30,000.00 – which actually the Court established did happen.[177] **Hence, the Court punished them with a lesser sanction than the one invoked by the amount of damages they were obligated to pay.**

Case study 28: Calculation mandatory for public officials

As stated several times, rare are the examples of handling high-level corruption cases. Even rarer are the cases in which the amounts of damages are measured in hundreds of thousands of euros. This study refers to one such case which is unique by the fact that the court requested from the prosecution to revise the indictment with evidence showing how they calculated the damages.

This case shows that some courts pass judgments ignoring the damages sustained, while in other politically more sensitive cases they use the inability to assess damages as a pretext not to launch court proceeding. It is interesting to see how the amounts of damages are eaten away- from pompously announced data by the

[173]The case reference in the prosecution office (Kt.br.139/01) gives an indication that this is a case filed in 2001, but the indictment was raised in June 2005, and the court adjudicated in July 2009, nine years after the prosecution started working on the case.
[174] K.br.5/11 of 04 March 2011
[175] K.br.76/11 of 17 June 2011
[176] CC 417(1)
[177] CC 417(2)

police over a more modest indictment bill by the prosecution to final withdrawal when evidence was requested.

The ruling of the Podgorica Basic Court[178] returned the indictment[179] to the Basic Prosecution Office to ask for further investigation. This indictment charged the Chair of the Board of Directors and the Legal Department Director of the national airline *Montenegro Airlines*.

According to the statement by the Police Directorate after filing the criminal report in 2006, they were suspected of damaging the company for more than 9.7 million euros, while the indictment, that came three years afterwards, assessed the damages at some €750,000.00.

Although the prosecution conducted the investigation for three years, according to the court's ruling, the prosecution did not gather enough evidence to raise an indictment for misuse of office, while on the count of malpractice in office, the indictment showed deficiencies since prosecution failed to cite the law or regulation violated or how it calculated the amount of damages stated in the indictment bill.

Such omissions and shortcomings in indictments show serious lack of competencies in the Sate Prosecution Office, but also raise suspicions as to the prosecution and courts only faking the readiness to tackle high-level corruption.

To the knowledge of the authors, and the publicly available data[180], this was the first indictment that the Podgorica Basic Court returned to the prosecution asking for additional investigation. Be it said that after the indictment was returned for revision, the Basic Prosecution Office withdrew from further prosecution.

[178] Kv.br.763/09 of 20 October 2009
[179] Kt.br.1446/06 of 15 July 2009
[180] Daily "Vijesti" of 31 January 2011, the article "In the Montenegro Airlines Case, Čarapić and Veljović Bear the Brunt"

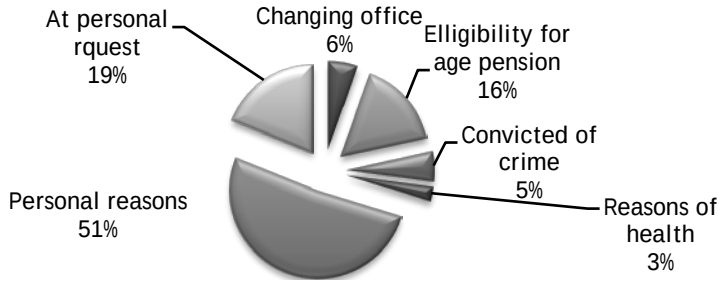
9. LIABILITY OF JUDGES AND PROSECUTORS

Few judges were dismissed, and for a large number of them their office terminated at personal request. The specific examples show that, when unlawful actions taken by judges are revealed, they are suggested by their superiors to resign to hide the omissions in the work of courts and judges from the public eye.
The testimonies by judges themselves show that the Judicial Council ignores the violation of laws and procedures in one Montenegrin court.
As regards prosecutors, none was held disciplinarily liable, and MANS alone had several initiatives launched against them on several grounds.

9.1. Dismissal and termination of office for judges

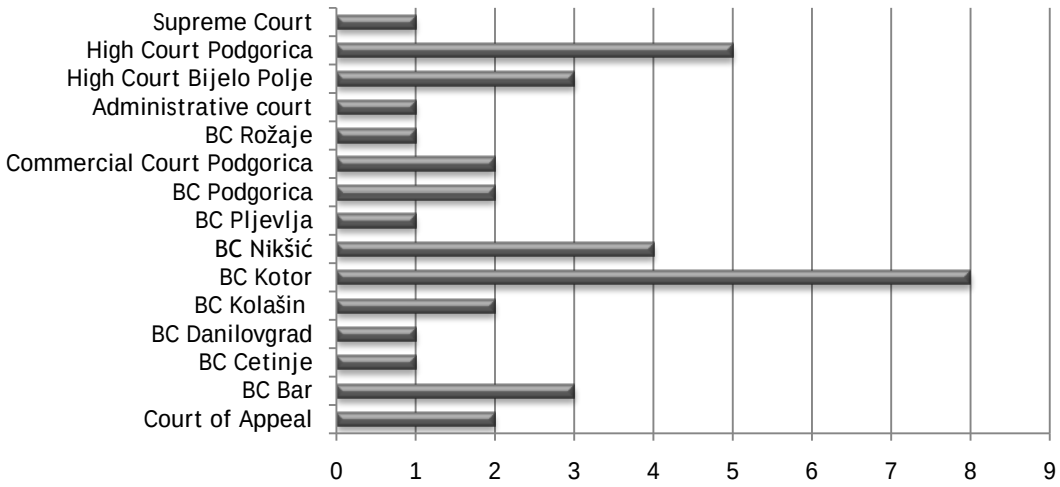
According to the data available on the Judicial Council's website over the last five years only four judges were dismissed, one due to malpractice in judicial office, and three on the count of incompetence and malpractice in judicial office. Three of them are judges of basic courts, and one of a high court.

