

REPORT ON REALISATION OF  
THE JUDICIAL REFORM STRATEGY  
FOR 2014–2018  
IN 2014–2016

Introduction, conclusions  
& recommendations

Podgorica  
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NOTE:

- HRA wrote chapters: 1.1 (except for 1.1.1.5, 1.1.6, 1.1.7), 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.3, 2.3, 2.5, 4.1, 5.1, 5.2, 5.3, 5.4, 5.5.1, 5.5.2, 5.5.3, 5.5.4, 5.5.6
- CeMI wrote chapters: 1.1.1.5, 1.1.6, 1.1.7, 1.1.6, 1.2.5, 2.1, 2.2, 2.4, 3.1, 3.2, 3.3, 4.2, 4.3, 4.4, 4.5, 4.6, 5.5.3, 5.5.5
- HRA and CeMI jointly wrote 1.1.4, 2.6.

# INTRODUCTION

Civil society organizations Human Rights Action (HRA) and Centre for Monitoring and Research (CEMI) conducted the project “Judicial Reform Monitoring” in Montenegro from August 2014 to April 2017 with the support of the European Commission through the Delegation of the European Union to Montenegro and Embassy of the Kingdom of the Netherlands. CSOs also achieved good cooperation with the Ministry of Justice and other judicial institutions during the project.

First publication within the project was the report on the realization of the previous Judicial Reform Strategy for 2007–2012 published in July 2015. A number of analyses and reports have been published since, aiming at improvement of quality of judicial reform in Montenegro as implemented under the current Judicial Reform Strategy for 2014–2018.<sup>1</sup> This report is supported by the whole research conducted within the project and is the project’s final result.

Montenegro started negotiations on accession to the EU in June 2012. Within the negotiations, the Chapter 23 on judiciary and fundamental rights was opened in December 2013. According to benchmarks set for that chapter, Montenegro accepted to adopt and implement the new national strategy for judicial reform and accompanying action plan. At that time the previous Strategy for the Reform of Judiciary 2007–2012 had already expired.

The Strategy for the Reform of the Judiciary 2014–2018 was adopted at the beginning of April 2014, and four months later also the Action Plan (AP) for its implementation for the first period 2014–2016. HRA and CeMI criticised such approach and called for drafting and adopting of strategies and action plans at the same time in future.

The Strategy 2014–2018 contains the same strategic objectives as the previous one, strengthening of independence, impartiality, efficiency, responsibility, and accessibility of judiciary and strengthening of public trust in judiciary, as well as two new objectives, Montenegrin judiciary as a part of the European judiciary and Development of judicial institutions and other institutions within judiciary. The Strategy contains a total of 5 strategic objectives, 21 strategic guidelines, 174 measures and 377 activities for their implementation.

<sup>1</sup> In addition to the monitoring reports on operation of Judicial and Prosecutorial Council and other judicial institutions, which have been published in the extended version of this report, HRA published special reports “Implementation Analysis of the Right to a Trial Within Reasonable Time Act (2011–2015)” and Accountability for Breach of Judicial Ethics in Montenegro – practice of the Commission on the Ethical Code of Judges (2011–2016)”, and CeMI published special reports “Analysis of Rationalisation of Judicial Network in Montenegro – Phase One (2013–2016)”. *Mandatory Defense – Domino effects of avoiding legal procedure*. Public polling “Attitudes of Citizens on the Judicial System in Montenegro” was conducted in May 2016. Two national conferences on judicial reform were organized in July 2015 and April 2017. For more details on project activities please see [www.hraction.org/?page\\_id=9412](http://www.hraction.org/?page_id=9412).

In October 2014 the Council for monitoring implementation of the Strategy was established. Until April 2017, the Government of Montenegro adopted five semi-annual reports of the Council on implementation of measures from the Action Plan 2014–2016 covering the period until 31 January 2017. Not a single report communicated any dilemma or criticism. According to the reports, the reform process is idyllic, implemented with the “satisfactory level of realization”. As much as 83% of strategic measures are considered as fully implemented, 12% partly, while only 4% remain not implemented, so it appears that the reform is at its very end.

This report of non-governmental organisations presents a different picture. It questions and disputes the majority of conclusions on the closure of realised measures and contains 180 recommendations on measures that should still be undertaken to allow for goals of the judicial reform to be accomplished.

Montenegro started on its journey of judicial reform 17 years ago with the Project of judicial reform in 2000. Judging by the plans for establishing a new information system in judiciary and slow process of rationalization of judiciary, it is certain that this process cannot be finished by 2020. The goal of this report is to help with a thorough examination of the process before it comes of age, in order to accelerate it and effectively bring it to an end.

In the previous report, published on 15 July 2015, about the past achievements of reform, HRA and CeMI warned that the adoption of the Strategy for the Reform of the Judiciary 2014–2018 and Action Plan for its implementation was not based on analytical assessment of previous reform achievements. Observations on deficiencies and successes were given arbitrarily in the Strategy, without an analytical assessment based on facts. Given that the Government will most certainly work on a new Strategy by the end of 2018, it would be irresponsible to repeat the same mistake.

Key recommendation from our previous report was to invest more means and attention in qualitative and thorough analysis of achievements of the reform, to publish them and discuss. Besides few exceptions, such analysis on an official level did not become a norm, and in the previous period there was no willingness to discuss with all interested parties about the planned measures, their implementation and, most importantly, about the assessment of their effects.

Today, after almost three years of implementation of the current Strategy for the Reform of the Judiciary, it is necessary to evaluate the degree of implementation of strategic objectives and gain insight in the effects of their implementation. Quite often in daily political events one loses sight of the ongoing reform processes. However, the reformed foundation of the system for execution of justice are very important to support major rule of law challenges facing Montenegro, which will only increase in the context of international integrations.

Such challenges should not be faced with suspicions regarding clientelism in judiciary, concerns regarding reliability of statistical data on judicial performance, delays in objectively reviewing the work load and results of judges and prosecutors in their working conditions and the pace and direction of rationalising the judicial system. This report also warns against deficiencies in legal framework ordering judiciary and state prosecutors, which should be urgently amended before their implementation causes damage.

The European Commission also concluded in its 2016 report on Montenegro that the state made only some progress in the judicial reform. In this phase of interna-

tional integration Montenegro needs visible results regarding implementation of public policies, and judiciary is certainly one of the key areas where results should be most visible. This report aims to provide an image of what has been achieved in the process of reform of the judiciary, to point out problems in certain areas and offer concrete suggestions for further reform.

The forthcoming creation of the new action plan for implementation of the Strategy of Judicial Reform for 2017–2018 in the autumn of 2017 provides with an opportunity to objectively review effects of the reform to date and provide for new measures to improve them. The new period of adoption of strategic documents should provide with convincing results of judicial institutions, which would be measured by supported indictments and quality judgments, reliable statistics, transparent appointments of judges and prosecutors on the basis of merit and else that should lead to increased quality of execution of justice and bigger trust of the public in judiciary.

With this report, HRA and CEMI give their contribution to the qualitative analysis of the process of the judicial reform. We believe that this approach is missing and that it has been missing in every phase of the reform of the judicial system, making it impossible to evaluate effects of implemented activities or measures. Analysis of implemented measures should not be mere counting of the same, as has been the case, but an objective evaluation of their effects on achieving strategic objectives in the area of judiciary.

The Report presents achievements of strategic objectives from the Strategy for the Reform of the Judiciary 2014–2018 through analysis of five semi-annual reports of the Council for monitoring implementation of the Strategy and AP, from Action plans for negotiation on Chapters 23 and 24, as well as from temporary measures for negotiation Chapter 23 set by the European Commission in December 2013, based on which the improvement in the area of rule of law which will affect the total course of accession negotiation will be measured. Reports and opinions of the Council of Europe, European Commission and other CSOs were also used. The abstract of the report in English includes this introduction, conclusions and recommendations, and the longer version in Montenegrin includes all the reports that conclusions and recommendations are based upon.

Finally, we hope that this report speaks in favor of inclusion of CSOs in official bodies for monitoring implementation of strategic documents. The Government of Montenegro did not include CSO's, except for professional associations of judges and prosecutors, in the structure of the Council monitoring implementation of the current Strategy, just like in 2008, when the Commission for monitoring the implementation of the Strategy 2007–2012 and Action Plan had been created. We urge that there be a call in the following process of the reform, which will enable all CSOs, and not only professional associations of judges and prosecutors, to run for a place in official bodies charged with monitoring of the reform and participate in them in public interest.

In Podgorica, May 2017

Tea Gorjanc-Prelevic, HRA executive director and  
Zlatko Vujović, president of the Management Board of CEMI

# STRATEGY FOR THE REFORM OF THE JUDICIARY 2014-2018

## 1. Strengthening independence, impartiality and accountability of the judiciary

- 1.1 Strengthening independence of the judiciary
- 1.2 Strengthening impartiality of the judiciary
- 1.3 Strengthening accountability of the judiciary

## 2. Strengthening efficiency of the judiciary

- 2.1 Rationalization of the judicial network and misdemeanor system
- 2.2 Enhancing criminal and civil law
- 2.3 Reduction of the number of cases in the backlog
- 2.4 Enhancing judicial management and administration system
- 2.5 Enhancing alternative methods of dispute resolution
- 2.6 Development of the Judicial Information System

## 3. Montenegrin judiciary as part of the European judiciary

- 3.1 Further development of the international and regional judicial cooperation
- 3.2 Further development of institutional cooperation at the international and regional level
- 3.3 Capacity building of judicial office holders and employees in judicial institutions in the area of implementation of the EU law

## 4. Increasing accessibility, transparency and public trust in the judiciary

- 4.1 Further harmonization and publication of case law
- 4.2 Improvement of the free legal aid system
- 4.3 Improvement of transparency of the work of judicial institutions
- 4.4 Enhancing infrastructure and security systems of judicial buildings and physical access of special categories of people to the judicial institutions

## 5. Development of judicial institutions and other institutions working with the judiciary

- 5.1 Ministry of Justice
- 5.2 Judicial Council
- 5.3 Prosecutorial Council
- 5.4 Judicial Training Centre
- 5.5 Judicial and other professions (lawyers, notaries, public enforcement officers, mediators, court experts, court interpreters)



# CONCLUSIONS AND RECOMMENDATIONS

## GENERAL CONCLUSIONS

Only some progress has been made in the previous period in the judicial reform in Montenegro, as was also noted by the European Commission in its latest report for Montenegro in 2016.

Given that 10 years have passed since the adoption of the first national judicial reform strategy (2007–2012) and even 17 since the first Judicial Reform Project in the Republic of Montenegro, reform activities in the judiciary haven't produced desired effects when it comes to creating independent, impartial, accountable and efficient judicial system. Numerous reform activities boiled down to legislative framework changes and institutional wandering, spending time necessary for achievements of concrete results.

Capacities of Judicial and Prosecutorial Councils for implementation of competences entrusted to them are very limited. These institutions are still lacking human, administrative and technical capacity to be the holders of the reform activities in the area of judiciary. The preconditions for thorough removal of political influence from the Councils have not been provided, although the Councils are key decision makers for securing independence and professionalism of judges and prosecutors.

The new system of selection, advancement and evaluation of judges and prosecutors has still not been adequately implemented in practice while in 2015 and 2016 the decisions were made in a non-transparent manner, disregarding merit and hence jeopardizing trust in the judiciary.

Results in the system of accountability in judiciary are also very low. Effects are reflected in only couple of proceedings in which violation of ethical codes and disciplinary liability of judicial office holders were established. The reasoning for decisions by the bodies deciding on these matters lack in substance and impartiality and are generally not in the spirit of reform. A tendency for avoiding competence has been observed as well.

Regarding efficiency of the judiciary, it is difficult to provide an objective assessment as existing statistical data is not always clear, substantial and reliable. The findings of EU experts give basis for serious concern with regard to reliability of statistics. Although electronic recordings of cases providing statistical data have been established and cases may be followed in the judicial information system (although not by citizen parties), the reports on the work of courts contain con-

tradictory data on the number of old cases, do not contain data on total length of court proceedings or on criminal cases that became time barred.

It appears that Montenegrin courts significantly decreased the number of backlogged cases and there is a trend of decrease in old cases on a yearly level with all courts. However, the clearance rate also decreased in 2015 and 2016 meaning that backlog was still created in spite of introduction of notaries in 2011 and public bailiffs in 2014, who significantly relaxed the courts' burden.

Although official reports monitor application of legal remedies for accelerating proceedings and protecting the right to a trial within a reasonable time, the effects of those remedies on actual acceleration of proceedings are not analyzed.

The first phase of rationalization of the judicial network has not fulfilled expectations regarding a more specific and all encompassing approach. The judicial information system is yet to be replaced by a new and sustainable one that will adequately connect judicial institutions and provide for reliable statistics. This new system will be able to provide data on the actual workload on judges only in 2020, allowing for decisions to be made regarding prospectively lowering the number of judges in Montenegro, which is among the few highest in Europe.

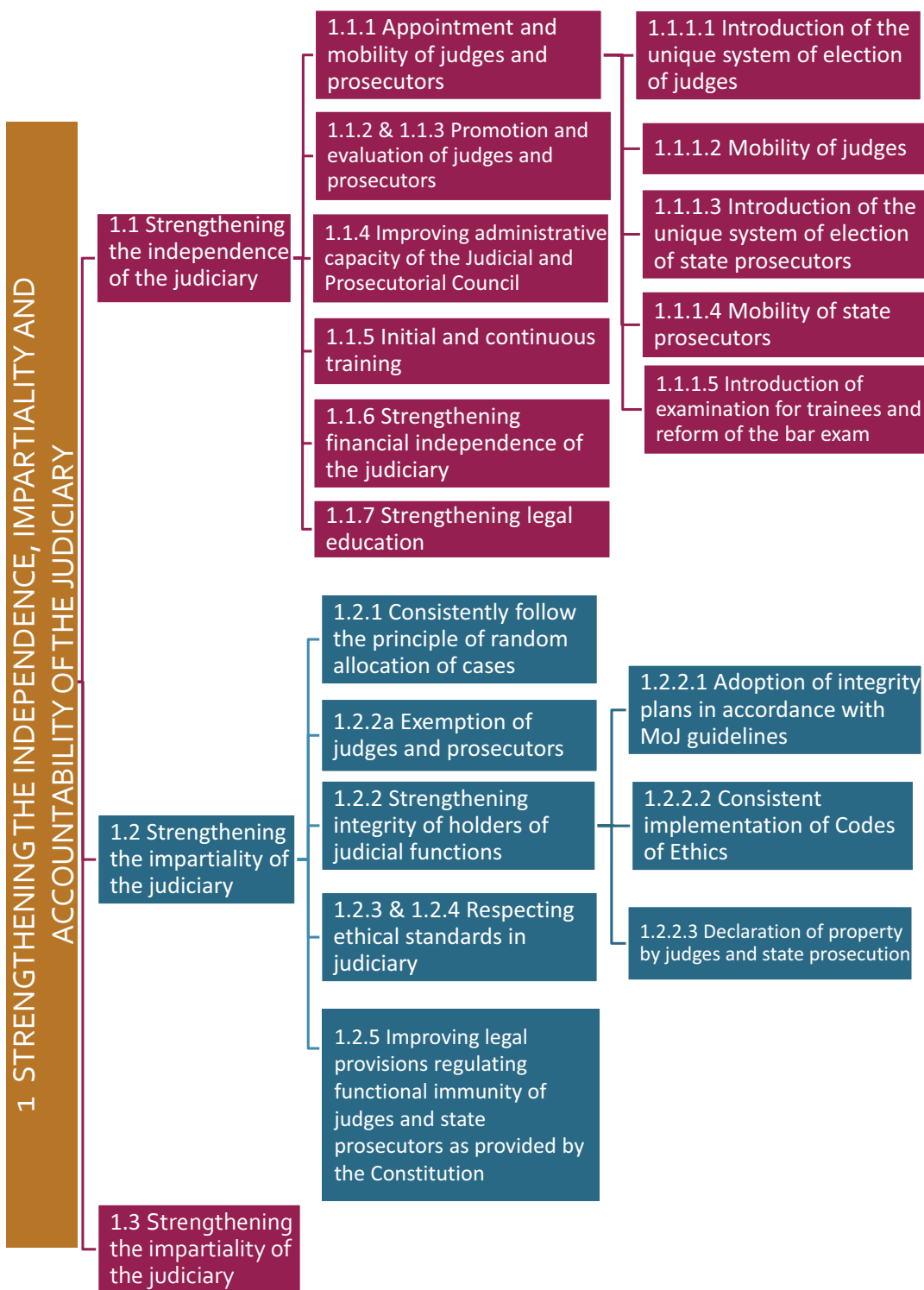
Although mediation is used in Montenegro more than in almost half of EU member states, it could easily be used much more if only the Government would agree to mediation in all disputes to which the state is a party and if the judges would thoroughly implement their legal obligation to refer more cases, i.e. parties to mediation.