Over the same period, 37 judges left the office, mostly for private reasons, or at their personal request.



Graph 23: Reasons for leaving the office of judges (2008-2012)

The largest number of them worked with the Basic Court in Kotor, then High Court Podgorica, followed by the Basic Court in Nikšić.



Graph 24: Number of judges who left office by court (2008-2012)

The small share of dismissals as compared to termination of office on other grounds may be explained by the case study which shows that in the rare cases of dismissals, these judges were previously suggested by their superiors to resign.

Case study 29: Judges about themselves – law violation "a standard practice"

This case study shows that when any unlawful actions are detected judges are suggested by their superiors to resign to hide everything from the media and the public eye.

Moreover, the statements from a judgment show that the Judicial Council ignores the fact that in second instance courts laws and the annual schedule of works are violated intentionally, setting up second instance panels immediately before the sessions, violating the right of parties to an independent court. The Judicial Council, moreover, does not see anything wrong in the fact that judges adjudicate in the areas of law not assigned to them and in cases they are not familiar with, while the decisions on their exclusion are made contrary to the CPC provisions.

The study gives an example in which the defendants and witnesses were the Bijo Polje High Court judges.

The Basic Court in Podgorica acquitted two judges of the criminal panel in the Bijelo Polje High Court[181], of the misuse of office charges for having kept silent, in the reporting and adjudicating as per the appeal, of the fact that the defendant had prior convictions, thus reversing the sanction into a suspended sentence, and procuring the defendant gains through being spared the imprisonment.

The judgment makes it clear that the Chief Judge of the Bijelo Polje High Court instigated the dismissal procedure for judges Adrović and Bošković. The Judicial Council refused to dismiss Judge Bošković, and Judge Adrović was dismissed.

However, we learn from the testimony given by Judge Adrović that **judges are suggested by their superiors to resign when any unlawful actions are discovered to hide the fact from the media, and to keep it away from the public eye**. According to the judgement, in his defence before the investigating judge, the accused judge Adrović said the following:

"On 25 July 2009 he was invited to the office of the Chief Judge of the Bijelo Polje High Court who informed him that he received a phone call from the Chief Judge of the Supreme Court to state his reasons why he reversed the three month imprisonment sentence to a suspended sentence for the defendant..., and the Chief Judge of the Bijelo Polje High Court asked him to write a statement. On the occasion, the Chief Judge of the Bijelo Polje High Court told him it would be best to resign to prevent press writings of the case".

The witness in the case, judge Konatar, stated that this was **the first disciplinary proceeding in that court**:

„The disciplinary proceeding against the defendants was the first disciplinary proceeding held at the Bijelo Polje High Court, and he had indirect knowledge from

[181] Presuda K.br.10/474 od 06.06.2011. godine

his colleagues who used to work at that Court that the same thing was done before at the same Court".

The accused judges explained that **the omissions were caused because it is a standard procedure before the Bijelo Polje High Court to violate laws in allocation of cases**. According to the statements quoted in the judgment, one of the accused judges claimed while presenting his defence in the main hearing:

"He explained it was a practice in the Bijelo Polje High Court to change the composition of the panel, upon the request of the colleague or the presiding judge or most often the rapporteur in case a panel member was absent, the member established by the annual allocation of cases".

It was discovered during the proceeding that the third member of the panel in the disputed case was a civil judge that the prosecution did not bring charges against like the other two, the presiding judge and the rapporteur in this case. That judge said in the main hearing that:

„He was never in the annual allocation of tasks assigned to be a member of the second instance criminal panel".

He explained that the **participation of civil judges in criminal panels, instead of criminal judges, contrary to the allocation of cases, was a standard practice in the Bijelo Polje High Court**:

"It was quite a common occurrence when a criminal judge was unable to attend the panel session, and in the absence of another criminal judge, to invite a civil judge to sit on the panel, which was a standard practice in the Bijelo Polje High Court".

This judge claimed that **everything was done with the active involvement of the former, and the tacit approval of the current Chief Judge**:

"In first instance case the Chief Judge would appoint by an oral order a civil judge to act in first instance criminal matters. The newly appointed Chief Judge should have been aware of this practice because he had available on daily basis the book signed by panel members in each specific case and never warned against doing so".

In his defence at the main hearing, the accused Judge Bošković, as quoted in the judgment, confirmed it was a standard practice, contrary to procedural rules, for civil judges to take part in criminal panels instead of criminal judges, **both in first and in second instance cases**:

"It would happen at the Bijelo Polje High Court that a civil judge would sit as a member of the panel in first instance criminal cases because there were no criminal judges or because their presence could not have been provided for, and this was an established practice".