On the other hand, there is an improvement regarding publicity of the work of courts, since the final decisions are published on the internet site of the Courts of Montenegro, the Judicial and Prosecutorial Councils also publish their decisions and allow access to their hearings, and since recently the basic courts provided for transparent random allocation of a case to a judge immediately upon receipt of the complaint or other act initiating the court procedure. However, the publication of judgments should be quicker and random allocation of cases should become transparent on all levels of courts and provided for also in smaller courts.

The system of free legal aid is functioning. Since 2015 the right to free legal aid has been provided for victims of family violence as well, but there is no free legal aid in administrative proceedings or for victims of police torture. There has been some advancement regarding accessibility of buildings of courts and state prosecutors offices but not enough. The process is nowhere near the speed required in accordance with the state's duty in this regard.

Implementation of the special chapter regarding development of judicial institutions has shown that the Centre for Education in the Judiciary was denied appropriate funding, that the Ministry of Justice lacks staff as well as the Judicial and Prosecutorial Councils. The planned measures for securing quality control over provision of free legal aid by lawyers have not been implemented. The state

needs to invest more in mediators and alternative dispute resolution in order to allow courts to focus on complex cases. The system of notaries and public bailiffs has generally fulfilled expectations although there is more to be done regarding interconnecting the information system network and providing for continuing education.



# PARTICULAR CONCLUSIONS AND RECOMMENDATIONS ON THE GOALS, SUBGOALS AND STRATEGIC MEASURES

## 1 STRENGTHENING INDEPENDENCE, IMPARTIALITY AND ACCOUNTABILITY OF THE JUDICIARY

Strengthening independence, impartiality and accountability of the judiciary is the first and the most substantial strategic chapter, divided into three strategic sub-goals:

- Strengthening independence of the judiciary (1.1),
- Strengthening impartiality of the judiciary (1.2),
- Strengthening accountability of the judiciary (1.3).

The following are the conclusions and recommendations on implementation of particular measures under each sub-goal.

### 1.1 Strengthening independence of the judiciary

The sub-goal *Strengthening independence of the judiciary* requires establishing “a nationwide unique, transparent and merit based system of election of holders of judicial function at the national level, with improved criteria for promotion and the system for periodical professional assessment” (indicator of impact).

#### 1.1.1 Selection and mobility of judges and prosecutors

The first strategic guideline is to *establish a unique, nationwide system of election of holders of judicial function, as well as the system of permanent voluntary horizontal transfer based on incentives* (1.1.1). Within this guideline, five measures have been foreseen:

- 1) Introduction of unique system of election of judges at the state level on the basis of transparent procedure and merit-based criteria (1.1.1.1),
- 2) Introduction of unique criteria for permanent transfer of judges from one court to another on voluntary basis (1.1.1.2),
- 3) Introduction of unique nationwide system of election of state prosecutors based on transparent procedure and merit-based criteria (1.1.1.3),

- 4) Improvement of unique criteria for better voluntarily mobility of state prosecutors (1.1.1.4),
- 5) Introduction of an obligation of passing the entrance exam for conducting internship in courts and state prosecution offices, modification of conditions for passing the Bar exam and introduction of marks for the Bar Exam (1.1.1.5).

The Government of Montenegro considers all measures implemented.

### Appointment of judges (1.1.1.1)

Implementation of the reform of the appointment of judges in the form of application of a uniform system of selection of candidates for judges at the state level, on the basis of the Judicial Council and Judges Act, began in October 2016 by announcing the first competition for the selection of three candidates. Already on this first occasion the Judicial Council deviated without explanation from its Plan of judicial vacancies at the national level, which was adopted in May 2015. Since its adoption until April 2017 this Plan was amended only once, while it has not been updated in line with vacant judicial posts in practice, hence, this was not a document based on which judicial vacancies were filled. Such an approach calls into question the application of a uniform system of appointment at the state level. Also, if the competition is announced not in accordance with the Plan, it is not possible to monitor the reasons for its announcement, i.e. whether and for what reasons the number of judges in Montenegro rises, which is already much higher than the European average.

The first decision on the appointment of three candidates for judges of first instance courts in Podgorica and Herceg-Novi was in accordance with the ranking list formed on the basis of success. The Judicial Council demonstrated unequal approach in interviewing candidates, since not all candidates were asked the same questions, as required by the Rules of Procedure of the Judicial Council.

Selected candidates were sent for initial training to Podgorica Basic Court for the duration of 18 months. The law makes no difference in the duration of training for candidates who have already been court advisors, as compared to those whose training is their first work experience in court. The length of initial training is particularly criticized by court presidents who lack judges, since referring judges from one court to another when no one is interested cannot compensate for the need for a judge.

In April 2017 the Judicial Council cancelled competition for the selection of candidates for judges of the Administrative Court, as it is not clear how to evaluate candidates appointed a judge for the first time in relation to those who already hold judicial office and wish to advance, i.e. be transferred from the Basic Court to the Administrative or the Commercial Court. Human Rights Action advised the Judicial Council and the Ministry of Justice back in 2009 about the need to introduce rules for such a situation.

Although in 2015 the Act and the Rules of Procedure of the Judicial Council introduced reasonable criteria for permanent appointment of judges from one court to another, the Judicial Council failed to apply them transparently in two cases,

because the decisions did not specify a decisive advantage of selected candidates in relation to others.

Before the beginning of implementation of the new Act, during 2015, the Judicial Council appointed 68 judges to the basic and misdemeanors courts, choosing as many as one third of candidates who were not best ranked on the list formed on the basis of success. No explanation was provided for deviation from the merit based list.

Only every fourth judge of the basic courts was appointed in accordance with the ranking list (5 of 21 or 25 %) that year. In appointing 47 judges in misdemeanors courts, in seven cases the Judicial Council deviated from the ranking list.

The most drastic deviations were recorded in the selection of judges of the Basic Court in Podgorica (the largest basic court in the capital of Montenegro). Out of 13 appointed judges, top-ranking candidate was never appointed. This was particularly unfair to candidates who had applied more than once, but were repeatedly refused by the Judicial Council, which provided no explanation thereof and opted for candidates with not as good success ranking.

The described practice of the Judicial Council causes concern and encourages doubt about the existence of clientelism in the judiciary, which can lead to judges being expected to return “the favor” to those who “arranged” that they be appointed not in line with the ranking list.

The Judicial Council has for many years refused to objectify its work and unify criteria by adopting indicators for evaluation, although this had formerly been prescribed by the Action Plan for the work of the Council. Insisting on the right that candidates are selected by secret ballot, despite achieved success reflected in the ranking list, contributed to the impression of the Judicial Council as a political body, unable to ensure impartiality and independence of judges. Also, the fact that the law has not provided for successful de-politicization of the composition of the Judicial Council, which would allow for effective reform, contributed to this situation.

### **Recommendations**

- 1 Expand the measure from the Action plan for the Chapter 23: “Make an analysis of the legislative framework and effects of its application regarding independence of the judiciary, with recommendations for improvement of the judiciary independence system” (1.1.5.5) to include the constitutional framework, provide for an analysis by an independent expert and organize expert discussion to debate its findings.
- 2 In the Action plan 2017–2018 include (reintroduce) measure 1.1.1.1: “Introduction of a uniform system of appointment of judges at the national level on the basis of transparent procedures and criteria based on merit”, in order to analyze and monitor its implementation. Within measure 1.1.1.1. envisage the following:
  - Harmonization of the Plan of judicial vacancies at the national level with its subsequently adopted amendments. Envisage periodic amendments to the Plan or its update in accordance with changes occurring in practice;

- Analysis of the application of the Guidelines for conducting an interview;
  - Analysis of the application of the initial training for a period of 18 months in the Basic Court in Podgorica based on the opinions and experiences of the presidents of basic courts;
  - Analysis of the effects of application of legal provisions in relation to the appointment of judges in the Administrative Court and the Commercial Court.
- 3 Amend the Judicial Council and Judges Act so as to:
    - a) Ensure thorough depolitisation of the composition of the Judicial Council and ensure that it is composed of lawyers who are not politically engaged; at least one spot should be provided for a representative of NGOs, which are not professional associations of judges and state prosecutors, but citizens with experience in the field of monitoring judicial reform in Montenegro;
    - b) Assess knowledge of foreign languages in the selection of candidates for judges;
    - c) Assess criteria “ability to make decisions and resolve conflicts” and “understanding the role of a judge in the society” in a written test in the selection of candidates for judges;
    - d) Ensure that candidates for a judge are entitled to examine and copy documentation of other candidates, amend the provisions relating to the length and obligation to attend initial training for candidates for judges, based on the previously developed analysis.
  - 4 Amend the Rules of Procedure of the Judicial Council to increase the number of tasks for the purpose of testing of candidates selected for the first time for a judge of the basic court/state prosecutor in the basic state prosecutor’s office.

### Mobility of judges (1.1.1.2)

During 2016, four vacancies were advertised for the permanent voluntary transfer of judges. Judges expressed no interest for mobility in the direction of Herceg-Novi and Bijelo Polje, as opposed to the transfer to Podgorica. Despite the prescribed reasonable criteria, decisions on the selection of judges for permanent voluntary transfer have not been sufficiently transparent and have not clearly indicated that the judges selected for transfer indeed met the required criteria better than other candidates.

#### *Recommendations*

- 1 Include (reintroduce) measure 1.1.1.2 “Permanent reassignment of judges from one court to another on a voluntary basis (mobility) on the basis of uniform criteria and transparent procedures” in the AP for monitoring the implementation of the Judicial Reform Strategy, to be implemented continuously through the activity of monitoring and reporting on transparency of permanent reassignment of judges.



- 2 As part of measure 1.1.1.2 (AP) envisage the activity aimed at further improvement of Incentive measures for permanent voluntary reassignment of judges, in order to encourage mobility among judges.

### Appointment of state prosecutors (1.1.1.3)

The first advertisement for the appointment of state prosecutors in accordance with the new law was announced in October 2016, consistent with the Plan of prosecutorial vacancies, for four state prosecutors. Candidates were selected in accordance with the ranking list, interview with the candidates was conducted fully in accordance with the Guidelines for conducting an interview, and the decisions include the number of points scored by each candidate – separately on a written test and in an interview, making these decisions sufficiently reasoned. As for the criteria for selection, the question is whether a written test only in the form of drafting of documents is enough, or would it be more useful to introduce other test questions. As for the criteria evaluated during the interview, it would be more objective to assess one's understanding of a state prosecutor's role in the society in a test; foreign language skills should be valued as well.

Application of the appointment in accordance with the ranking list, as with judges, began in 2016. In this way, obviously, a more favorable position was provided for candidates who had already held judicial office as compared to those applying for the first time. Thus, in the meantime, a total of 84 candidates who performed the function of deputy supreme, high or basic state prosecutor were practically (re) elected by a majority vote of members of the Prosecutorial Council. Re-election of old employees, some of whom were responsible for unprofessionally leading investigations of serious human rights violations, did not respond to expectations of the reform in the State Prosecutor's Office. During 2015, the Prosecutorial Council appointed 13 new state prosecutors, so the total number of selected candidates was 97. Although the Prosecutorial Council, during the selection, generally observed the ranking list compiled by the Commission for knowledge assessment and decision making, deviations were noted in 7 cases, which is a little less than 7% of the total number of decisions taken. In all cases the decisions failed to provide reasoning for deviation from the ranking list.

As with the appointment of judges, even before the law prohibited deviation from the ranking lists we believe that the Prosecutorial Council should have transparently and objectively selected prosecutors in keeping with the points list drafted on the basis of candidates' expertise and quality, or provided valid explanation in case of deviation from the list. Noteworthy is the example of a candidate who had applied three times for the ads for work in three state prosecutor's offices but was not appointed in accordance with the ranking list – instead, in all three cases lower-ranked candidates were selected, and all three times without explanation.

### Recommendations

- 1 Include (reintroduce) measure 1.1.1.3 "Introduction of a uniform system of appointment of state prosecutors at the state level on the basis of transparent procedures and criteria based on merit" in the AP for monitoring the implementation of the Judicial Reform Strategy, in order to analyze and monitor its implementation particularly with regard to the analysis

of application of initial training for a period of 18 months in the Basic State Prosecutor's Office in Podgorica.

- 2 Amend the State Prosecutor's Office Act in relation to:
  - The condition of limitations with respect to the engagement members of the Council political eminent lawyers, as well as to the Judicial Council;
  - Assess knowledge of foreign languages in the selection of candidates;
  - Assess criteria "ability to make decisions and resolve conflicts" and "understanding the role of a judge in the society" in a written test;
  - Ensure that candidates are entitled to examine and copy documentation of other candidates,
  - Amend the provisions regarding the length and obligation to attend initial training for candidates for state prosecutors based on the previously developed analysis.
- 3 Amend the Rules of Procedure of the Prosecutorial Council to increase the number of tasks for the purpose of testing of candidates selected for the first time for a judge of the basic court/state prosecutor in the basic state prosecutor's office.

#### **Mobility of state prosecutors (1.1.1.4)**

During 2016, two internal ads were announced calling basic state prosecutors to apply for voluntary transfer to the basic state prosecutor's offices in Bijelo Polje (1 position), Kotor (2 positions), Podgorica (1 position) and Berane (1 position). Only one basic state prosecutor applied and was assigned to the wanted position in Bijelo Polje. No one was interested in voluntarily transferring to the posts in Kotor, Podgorica or Berane.

#### ***Recommendation***

Include (reintroduce) measure 1.1.1.4 "Improve the unified criteria for greater voluntary mobility of state prosecutors" in the AP for monitoring the implementation of the Judicial Reform Strategy and envisage the activity to adopt Incentive measures for voluntary permanent reassignment of state prosecutors, in order to encourage mobility.

#### **Introduction of examination for trainees and reform of the bar exam (1.1.1.5)**

Act on Trainees in Courts and State Prosecutor's Offices and the Bar Exam, adopted in 2016, has introduced significant changes in terms of engagement of trainees in judicial bodies, as well as the conditions and manner of taking the bar exam. This law introduces the obligation to adopt specific plans for employment of trainees in courts and state prosecutor's offices as well as to introduce entrance examination for trainees. The Act is not yet applied, since the programs for taking the bar exam were not adopted, Commission for the entrance and bar exam was not formed, nor were the plans for hiring trainees adopted, which should contain the number of intern positions in the judicial bodies.

## Recommendation

The Supreme Court and the Supreme State Prosecutor's Office should adopt plans for hiring trainees and engaging trainees through programs of professional training in the courts and state prosecutor's offices, in accordance with the Act. The Ministry of Justice should develop a program for taking the bar exam as soon as possible, as well as form the bar exam commission. It is essential that the AP provide continuous monitoring of the application of this Act, especially with regard to the planning of the employment and engagement of trainees in courts and state prosecutor's offices, as well as the impact that the bar exam and exam for trainees will have on the judicial system as a whole.

### 1.1.2 and 1.1.3 Promotion and evaluation of judges and prosecutors

In March 2015 two main criteria for promotion of judges and state prosecutors were set forth by the new laws: performance evaluation and evaluation of interviews with candidates. Performance evaluation is based on the system of periodic evaluation of judges and state prosecutors, which is prescribed by the laws and specified in more detail by secondary legislation adopted by the Judicial and Prosecutorial Councils in 2015 and 2016.

Application of the new rules on promotion and evaluation of judges and state prosecutors was postponed until 1 January 2016; thus, the appointment of judges to higher instance courts and promotion of state prosecutors was meanwhile carried out in line with the previously applicable laws.

Sixteen judges were promoted in 2015 and 2016 – three by being appointed judges of the Supreme Court of Montenegro, two were appointed judges of the Administrative Court, one – judge of the Commercial Court, while ten were appointed judges in Podgorica High Court. Four ads were not announced in accordance with the Plan of judicial posts. Also, ten presidents of courts were appointed in this period. The lack of indicators for evaluating candidates, that Human Rights Action kept pointing to since 2009, shattered the objectivity of the promotion process, since it enabled arbitrary assessment of candidates and compiling of score (ranking) lists. This situation has led to filing of a complaint against decisions of the Judicial Council in two cases. The Administrative and Supreme Courts in their rulings granted the right to the Judicial Council to evaluate candidates at its own discretion, which may be legal, but has not instilled confidence in the work of this body. These appointment procedures were also marked by the controversial appointment of a longtime assistant to ministers of justice as judge and immediately the president of the Administrative Court, as well as by a dispute over the assessment of candidates applying for the post of Administrative Court judge who had not previously held judicial office as opposed to those who had. This problem has not been resolved to date although since 2008 the Judicial Council had the time to take action to that end. The same problem existed with the Prosecutorial Council in relation to the promotion of prosecutors (more detail in separate reports on the promotion of judges and prosecutors prior to the reform).