It was confirmed by another accused, Judge Adrović who, as quoted in the judgment, in his defence before the investigating judge said the following:

"It was a standard practice of the Bjelo Polje High Court for civil judges to act in criminal matters, not only in second instance cases but also as standing judges in the first instance criminal cases".

The change in the composition of the panel in the case at hand happened because one of the judges appointed to the panel was previously the investigating judge in the

same case. That judge, as a witness in this case, confirmed that it was a practice of the Court to set up panels contrary to procedural rules and stated:

"The legal procedure to ask the Chief Judge to appoint the new panel member was not observed".

Another judge of the same court, acting as a witness, confirmed that the **decisions on exclusion of judges were passed contrary to the Criminal Procedure Code**:

"They did not follow the procedure stipulated by the CPC for the exclusion of a judge in the full capacity, but rather replaced the panel member prevented from acting by another member regardless of the annual allocation of cases. This practice existed in the Bijelo Polje High Court even before his arrival, and it s still done so".

Such a practice and putting up with it shows intentional disregards of laws by courts, but also of the European Convention on Human Rights.

Article 8 of the Law on Courts stipulates that everyone shall have the right to be adjudicated in his legal matter, independently of the parties and the features of the matter of law, by a judge appointed to act in the case. Article 89 of the same Law stipulates that cases shall be allocated without delay, according to the annual schedule of tasks, by random allocation methodology depending solely on the code and the reference number of the case, and that the given judge carries out the judicial function in one or several areas of law allocated at the beginning of the calendar year.

Article 90 of the same Law stipulates the methodology for random allocation of cases, while Article 93(1) stipulates that an allocated case may be withdrawn from a judge or a panel only if it is established they have not been acting in the case without proper reasons, due to exclusion or if a judge is prevented from performing the judicial function for over 3 months.

Contrary to that, judges of this court agree the cases are allocated and judges act as per them in contravention to the annual allocation of tasks, by searching for "available" judges to attend the panel session and by being called on the day of the session.

Moreover, during the court proceeding they even confirmed that judges perform functions in areas of law not allocated to them at the beginning of the calendar year and in case in which they are unaware even of the basic data, facts or circumstances of the case.

In addition, in an objective approach to the examination of impartiality of the court the ECHR believes that *"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".*[182] In line with the principles of the Strasbourg court, in order to determine the impartiality of a court it is extremely important to observe the right to a randomly allocated judge and the violation of this principle constitutes the infringement of Article 6 of the Convention. The standard practice of breaching the random allocation rules and setting up panels contrary to the law and the annual schedule of tasks is indicative of

[182] *Fey vs Austria*, 1993, para 30

mass and intentional violation of the rights to an independent court by all the judges within this Court.

Interestingly, the defendants in this case quoted in their defence they did not intend to assist the defendant to whom they pronounced a suspended sentence, had they wanted, they could have done so in a much simpler way:

"Had we intended to help, an easier way was just to quash the first instance judgment, since one can always find a reason to do so and by stipulating the reasons produce a different decision of the first instance court", said the accused Judge Bošković.

"Had he intended to assist anyone it would have been easiest to quash the judgment and through the reasons for doing so indicate to the Basic Court to pronounce a suspended sentence or acquit of charges", the judgment quotes the defence of Judge Adrović.

Such statements given by High Court judges raise serious suspicions that the second instance courts **may have a dangerous and unlawful practice of quashing first instance judgments** when there are no reasons for doing so, and thus having an unlawful impact on the first instance rulings.
It is quite symptomatic that state prosecution was not interested to find out how can always a reason be found to quash a judgement or that there were such cases which caused altering the rulings of first instance courts. This proves that the prosecution is not interested in examining and possibly prosecuting corruption in the judiciary.

It is also interesting that the accused judges and their witnesses revealed the **standard practice of the Bijelo Polje High Court for the panel members in second instance cases not to be familiar with the case files, not even the first instance judgment, but adjudicate solely based on the assessments of the judge rapporteur**:

"From the moment the judge rapporteur receives the case until the panel session, the presiding judge and the panel member never receive the judgment or the appeals of parties or case files to familiarise with the case", said the accused judge Bošković.

"He explained that never before the session had he received a copy of the judgment or anything from the case file, and he thinks that neither other colleagues, acting either as panel members or presiding judges, did receive a copy of the (first instance) judgment; the rapporteur judge was the only one fully familiar with the case file. When they withdraw for a closed session and vote, the panel member and the presiding judge rely on the proposed decision by the judge rapporteur. This practice has not changed in the Bijelo Polje High Court even after launching this criminal proceeding", states the judgment quoting the defence.

The accused Judge Adrović, who acted as the rapporteur in the case at hand, according to the judgment, said that it was a practice for the raaporteur to inform him and the other panel member of the case file at the panel session, and nothing has changesdeven now".

A witness, Judge Mrdak, who was the third panel member, stated:

In the case at hand in which he acted as a panel member he did not ask for the case file since he took part in a panel with two criminal judges who dealt with these matters, and thus he did not get involved much in the discussion, since he only took part in the panel not to postpone the session, and not to give any professional contribution".