Initial procedures of announcing vacancies for the promotion of judges and prosecutors on the basis of new laws – planned too ambitiously for the end of 2014

(AP, activity 1.1.2.1 b) – by 2017 were carried out only in the case of appointment of special state prosecutors and one appointment of state prosecutors to the High State Prosecutor's Office. In the latter, candidate state prosecutors were evaluated for the purpose of promotion.

The first ad for the promotion of judges under the new law was announced for the appointment of the Supreme Court judge on 27 December 2016, and in January 2017 two ads were announced for the appointment of judge of Bijelo Polje High Court and two judges of the Administrative Court. Neither procedure has been completed.

Evaluation procedure of judges and presidents of courts, i.e. state prosecutors and heads of state prosecution offices (AP, activity 1.1.3.2 b) by April 2017 was conducted in only one basic court (in Nikšić) and one basic state prosecution office (in Cetinje) within the pilot projects, envisaged by measures in the AP 23. The results of these projects were not published.

The new system for evaluation and promotion of judges and state prosecutors contains obvious shortcomings, particularly in relation to the rules for determining the score that their promotion depends on; thus, it is necessary to urgently amend relevant laws and bylaws. Prior to that ensure consultation with all judges, state prosecutors, as well as lawyers.

### Recommendations

- 1 Amend legally prescribed rule for determining performance score for judges and state prosecutors, which is illogical, incomplete and unfair, as it allows for, *inter alia*, promotion of judges and prosecutors with unsatisfactory quality and quantity of performance, as well as those with established unsatisfactory relationship with clients, colleagues and staff due to a number of violations of the Code of Ethics.
- 2 Amend the law to stipulate that the Supreme Court judges as well as state prosecutors at the Supreme State Prosecutor's Office also be evaluated, some of which may be further promoted, while the objective of evaluation prescribed by law for all others applies to them as well (assessment of competence, work ethics and need of further training).
- 3 Ensure that the quality of performance of judges and state prosecutors is assessed also in relation to decisions of the Constitutional Court and the European Court of Human Rights, and that in this regard – when necessary – an exception is made in relation to the three-year assessment period so as to motivate judges and prosecutors to follow and implement the European Court of Human Rights practice same as the practice of the highest judicial instances in Montenegro.
- 4 Revise justification for interviewing candidates in the promotion procedure given the prescribed content of such interview, the purpose of which is to discuss motivation, assess communication and other points assessed in the first election.
- 5 In relation to the number of adopted requests for review, ensure that this number is not calculated by default, but a record kept of judges

whose actions led to subsequent adoption of a request for review in the specific case.

- 6 The quality of performance of state prosecutors should be assessed also based on the number of adopted or rejected proposals to order and extend detention and on the basis of adopted complaints about the rejection of criminal charges.
- 7 Ensure that the reasons for time-bar of prosecution are examined in each case in which it occurs, that a commission determines possible accountability of the competent judge or state prosecutor, and if the accountability is established – that this has an impact on their evaluation, promotion and dismissal.
- 8 Rules on evaluation of the sub-criteria “Education and training” and “Participation in various professional activities” contain obvious errors in the text that should be corrected, and in relation to judges the rules should be harmonized with the law or the law amended; prevent unjustified discrepancies in the evaluation of judges and prosecutors with respect to the acquisition of academic titles and avoid evaluating circumstances that the applicant cannot influence, such as whether he/she will be invited to participate in the working group, to teach a seminar or participate in additional, optional trainings.
- 9 Amend relevant laws and by-laws to ensure that all identified violations of the Code of Ethics be taken into account in deciding on promotion and assessed in accordance with their severity, not by default, as currently required by Art. 20 of the Rules for the Evaluation of Judges and Court Presidents. In addition, prevent vague and unfair equaling of one decision establishing judge’s violation of the Code of Ethics with the adoption of three complaints concerning judge’s performance by the Judicial Council.
- 10 Prescribe reduction of the norm (“average benchmarks of quantity of work”) for the work of court presidents as judges, i.e. heads of the state prosecutor’s offices as state prosecutors.
- 11 Prescribe the method for evaluating candidates for judges of the Administrative Court and Commercial Court that fall under different categories – those who were not judges before as compared to the candidates who were judges; in relation to the appointment of one judge of the Supreme Court, this problem can be prevented if the vacancy is advertised only for candidates who have not previously held state prosecutor or judge’s office.

#### 1.1.4 Improving administrative capacity of the Judicial council and Prosecutorial council

Strengthening administrative capacity does not affect impartiality and transparency of decision-making of council members, but it does represent an important factor for the overall strengthening of effective work of these bodies. In this sense, it is necessary to consider job commitment of members of both councils – particularly the Judicial Council – bearing in mind that currently nine out of ten of its members perform very demanding primary professions, of which the

Supreme Court president and the Minister of Justice particularly stand out with regard to the scope and complexity of their professional tasks. Judicial Council has held 25 sessions in 2016, which is double the planned number. Council's sessions last 60–90 minutes on average, during working hours until 3 p.m. Although all members generally attended the sessions, the impression is that not all equally contribute to the work of this Council, as opposed to the Prosecutorial Council members.

Prosecutorial Council has not fully complied with the planned number of sessions (9 of 12 held), but its sessions on average last longer than sessions of the Judicial Council, items on the agenda are discussed for longer and interviews with candidates for the job of the prosecutor last twice as long as compared to interviews with potential judges at the Judicial Council. The immediate impression is that all members of the Prosecutorial Council are very committed to carrying out their professional obligations.

Although both secretariats – even with the current capacity – provide the necessary administrative support to the councils, there are fewer employees than prescribed by the systematization act. Staff undergoes training programs.

### *Recommendations*

- 1 Prescribe by the AP measure Analysis of the performance of members of the councils as part of the strategic guideline “Strengthening the accountability of the judiciary”.
- 2 In accordance with the Rules of Procedure of the Judicial Council and practice established by this Council, ensure that minutes of the work of the commissions are modelled after the minutes of the Judicial Council sessions.
- 3 Ensure employment of clerks in the Judicial and Prosecutorial Council secretariats in line with the systematization acts, so that the secretariats are able to perform tasks at full capacity; also, continue their further training.
- 4 Consider the possibility to further stimulate in-demand workforce for work at the Secretariat, as well as the possibility of additional stimulus for employees who achieve good results.
- 5 Harmonize the Judicial Council and Judges Act with the Act on Amendments to the Salaries of State Sector Employees Act.

### **1.1.5 Initial and continuous training**

Anticipated laws were adopted, the Centre has been transformed from an organizational unit of the Supreme Court to a separate legal entity and in 2016 began the implementation of programs of initial and continuous training in accordance with the new laws of 2015 and accompanying bylaws. Initial training of the first seven candidates for judges and prosecutors for a period of 18 months is currently ongoing.

Continuous training is conducted according to the law and the program. Act on the Training Centre for Judges and Prosecutors prescribes that every judge and

prosecutor has the right and obligation to participate in the program of continuous training at least two working days a year. The 2016 annual report on the work of the Centre contains no data on the number of judges and state prosecutors who responded to their right and obligation to spend two working days that year in training; the report, however, states that only 7 (or 8%) of 122 state prosecutor, and 65 (or 21%) of 314 judges did not take part in trainings organized by the Centre in 2016.

Mentors carry out practical part of the initial training. One of the judges who made the list of mentors – compiled by the Judicial Council – was a judge who in the proceedings led against the victim of abuse, coercion into prostitution and trafficking for allegedly giving false testimony, made scandalous remarks in the ruling that it was “impossible” that the Montenegrin statesman led immoral (licentious) life and that it was “illogical” that Deputy Supreme State Prosecutor could commit criminal offenses. Such views do not inspire confidence in his impartiality and independence, or confidence that such a judge should be mentoring candidates for judges.

The Judicial Council and Judges Act (Art. 99, para 1) and the State Prosecutor’s Office Act (Art. 98, para 1) require that judges and prosecutors, evaluated with ‘satisfactory’ and ‘unsatisfactory’, be referred to the program of mandatory continuous training, in accordance with the law governing the training of judges and state prosecutors. This formulation has a pejorative connotation, as if continuous training is a way of punishment. What is missing in the wording of these provisions is clarification that this is a special program of continuous training for those that are evaluated as stated above, in accordance with the Act on the Training Centre for Judges and Prosecutors (Art. 49).