Such a practice was confirmed by another witness, Judge Bošković who, as quoted by the judgment, said:

"When he acted as a panel member or a presiding judge of the second instance criminal panel, he was never familiarised with the case file before the panel session".

In his defence at the main hearing the accused Judge Bošković said that the **established CPC violation and noncompliance with procedural rules is not problematic for the Judicial Council**:

"The Judicial Council has passed a decision already known to the Court and it would be logical to stay the criminal proceeding after that, because the Judicial Council did not find that he and his colleague Mrdak made any mistake on the said occasion".

Case study 30: Forced "voluntary" leaving

These cases show that judges are managed autocratically by the Chief Judge of the Supreme Court who decides when the office of a judge shall terminate. Under the command of the Chief Judge of the Supreme Court, judges leave the office voluntarily, and in return there is no discussion of their liability, and the omissions in the work of courts and judges are hidden from the public.

According to Article 121(2) of the Constitution of Montenegro, the office of a judge terminates when he asks so, when becoming eligible for age pension, and if convicted to unsuspended imprisonment sentence.

As already noted, in most of the cases judges left office at personal request, and judges are not obliged to disclose the personal reasons; thus, it is not possible to draw conclusions of the reasons why so many judges resign.

Nevertheless, it is quite interesting that the "personal reasons" for resigning appear immediately after launching or announcing the procedure for establishing their liability. Also, the suspicions surrounding "personal reasons" stem also from the explicit announcement of the Judicial Council Chair and the Chief Judge of the Supreme Court, Vesna Medenica back in 2008.

According to the media reporting[183], on 24 June 2008 at an extended Bench Session held in Cetinje, Medenica pointed out:

*"All those aware of their obligations, the weight of judicial office and the liability it implies, both before the public judgment and before themselves, **must make a radical decision and leave the judicial office**. Incompetence and ignorance, ill intentions and faking justice shall not be met with a sympathetic ear by the Judicial Council in future."*

Such views may be interpreted as a pubic message by the Chief Judge of the Supreme Court to all the judges against whom the dismissal proceeding is instigated to resign.

[183] Among others, "Remedial Teaching for Judges", daily Pobjeda, 25 June 2008.

After such a public message, the media published[184] that Medenica asked to examine a case file of one judge, who then resigned from "personal reasons", and his office was terminated on 04 July 2008.[185]

The examples of judges whose office terminated following their resignation from "personal reasons" show that such decisions were forced.

For instance, on 03 October 2009, the Podgorica High Court judge Lazar Aković was suspended.

According to the judge's public statements[186], before proposing his dismissal, the Chief Judge of the High Court informed him he was forced to ask for his dismissal since he was "under pressure" and advised him to meet the Chief Judge of the Supreme Court and discuss with her or resign.

Three weeks later, on 24 October 2009, Judge Aković resigned "for personal reasons", and his office was terminated on 11 November 2009[187].

On 21 October 2011, again for "personal reasons", the office of the Podogrica High Court judge Slavka Vukčević[188], who inherited the case in which the trial judge was Judge Aković, was terminated. No dismissal procedure was instigated against her, but in her case the Minister of Justice stated that the Judicial Council established omissions in her work and announced taking measures.[189]

9.2. Disciplinary (non)liability of prosecutors

State prosecutors and deputy state prosecutors hold disciplinary liability for negligent performance of their office or if they damage the reputation of the prosecutorial office[190].

According to the data of the Prosecutorial Council made available to us by invoking the FAI Law, from its establishment until the end of 2012 there was not a single disciplinary

[184] "A case Held by Medenica", daily Pobjeda, 17 June 2008
[185] Su.R.br.92/08.
[186] "Leaves Without Regrets", daily Pobjeda, 24 October 2009
[187] Su.R.br.1569/09.
[188] Su.R.br.903/2011.
[189] Among others: "Omissions Self-evident", daily *Dan*, 22 September 2011, '"There Were Omissions in Writing the Judgment", TV Vijesti, Vijesti u pola 7, 21 September 2011
[190] According to Article 41 of the State Prosecutor Law, the State Prosecutor or Deputy State Prosecutor shall be considered as exercising negligently the prosecutorial office if he/she without justified reason: 1) does not take cases in the order they are registered; 2) rejects to perform the tasks and duties entrusted to him; 3) fails to appear or is late to scheduled hearings or trials in the cases allocated to him or her; (4) is absent from prosecution sessions; (5) is absent from work; (5a) omits to ask for excusal in cases in which grounds for excusal exist; (5b) fails to observe the set deadlines for taking actions or passing decisions in the proceeding or delays the proceeding in any other way; 5c) fails to keep the state prosecutor or the immediately superior prosecutor informed of cases where proceedings take longer; 5d) prevents supervision in terms with the law; 5e) fails to attend mandatory training events; 5f) fails to act as per state prosecutor's or immediately superior prosecutor's orders; 6) in other cases when the present Law prescribes that certain actions or omissions amount to negligent performance of the tasks. According to the same article, the State Prosecutor or Deputy State Prosecutor shall be considered as harming the reputation of the prosecutorial office, particularly if : 1) in the exercise of the prosecutorial function or in the public brings himself in a state or behaves in the manner that is not befitting the prosecutorial office; 2) accepts gifts or fails to declare assets and income in line with the conflict of interest provisions; 3) behaves in an improper or insulting manner towards individuals, state authorities or legal persons in connection with the exercise of his/her office; 4) fails to refrain from improper relations with defence counsels and parties in the cases he/she acts in or discloses information he/she learned in the course of their acting in cases; 5) uses prosecutorial office to pursue private interests and interests of his family members or close persons.

proceeding against prosecutors heard, and the Council "did not receive a single proposal for establishing disciplinary liability of prosecutors".

There were only two disciplinary proceedings against two deputy prosecutors:

> In the first case, the Prosecutorial Council found a deputy basic prosecutor from Bijelo Polje guilty for failure to attend mandatory training. The sanction he received was a 10% reduction of his salary for three months.
>
> In the second case, the Prosecutorial Council found a deputy state prosecutor from Podgorica guilty of negligent performance of tasks and he was sanctioned by a 15% reduction of salary lasting three months.

Previous chapters quoted several instances of prosecutorial inefficiency, selective criminal prosecution and a number of other law infringements.

MANS filed several initiatives against prosecutors on the count of **malpractice in office**, more specifically for failure to adhere to the set times and for delays in pre-trial and trial procedures:

- **For failure to act as per criminal charges** filed by MANS for over half a year[191] we filed the total of 33 reports to the Supreme State Prosecution. In 23 cases the Supreme State Prosecution did respond, but did not instigate a proceeding against any of the reported prosecutors, but was of the opinion that each of the prosecutors acted in compliance with the law.

- **On the count of failures in criminal prosecution of corruption cases** MANS filed with the Prosecutorial Council five initiatives asking to instigate dismissal procedure for specific prosecutors – three deputies to the Special Prosecutor and two deputy basic prosecutors. The dismissal was requested since they dropped the charges in their closing arguments, after several months, without any valid justification[192]. The Prosecutorial Council sent the reports to the persons concerned for their response and asked for case files, without any result even four months after reporting.

We filed two types of reports against prosecutors and deputies who failed to declare and/or falsely declared their assets

- We filed four reports with the Commission for Prevention of Conflict of Interest and asked it to establish that the prosecutors and deputy prosecutors in their official declarations provided false data on their assets and launch misdemeanour proceedings against them[193].

[191] Article 71 of the Rulebook on Internal Actions of the State Prosecution envisages that a state prosecutor or a deputy are obliged to pass a decision as per assigned cases not later than within three months, or only exceptionally within six months in complex cases

[192] The Deputy State Prosecutor in Plav dropped the charges 39 months after raising the indictment since she believed that the defendant did not procure any gains, which was mandatory as per the amended CC, and which has been proven during the proceeding, according to her; Deputy State Prosecutor in Cetinje dropped the charges 12 months after raising the indictment and more than 14 years after the time stated as the time of commission, due to statute of limitations under the amended CC; the Deputy Special Prosecutor dropped the charges in his closing arguments 34 months after raising the indictment since he believed there was no evidence the defendant actually committed the crime; another Deputy Special Prosecutor dropped the charges during the closing argument 21 months after raising the indictment without giving any reasons for doing so; and the third Deputy Special Prosecutor dropped the charges during the closing arguments eight months after raising the indictment since she believed there was no evidence the defendant committed the offence.

[193] We filed with the Commission reports against one High State Prosecutor from Podgorica, one Basic State Prosecutor in Rožaje, one Deputy Special Prosecutor and one Deputy High Prosecutor in Podgorica.

- We filed reports against three persons with their immediate superiors[194] and asked them to launch dismissal procedures for **damaging the dignity of prosecutorial office** on the count of providing false data on their assets and income, contrary to the conflict of interest provisions.

Prosecutors mostly declared false data as regards the total footage of the property they hold or failed to mention some property owned by their spouses.

> The most interesting is the case of the Basic State Prosecutor from Rožaje who did not declare any property in his 2013 Declaration of Assets and Income. Going through the data available on the Property Administration's website we noted he did own a plot of land, 160 m², with family residential buildings 1 and 2 with a yard, two business premises, 80m² each, and a meadow, 600 m². None of these assets were mentioned in the Declaration of Assets and Income he filed this year.

We are still awaiting the decisions by the Commission and the immediate superiors.

[194] Against one High State Prosecutor in Podgorica, one Basic State Prosecutor in Rožaje and one Deputy Special Prosecutor.

10. PARDONING FOR PERSONS CONVICTED OF CORRUPTION

Civil servants are rarely convicted of corruption, and even more rarely would courts pronounce imprisonment sentences, but even in such rare cases some avoid liability for criminal offences thanks to Presidential Pardon. Declaring such data secret gives rise to serious doubts regarding the underpinning reasons, since the examples published by the media show that official statements of reasons are not true.

The President banned access to information on pardoning for corruption offences.