### *Recommendations*

- 1 When selecting mentors make sure that the training of candidates for judges and prosecutors is carried out by persons who can be role models in terms of ethics, too.
- 2 In the wording of Art. 99, para 1 of the Judicial Council and Judges Act and Art. 98, para 1 of the State Prosecutor’s Office Act, which require that judges and prosecutors evaluated with ‘satisfactory’ and ‘unsatisfactory’ be referred to mandatory continuous training program, add the word “special” before the word “program”, in accordance with the actual situation. Thus, the impression that continuous training represents a way of punishment will be avoided.

## **1.1.6 Strengthening financial independence of the judiciary**

Although the Judicial and Prosecutorial Councils are legally allowed to plan, propose and dispose of budget funds for the work of the courts and state prosecutor’s offices, it appears that a higher degree of financial independence of the judiciary – as a strategic goal – has not been achieved. Albeit separate budget lines, the judiciary and the prosecution do not have a decisive role in planning their own budgets – executive branch does.

Montenegrin judiciary is in need of proper rationalization. However, until the planning and implementation of rationalization is completed in accordance with the European indicators, it is necessary to allow the judiciary to adequately operate with its current resources. Funds allocated for the work of judicial institutions were, as a rule, smaller than funds suggested by these institutions.

Legal obligation to provide funds for operation of the Training Centre in the judiciary and prosecution in the amount of 2% of the allocated budget for the courts and state prosecutor's offices is not respected.

Although the Courts Act stipulates that funds for the work of courts be provided in the Budget of Montenegro and that the courts alone dispose of the funds, this obligation is still not observed consistently, as the Budget Act does not yet recognize the courts as independent budgetary units. As a result, the courts and state prosecutor's offices are not familiar with the exact amount of funding allocated for their work at the level of the budget year. The current system of release of approved budget funds with the approval of the Ministry of Finance limits external independence of judicial institutions, which in reality cannot dispose of the approved budget without prior approval of executive institutions.

#### *Recommendations*

- 1 Provide for sufficient budgetary resources in the 2018 Budget Act for operation of the courts and state prosecutor's offices, in accordance with the proposals of the Judicial and Prosecutorial Council
- 2 Allow the Training Centre for the judiciary and state prosecution to use funds allocated in the budget.
- 3 In the 2018 Budget Act recognize the courts and state prosecutor's offices as independent budgetary units in accordance with the Courts Act.
- 4 Allow distribution of budgetary funds by the courts and state prosecutor's offices to enable courts presidents / heads of state prosecutor's offices to keep track of allocated resources and the needs of courts / state prosecutor's offices.

### **1.1.7 Strengthening legal education**

Within the strategic guideline related to the strengthening of legal education, the AP envisaged implementation of two measures – Training of students of specialist academic studies (1.1.7.1) and participation of judges and state prosecutors in legal clinics (1.1.7.2). Action Plan for Chapter 23 does not contain measures related to the strengthening of legal education.

The first measure envisaged signing of a memorandum on cooperation between judicial institutions and law schools. On the other hand, implementation of the obligation of participation of judges and state prosecutors in legal clinics was foreseen after drafting of a plan and program for their participation in clinical education programs. Reports on the implementation of AP 2014–2016 contain only information on the signing of Memorandum of Cooperation between the Supreme Court of Montenegro and a private school – Faculty of Law of the Uni-



versity of Donja Gorica (UDG) in 2014. The said implies that this strategic guideline has not been implemented.

### *Recommendation*

Amend the measure 1.1.7.2. to read Improvement of clinical education program, primarily at the state Faculty of Law of the University of Montenegro, where legal clinics have been an integral part of the curriculum in the last (specialist) year of study for a number of years. This implies aligning clinical education programs with the needs of students to acquire practical skills in their final years of study to prepare them for future professional engagement in judicial institutions or judicial professions (attorneys, notaries, etc.).

Clinical education program should be revised by a team of experts composed of representatives of the Faculty of Law, Ministry of Justice, Supreme Court, Supreme State Prosecutor's Office and Montenegrin Bar Association. Envisage that the implementation of this activity be completed no later than in the first quarter of 2018, so that testing of the program could be carried out during the 2018/2019 school year.

## 1.2 Strengthening impartiality of the judiciary

Strategic aim “Strengthening the impartiality of the judiciary” should improve mechanism for ensuring the guaranties of impartiality of judiciary through implementation of random allocation of cases, harmonization of codes of ethics with European standards and ensuring the liability of holders of judicial functions for conducted criminal offences (indicator of impact 1.2).

For the implementation of this aim Action Plan for the implementation of the Strategy envisages strategic guidelines:

- consistently follow the principle of random allocation of cases (1.2.1);
- strengthen integrity of holders of judicial functions (1.2.2);
- amend Codes of Ethics for judges and state prosecutors (1.2.3);
- the Codes of Ethics should be accompanied by guidelines and systematic trainings (1.2.4);
- improve legal provisions regulating functional immunity of judges and state prosecutors as provided for by the Constitution (1.2.5).

### 1.2.1 Random allocation of cases

In 2016 changes were introduced to PRIS to include a proposed innovation that enables a party to learn about the judge the case has randomly been assigned to immediately upon submitting the initial document. This is not yet possible in the courts of higher instance. Application of the method of random allocation of cases is rather unconvincing in the courts with a small number of judges, where one judge is exclusively or almost exclusively in charge of a certain case type.

It was noted that there were deviations from the principle of random allocation through PRIS during the reallocation of cases within the Court to a new judge. Action plans in the coming phases of the reform should provide for monitoring of the application of the method of random allocation of cases, as well as the implementation of recommendations listed below:

1. Revise annual tasks schedules in all the courts to ensure that in every court department there is a minimum of two judges, i.e. that all judges are included in random allocation of cases so that this method is actually put into practice. Action Plan to prescribe a measure that would ensure verifying whether these schedules have been appropriately modified.
2. Automated allocation of cases through PRIS has not yet been introduced in misdemeanours courts – thus, the practice of implementation of the principle of random allocation of cases in these courts should be particularly monitored by a relevant inspection authority and special reports should be drafted.
3. Different approach of the courts has been noted in terms of reallocation of cases within the court to a new judge. Even though the law clearly envisages the principle of random allocation of all cases to judges through PRIS, Court Rules of Procedure should still prescribe its application in all

specific situations as well, such as allocation of cases to a new judge, reallocation of cases among courts, allocation of cases where the request for exemption of a judge is granted, etc., for the purpose of legal certainty.

- 4 Define time and weekday for reallocating cases previously assigned to a judge who had left the court to a new judge, i.e. for including such cases in the system of random allocation so as to prevent possible misuse when entering information into PRIS.
- 5 Specify the procedure for handling urgent cases, including deadlines, control procedures and establishing of responsibility for failure to comply with the deadlines, as well as the manner of keeping records of urgent cases within the system of random allocation.
- 6 The Judicial Council should take measures to ensure that the date stamp also includes time (hour and minute) of receipt of a document initiating proceedings and before a higher instance, as well as to enable the parties to verify the date in case of doubt. NGOs that monitor the reform of the judiciary should be allowed the same (hour and minute).
- 7 Enable the parties to carry out control in case of doubt, as well as NGOs that monitor judicial reform.
8. Amend PRIS to enable application of the provision of the Rules of Procedure (Art. 59) which requires that the case in which a claim was withdrawn when reallocated be assigned to a judge first in charge of the case. In the meantime, a rule should be introduced requiring a judge to inform the registry office about withdrawal of a claim, in order to verify all claims between the same parties submitted in the same time period and to prevent abuse.
- 9 Expressly prescribe by procedural laws that adjudication in the case by a judge who was not assigned to that case using the method of random allocation of cases constitutes essential violation of procedure, in accordance with the Courts Act and Court Rules of Procedure.
- 10 Increase effectiveness of judicial inspectorate of the Ministry of Justice by prescribing its obligation to carry out more frequent and extraordinary controls and without special approval of the Minister. Increase the scope of competence of a judicial inspector to include initiating control procedure over judicial authorities ex officio, i.e. when s/he has knowledge of irregularities, so as to react immediately and without informing the court previously.
- 11 Carry out special inspection control in misdemeanours courts, where random allocation of cases within PRIS has not yet been introduced, and draft a special report thereof.
- 12 The Ministry of Justice should additionally promote judicial inspectorate, considering that on the website of the Ministry there is no information on how a citizen can address this agency and what are its responsibilities.

### 1.2.2a Exemption of judges and prosecutors

The AP for Chapter 23 contains a recommendation to review the procedure for filing an exemption request and, if necessary, make changes (1.2.2). In order to im-

plement this recommendation, an analysis of submitted requests for exemption and decisions made on these requests needed to be carried out on an annual basis and according to the results of the analysis, if necessary, changes made to the rules on exemption in order to improve this legal instrument as an important mechanism for strengthening the impartiality of judges and state prosecutors (1.2.2.1).

The Supreme Court has carried out the planned analysis which contains data on the number of requests for exemption submitted in the period 2012–2014. The data were presented in a table indicating the number of granted, rejected, dismissed, withdrawn or otherwise resolved requests, without statistical processing of such data. There is no information on how many exemption requests were submitted by the parties, and how many by judges or state prosecutors.

The analysis lists most common reasons for seeking an exemption as well as two proposals for amendments to the Criminal Procedure Code (introduction of new paragraph in Art. 41) and to Art. 72 of the Civil Procedure Code. These proposals were adopted as amendments to the laws in 2015. As a result, the Government considers this measure to be implemented and there has been no further reporting thereof.

According to MANS report on implementation of measures under Chapter 23, the number of granted requests for exemption of judges is increasing, while data on requests for exemption of public prosecutors are not available to the public.<sup>2</sup>

#### *Recommendation*

The new Action Plan should envisage development of a new analysis of submitted exemption requests and the manner of their handling in the period 2015–2017, with the prescribed content of such analysis, including information on applicants and statistical data processing with conclusions. Also, analyze the effect of the law changes.

## 1.2.2 Strengthening integrity of holders of judicial functions

Within the framework of this strategic guideline one was supposed to adopt the Integrity plan in courts and state prosecution offices in accordance with MoJ guidelines (1.2.2.1), consistently implement Codes of Ethics (1.2.2.2) and declare property by judges and state prosecutors (1.2.2.3).

All courts, public prosecution offices, the Judicial Council and Prosecutorial Council adopted their integrity plans in 2016, but their application is not yet implemented in full. No matter that plans exist, the effect of their application still cannot be seen, bearing in mind that they should serve as an effective means of preventing corruption in the judiciary, as well as to serve the improvement of the integrity of the institution and the judicial system as a whole. The information contained in integrity plans have so far remained a dead letter, since no judicial institution analytically acceded to the application of integrity plans and prepared reports or analysis.

<sup>2</sup> Report on implementation of Action plan for chapter 23, MANS, February 2017, p. 15 <http://www.mans.co.me/en/wp-content/uploads/2017/05/AP23ENGfin.pdf>.

On the application of ethical codes see below.

Judges and prosecutors are state officials, in the context of provisions of the Prevention of Corruption Act; accordingly, they are subject to general provisions on the conflict of interest, declaration of assets and gifts, restrictions upon the termination of office. Members of both the Judicial and Prosecutorial Council are required to declare assets, too. According to information from the report on implementation of the AP 2014–2016, judges and state prosecutors, as well as members of both councils regularly declare their property. During 2016 there were no misdemeanour proceedings initiated against judges or prosecutors for failing to report income and assets, while in two cases initiated in 2015 against a judge and a prosecutor for failing to submit their Statement within the prescribed deadline, their responsibility was established – a fine was imposed in one case (€ 100.00 plus court expenses) and in another a warning issued, plus court expenses. During 2016 (in the period 1 January – 30 September) administrative and misdemeanour proceedings were initiated in relation to four judges to determine whether they violated the law for submitting incomplete / incorrect data in the Statement of income and assets. In 2016, twelve misdemeanour proceedings initiated in 2015 were completed for judges and prosecutors for the submission of incomplete / incorrect information; sanctions were imposed in 8 cases.

### *Recommendations*

- 1 Since production of the integrity plan is a continuous process, judicial institutions should conduct an analysis of the application of integrity plans in 2017 and adopt new plans for the period 2018–2019.
- 2 Judges and prosecutors, as well as members of the Judicial and Prosecutorial Councils should continue their practice of complying with an obligation to report assets on a regular basis. In cases where the responsibility of a judge / prosecutor is established for failure to submit their Statement within the prescribed deadline or for submitting incomplete / incorrect data therein, Judicial and Prosecutorial Councils should initiate the procedure for determining disciplinary responsibility in accordance with Art. 102, para 2, item 11 of the Judicial Council and Judges Act. In this context, better and more proactive communication is expected between the two councils and the Agency for the prevention of corruption.

### **1.2.3 and 1.2.4 Respecting ethical standards in the judiciary**

The EU stressed the importance of full respect for high ethical standards in the judiciary. As an interim measure in the accession negotiations, Montenegro should provide initial summary of the results of regular performance assessments of judges and prosecutors and ensure that in case of identified violations disciplinary penalties be effectively applied. Montenegro is developing the practice of interpretation of disciplinary rules and raising awareness among judges and prosecutors on the revised Code of Ethics.

The Action Plan for implementation of the Strategy contains the strategic guidelines “Amend Codes of Ethics for judges and state prosecutors” (1.2.3) and “The Code of Ethics should be accompanied by guidelines and systematic trainings”

(1.2.4), while the AP 23 ensures implementation of the recommendations provided by the EU to “ensure effective monitoring of compliance with the codes of ethics” (1.2.4). Both plans for attaining these goals predict also informing the citizens of their right to file complaints against judges and prosecutors, systematic training for judges and prosecutors, as well as that the commissions for monitoring compliance with codes of ethics regularly report on compliance with the Code, analyze compliance with the Code, and in particular respect for the rules of conflict of interest for judges and prosecutors.

The Codes of Ethics for judges and state prosecutors are consistent with international recommendations. Informing citizens about the existence of ethical rules for judges and prosecutors and about the committees to monitor their implementation is not enough. According to research by the Association of Judges and NGO Civic Alliance, majority of citizens have not heard about the codes or is not sure that they exist, and only 16% knew that there are commissions that monitor their implementation.

The website Courts of Montenegro does not contain the information for citizens to whom they can report a judge who violates the Code, unlike the website of the Supreme State Prosecutor’s Office which contains such instructions in relation to the state prosecutors. Judicial Ethics Code is not prominently published on the portal Courts of Montenegro.

The brochures about the Code of Ethics of Judges and Prosecutors Code of Ethics were made and distributed with daily Pobjeda, although this newspaper has not the largest print run. The said opinion poll showed that the brochure had the least impact on informing citizens.

In the chapter on strengthening the accountability of the judiciary (1.3) it has been concluded that the actions of disciplinary offenses for both the judges and state prosecutors are vague and that they do not differ from violations of the codes of ethics, which creates legal uncertainty and does not contribute to strengthening the accountability in the judiciary. This favours the tendency to resort to punishment for violation of ethics, which does not imply a sanction, rather than to start disciplinary proceedings.

A solution under which a violation of the Code of Ethics does not affect judges’ promotion even in the case of multiple violations, and irrespective of the gravity of violation of the rules of ethics, has been explained and criticized in the part of this report dealing with accountability and promotion. As regards state prosecutors, the rule on evaluation is better formulated, but still does not ensure that a violation of ethics affect promotion. Additionally, in the case of both the judges and state prosecutors, breach of only one section of the Code can affect their evaluation and promotion, which surely does not contribute to strengthening the accountability of the judiciary.

Annual reporting of the commissions on the Code application is a mere formality. The Commission on Code of Judicial Ethics is not even aware of its obligation to draw up annual analyses on the application of the Code with regard to respect for the rules on conflict of interest and declaration of assets, while the Commission on Code of Prosecutorial Ethics was pleased to state that no complaints

were filed for state prosecutors' failure to report assets, without verifying whether there had been any such cases in practice, which brought about disciplinary action against prosecutors.

Since its establishment on 1 October 2011 until 31 December 2016, that is over the period of five years and three months, the Commission on Code of Judicial Ethics decided on a total of 47 initiatives for establishing violation of the Code. Of these, in five cases the Commission found a violation of the Code (10.6%), in 32 cases it did not find any violations of the Code (68%), declined its competence in 8 cases (17%), in one case the applicant withdrew so the proceedings was suspended, and in one case dismissed the initiative. In the case under Chapter 4.5. where a complaint was lodged before the Judicial Council against the Commission members, there was no feedback from the Commission whatsoever. Human Rights Action has prepared a special report on five years of work of this commission, which includes an analysis of all decisions.