> The President's Office denied MANS access to data on pardons for corruption offences, stating that by publishing such data MANS infringes on the right to privacy of the pardoned persons.
>
> The President's Office stated that the publication of such data in the media on previous occasions caused serious discomfort and that such persons complained to the President's Office. They also noted that the convicts expressed *"readiness even to a negative reaction, including such negative response against MANS"* and that the staff there implored them not to do so.[195]
>
> MANS instigated an administrative dispute before the Administrative Court against such a document issued by the President's Office. The case is still underway.

Hence, instead of providing the data requested that need to be public anyway, the President's Office expressed concerns for alleged violation of rights of persons convicted of corruption pardoned by the President, i.e. those that through the grace of the President avoided sanctions imposed by courts in criminal proceedings.

In addition, President's Office failed to report what negative reaction against MANS was announced by the persons convicted of corruption and what else was done, apart from verbal dissuading, to protect MANS against the negative reaction of the convicts pardoned by the President. That is why such actions constitute an attempt of intimidation and dissuasion from investigating into how various institutions act in corruption cases.

According to the data published in the media[196], in four years President pardoned six persons convicted of corruption and organised crime.

> President showed grace also for the customs officer Boro Jovanić convicted of a corruption offence – passive bribery in the case of organised smuggling of luxury cars[197].
>
> As the reason for pardoning, the President's Office stated that Jovanić lived on social benefits, although officially at the time he was a co-owner of a private company. President also pardoned the leader of the criminal group from the same case in which Jovanić was convicted.

[195] A letter to the Office of the President of Montenegro ref.03 - 1800/2 of 24 December 2012
[196] Daily "Vijesti" of 11 December 2012, " Vujanović Releases All Those Proposed by the Minister"
[197] Accidentally, customs officer Jovanić is the brother of Podgorica Basic Court judge Blažo Jovanić, the first judge in Montenegro who awarded the compensation for intangible damages against one independent media outlet at the time when such form of compensation was not envisaged by the laws of Montenegro. More details in MANS' publication "What is the Price of Freedom of Speech?", pp. 51 - 53

Be it noted that after the corruption conviction, customs officer Jovanić worked as a driver for Aco Đukanović, a co-owner of Prva banka and brother of Montenegro's Prime Minister with several terms in office, Milo Đukanović. After the presidential pardon, Jovanić was reinstated at the Customs Administration regardless of being convicted for a corruption offence making him unworthy of office.

That is why this case, from the instigation to pardon and reinstatement, shows the lack of will to curb corruption.

President pardoned a civil engineering inspector in the Capital City Podgorica, Vladan Juretić, and his superior, Vlatko Vučinić, convicted for misuse of office[198]. Previously, the High Court halved the sentences pronounced by the Basic Court, and thus Juretić, instead of one year in prison got six months, a Vučinić three months instead of six.

Thanks to the grace of the President, they did not have to serve even half the sentence, since their imprisonment sentences were replaced by suspended ones.

[198] Daily "Vijesti" of 03 December 2012, "Marković Proposes, Vujanović Pardons Secretly"

11. ACCESS TO JUDGMENTS

All Basic Courts made their judgments available to us or posted them on their web pages, finally reversing the practice of secrecy, although some courts still resist. Many courts persisted for over two years in their efforts to hide from the public the final judgments for corruption offences. The Supreme Court first decided judgments were secret, and after the public pressure by MANS and the EC Progress Report, reversed the ruling and ordered all courts to publish their judgments.

Invoking the Free Access to Information (FAI) Law, MANS requested from all relevant courts in Montenegro copies of final judgments in corruption cases, passed between early 2006 and August 2012. Initially we encountered resistance of most courts to make final judgments publicly available and enable review of case law, which is, in democratic countries with independent judiciary, a subject of studies and comments, and used in other court proceedings[199].

When deciding upon applications, some courts referred to FAI Law provisions protecting privacy and personal interests, stating that publication of judgments would threaten the private life of parties to the proceedings.

MANS appealed against such decisions passed by courts, rejected as ill-founded by the Ministry of Justice. The Moj upheld the reasoning propounded by courts, believing that the CPC stipulates that access to judgments may be allowed only to persons who prove their justified interest, upon Chief Judge's granting of access.

MANS then asked for the MoJ's decision to be abolished by the Administrative Court, which initially rejected the complaint upholding the stand that access to judgments may be allowed only to parties to the proceedings, and as granted solely by the Chief Judge. MANS requested the Supreme Court to review the Administrative Court's decisions, which did not produce satisfactory results right away, since the Supreme Court also banned access to final judgments in corruption cases.

The uneven practice seen in the fact that some courts in the first instance did grant access to judgments was justified by the Supreme Court by stating that each Chief Judge holds a discretionary right whether to publish the judgments or declare them secret.

[199] Basic Courts in Bar, Cetinje, Herceg Novi, Ulcinj, Podgorica, Nikšić and the High Court in Bijelo Polje banned access to judgments.

U sjednici vijeća razmotreni su cjelokupni spisi predmeta, ispitana pobijana presuda u granicama propisanim u članu 45. Zakona o upravnom sporu i ocijenjeni navodi podnijetog zahtjeva, pa je vijeće našlo da je:

Zahtjev za vanredno preispitivanje sudske odluke, neosnovan.

Pobijana sudska odluka, po ocjeni ovog suda, zasnovana je na relevantnom i pouzdanom činjeničnom utvrdjenju, i zakonitom materijalno - pravnom utemeljenju, o čemu su, u obrazloženju pobijane presude, dati potpuni i valjani razlozi na čiju sadržinu ovaj sud upućuje.

Po ocjeni ovog suda, pravilno je Upravni sud, u postupku kontrole zakonitosti osporenog akta zaključio, na temelju utvrdjenog činjeničnog stanja, da osporenim upravnim aktom nije povrijedjen zakon na štetu tužioca, polazeći od činjenice da je, pristup traženih informacija koje se odnose na krivična djela naznačena dispozitivom prvostepenog upravnog akta, u smilu odredbe člana 9. stav 1. tačka 6. Zakona o slobodnom pristupu informacijama ("Sl.list RCG", br.68/05), ograničenog karaktera i da su iste dostupne samo licima koja za to imaju opravdani pravni interes u smislu odredbe člana 164. u vezi člana 176. st.1. i 2. Zakonika o krivičnom postupku, o čemu su u pobijanoj presudi dati potpuni i valjani razlozi, na koje ovaj sud upućuje.

Sud je cijenio i druge navode iz podnijetog zahtjeva za vanredno preispitivanje sudske odluke, ali je našao da su oni bez uticaja na donošenje drugačije odluke u ovoj stvari.

Sa iznijetih razloga, a na osnovu člana 46. stav 1. Zakona o upravnom sporu, odlučeno je kao u izreci ove presude.

VRHOVNI SUD CRNE GORE
Podgorica, 14.02.2011. godine

Zapisničar,
Marina Bogdanović,s.r.

Predsjednik vijeća,
Sreten Ivanović,s.r.

The Supreme Court ruling Uvp. br. 47/11 of 14 February 2011

Following an intensive media campaign by MANS, and the EC Progress Report stating that the judiciary has to make its work transparent, especially in cases dealing with corruption and organised crime, **in the second case we launched on the same ground, the Supreme Court passed the opposite decision – to make final judgments publicly available**.

Zahtjevom od 25. 11. 2010. godine tužilja je tražila da joj se dostave presude koje se odnose na krivična djela tamo pobrojana.

Obrazlažući svoju odluku Upravni sud nalazi da osporenim rješenjem nije povrijedjen zakona na štetu tužilji polazeći od odredbi Zakonika o krivičnom postupku i Zakona o sudovima kojim je propisano kome, kada i pod kojim uslovima je dozvoljen uvid u sudske spise, odnosno razgledanje, prepisivanje i kopiranje sudskih spisa.

Gornji razlozi pobijane presude su nerazumljivi jer u konkretnom slučaju nije tražen uvid u sudske spise, odnosno razgledanje, prepisivanje i kopiranje sudskih spisa. Na taj način počinjena je povreda pravila postupka u upravnom sporu iz člana 367 st. 2 tač. 15 u vezi člana 55 ZUS-a.

U okviru programa "Sudska praksa" sudovi su dužni pravosnažne odluke objaviti na internet stranici, a što Upravni sud Crne Gore radi od svog osnivanja.

Polazeći od gornje činjenice ovaj sud nalazi da je zakonitost osporenog rješenja trebalo cijeniti u svijetlu iste. Naime, kada se na osnovu Zakona o slobodnom pristupu informacijama traži pristup informaciji dostavljanjem pravosnažnih sudskih odluka, koje su objavljene na internet stranici suda takav zahtjev se odbija i podnosilac istog obavještava o nosaču tražene informacije - član 14 Zakona o slobodnom pristupu informacijama. Ukoliko pak, tražena pravosnažna presuda nije objavljena na internet stranici nadležni sud je dužan omogućiti pristup informaciji dostavljanjem iste nakon što izvrši anonimizaciju podataka u skladu sa Pravilnikom o anonimizaciji podataka u sudskim odlukama.

Nasuprot prednjem primjenom Zakona o slobodnom pristupu informacijama ne može se dozvoliti pristup informaciji kada se traži pojedinačna tačno odredjena odluka, jer se u tom slučaju ni anonimizacijom podataka ne mogu zaštiti podaci o ličnosti.

Stojeći na gornjem stanovištu ovaj sud nalazi da je pobijanom presudom počinjena povreda materijalnog prava.

Sa iznijetih razloga, a s pozivom na član 46 st. 2 ZUS-a, odlučeno je kao u izreci ove presude.

U ponovnom odlučivanju Upravni sud će otkloniti ukazane povrede pravila postupka, pa donijeti novu zakonitu odluku uz pravilnu primjenu materijalnog prava.

VRHOVNI SUD CRNE GORE
Podgorica, 6. 09. 2011. godine

Zapisničar,
Radojka Djordjević,s.r

Predsjednik vijeća,
Dr Čedomir Bogićević,s.r

The Supreme Court ruling Uvp. br. 255/11 of 06 September 2011
The Supreme Court's judgment states:

..."Under the "Case Law" section, courts are obliged to post final judgments on their respective web sites. In case the requested final judgment is not posted on the website, the relevant court is obliged to grant access to such information by making it available after the deletion of personal data in line with the Rulebook on Anonymisation of Data in Court Judgments"...[200]

[200] The Supreme Court ruling Uvp. br. 255/11 of 06 September 2011

Only after the Supreme Court granted MANS request for reviewing the Administrative Court judgment did this Court change its decision and ordered the Ministry of Justice to annul the decisions passed by Basic Courts banning access to final judgments in corruption cases.

Finally, after more than two years since the beginning of the procedure, Basic Courts made available to MANS the judgments in corruption cases and started posting them on their web sites, finally reversing the practice of hiding such judgments.

As compared to the first set of applications when MANS requested judgments, when seven out of 15 Montenegrin courts denied access, at later stages all courts did make the judgments available upon request or would post them on their website.

Nevertheless, with three courts we experienced or are still experiencing very pronounced problems in accessing judgments.

Basic Court Podgorica

This Court with indubitably largest administrative capacities and human resources in Montenegro, proved to be one of the least transparent courts. From the very start the Basic Court Podgorica attempted in various ways to prevent access to its judgments. First we were informed they could not oblige our request since **the Court was unable to make a selection of judgments** by the type of offences or disputes, and asked us to give the code signs of specific cases or names of persons covered by the offence.

After several years of administrative dispute that MANS conducted against the Basic Court, in late 2012 the Administrative Court passed a ruling by which MANS is allowed **direct inspection** of judgments.

This Court asked us to select the cases of our interest within their premises by going through their files and indicating the judgment reference number, then file another application quoting the references previously taken.

Given that our cooperation with this Court, to say the least, was rather poor, we obliged such requests, with the final aim of obtaining the final judgments passed by this Court.

Notwithstanding our efforts, the Basic Court Podgorica made available only **some judgments**, while for others it referred us to High Courts in Bijelo Polje and Podgorica given that such judgments allegedly were not held by them anymore. The Court made sure to calculate costs for each judgment made available to MANS.

Basic Court in Nikšić

In the very beginning this Court enabled **direct inspection** of their judgment, but without the possibility of noting down data or making copies. After the second instance procedure and the administrative dispute resolved in favour of MANS, this Court started posting their final judgments on their web site.

In early 2013, MANS filed a new set of applications with this Court requesting judgments in corruption cases passed between 01 January 2011 and 30 July 2012.

Acting as per the applications, the Basic Court Nikšić chose to disregard the set case law of the Administrative Court and the Supreme Court ordering Basic Courts to publish their judgments, and again declared their judgments secret. MANS lodge an appeal, still pending.

Basic Court in Bijelo Polje

The Basic Court Bijelo Polje made available copies of judgments from the first requested period with **only the introduction and the dispositional part**, no rationale.

Deciding as per the second application, the Court declared final judgments **secret**, to protect privacy of parties to the proceedings. However, the documents made available by the same Court as per the first application contain personal data of the parties. The MoJ upheld this decision, and the Administrative Court rejected the complaint to the MoJ's decision.

It was only after the Supreme Court decision that in the repeated procedure the Administrative Court ordered the MoJ to annul Basic Court's decision, and the Bijelo Polje Court **subsequently made** the requested judgments a**vailable**, doing the same as per repeated applications for later periods.
The table below shows responses by courts to applications for information requesting final judgments in corruption cases for four periods of time.

COURT	Responses to applications for copies of judgments			
	01 Jan 2006-30 Sep 2009	01 Oct 2009- 30 Sep 2010	01 Oct 2010-31 Dec 2010	01 Jan 2011-30 July 2012
BC Berane	Access granted	Access granted	No such judgments	Access granted
BC Bijelo Polje	Access granted	Access granted	Access granted	No such judgments
BC Danilovgrad	Access granted	No such judgments	No such judgments	Access granted
BC Herceg-Novi	Access granted	Access granted	No such judgments	No such judgments
BC Kolašin	Access granted	Access granted	No such judgments	No such judgments
BC Plav	Access granted	Access granted	No such judgments	Access granted
BC Pljevlja	Access granted	No such judgments	No such judgments	Posted on the website
BC Rožaje	Access granted	Access granted	Access granted	Access granted
BC Žabljak	Access granted	Access granted	No such judgments	Access granted
BC Nikšić	Access denied	Access denied	Access denied	Posted on the website
BC Bar	Access granted	Access granted	Access granted	Access granted
BC Cetinje	Access granted	Access granted	Access granted	Access granted
BC Kotor	Access granted	Access granted	No such judgments	Posted on the website
BC Ulcinj	Access granted	Access granted	Access granted	Access granted
OS Podgorica	Access denied	No response	Access granted (inspection)	Access granted (inspection)
Court of Appeals	No such judgments	Access granted	Access granted	Posted on the website
High Court Podgorica	Access granted	Posted on the website	No such judgments	Posted on the website
High Court Bijelo Polje	Access denied	Access granted	No such judgments	Access granted

Table 4: Responses by court to applications for copies of final judgments in corruption cases

GRAPHS

TABLES