Work of the Commission on Code of Judicial Ethics is inconclusive and its decisions, as a rule, do not give off the impression of objectivity. The Commission generally failed to thoroughly establish factual information, but in most of the decisions adopted by the merits (19 of 37) uncritically accepting the statements the judge, providing vague and incomplete explanations. The reasoning accompanying its decisions does not always indicate what the complaints specifically related to, the basis on which the Commission adopted its decision, or why it has not been decided on all the allegations in the complaint, or why the Commission declined its competence in specific cases.

The Commission has missed the opportunity to interpret whether particular actions of a judge, included in the initiatives for establishing breach of the Code, may be considered violations of the Code, which was of importance for its future application. For example, a question whether it is ethical for a judge to state in his judgment that "it is impossible that the highest state official in Montenegro leads immoral life" remained unanswered, as well as various other issues in need of an answer.<sup>3</sup>

It has been noticed that both commissions treated actions of judges/state prosecutors that matched actions constituting a disciplinary offense as violations of the Code, without providing an explanation as to why there was no disciplinary proceedings.

### *Recommendations*

The Judicial Ethics Code should be visibly published on the portal [www.sudovi.me](http://www.sudovi.me) together with instructions for citizens on where and how they can report its violations;

The Commissions should in cooperation with the media inform about ethical codes for judges and state prosecutors as well as about their practice of monitoring its violations;

<sup>3</sup> For a detailed overview of questions that remained unanswered see report "How to establish accountability for breach of judicial ethics in Montenegro? Operation of the Commission on Code of Judicial Ethics (2011 - 2016)", Human Rights Action, 2017.

Annual Reports to the work of the Commissions should include an analysis of respect of codes of ethics with specific parts of the respect of rules on conflict of interest, based on the AP for 23 (1.2.4.5). Reports should include observations and suggestions of commissions' members, and not just retelling of the passed decisions;

The Commission has to establish facts and provide with a convincing reasoning;

In any case in which the treatment of a judge or prosecutor fits the description of a disciplinary offense, the commission should suspend the proceedings and initiate disciplinary proceedings or explain why it considers that it should not do so.

Following are the recommendations of a special report of the Commission on Judicial Ethics Code (not including recommendations listed in the section on accountability of the judiciary):

- 1 Amend contents of the records referred to in Art. 130 of the Judicial Council and Judges Act to include the identified violations of the Code;
- 2 Amend the Rules for evaluation of judges so as to take into account the gravity of breach of the Code, and abolish the distinction in the assessment of violations of the Code established by the Commission and the adoption of complaints against the work of judges by the Judicial Council;
- 3 Prescribe the grounds for dismissal and the procedure for dismissal of all members of the Commission, the grounds for their exemption, exemption procedure and substitution in such a situation;
- 4 The Rules of Procedure should stipulate that the Commission may also consider anonymous reports;
- 5 Amend Art. 12 of the Code and Art. 9 of the Rules of Procedure of the Commission on Code of Judicial Ethics to prescribe the Commission's obligation, in addition to assessing allegations of the initiative and obtaining statement of a judge against whom the initiative was submitted, to adduce other evidence in order to verify allegations of the initiative and fully determine the facts;
- 6 The Commission should act with due diligence on each submitted initiative and respond in its decisions to all the questions listed by the applicant for assessment of violations of the Code of Judicial Ethics, particularly the questions directly indicated by applicants, or decide whether to dismiss the initiative because the Commission is not competent to handle it, or because it is manifestly ill-founded;
- 7 The Commission should evaluate compliance with the rules stipulated by the Code by always clearly linking its assessment to specific ethical rules and clearly explaining which aspects of behaviour and performance of judges may be the subject of its consideration, especially when it comes to lawful and orderly work of judges (including also the legality of decisions of judges and compliance with the procedural laws in terms of deadlines and procedures in specific cases;
- 8 The Commission should particularly thoroughly examine the cases in which it has been pointed to biased conduct of judges toward their long-time fellow judges who then become lawyers, and provide a detailed reasoning for decisions in such cases;



- 9 Change the current composition of the Commission;
- 10 Specify competence of the Judicial Council to act on complaints;
- 11 Prescribe explicit right of all the parties that lodged an initiative to submit a complaint to the Judicial Council against the Commission's decision, in order to ensure control over its operation in case of superficial handling, such as criticized herein;
- 12 The Judicial Council should take an active role in terms of monitoring the implementation of the Code of Judicial Ethics, rather than declining competence with regard to complaints that indicate unethical behaviour that undermines the reputation of the judiciary.

### 1.2.5 Improving legal provisions regulating functional immunity of judges and state prosecutors as provided for by the Constitution

This strategic guideline foresees implementation of one measure – enable that judges and state prosecutors shall be liable for performed criminal offence, and the civil liability for damage caused by their work shall be entrusted to the state with the right for reimbursement (1.2.5.1). This is to be realized by adopting the Judicial Council Act and the State Prosecutor's Office Act. These acts contain the corresponding articles (Art. 104 of the Judicial Council Act and Art. 102 of the State Prosecutor's Office Act).

According to available information, there were no cases in which the functional immunity of the judge or state prosecutor prevented criminal proceedings.

### 1.3 Strengthening accountability of the judiciary

the EU stressed the importance of fair and impartial disciplinary proceedings and urged Montenegro to ensure regular and effective supervision over the work of judges and actively promote ethical conduct in the judicial system. The EU encouraged Montenegro to establish an effective complaints mechanism for “justice users”, raise awareness about its existence, and ensure that integrity be an explicit criterion in the evaluation, promotion and appointment to higher functions. The results are expected in terms of consistent and dissuasive disciplinary measures.

Within the strategic sub-goal: Strengthening the accountability of the judiciary, the Strategy sets out five strategic guidelines, of which the last was omitted from the AP 2014–2016:

- Reasons for disciplinary responsibility of judges and state prosecutors should be made sufficiently objective, actions of reasons for disciplinary responsibility should be clearly prescribed by law to prevent discretion at decision-making in disciplinary proceedings (1.3.1);
- Distinguish between mild, severe and most severe grounds for disciplinary responsibility and improve the system of sanctions that may be imposed in disciplinary proceedings to correspond to the principle of proportionality (1.3.2);
- Revise dual role of the Disciplinary Commission, which should not be able to initiate and conduct the proceedings (1.3.3);
- Clearly specify the grounds for dismissal of state prosecutors (1.3.4), and
- Continuously monitor objectivity and transparency of procedures for establishing accountability of judges and state prosecutors (this guideline is not in the AP).

In relation to the same amendments to the law, AP 23 specifies that it is necessary to prescribe “obligation to comply with the principle of proportionality between a disciplinary offense and disciplinary sanction” (1.3.1.2).

Strategic documents divide the reform and monitoring of disciplinary and ethical responsibilities of judges and state prosecutors into two different sub-goals; accordingly, disciplinary responsibility falls under “Strengthening the accountability of the judiciary”, and respect for the ethics under “Strengthening of impartiality”. However, in order to strengthen the accountability of the judiciary, we believe it is necessary to assess the rules on disciplinary and ethical responsibility and their application together.

All planned measures and activities in terms of amendments to the law and creation of database of procedures for establishing accountability (AP 23, 1.3.1.4) the Government considers as fulfilled. The only remaining duty is to conduct procedures for establishing accountability of judges and state prosecutors in accordance with the law and include information thereof in the annual reports on the work of the Judicial and Prosecutorial Councils (AP, 1.3.4.1 b).

However, new regulations from March 2015 have failed to fully fulfil their tasks, either because application of the principle of proportionality was not prescribed

in imposing disciplinary sanctions from AP 23, 1.3.1.2, or because they did not meet the real needs, e.g. actions of disciplinary offenses that would minimize discretionary deciding on responsibility of judges and state prosecutors are not specified to a sufficient degree, in line with AP, 1.3.1.

Although the Constitution was amended and the new laws laid down the conditions for conducting disciplinary proceedings against judges and state prosecutors as well as strengthened the procedure for removing judges and prosecutors' functional immunity, not one state prosecutor was dismissed or disciplined in practice in 2015 and 2016. In 2015 three judges received a formal warning on the basis of the previous law, while in 2016 there were no disciplinary measures imposed against judges.

In 2015 four proposals for initiating disciplinary proceedings against state prosecutors were submitted, but none granted, while in 2016 no such proposal has been submitted. The Prosecutorial Council has failed to submit decisions on these four proposals in the legally prescribed deadline.

In 2016, one proposal for establishing disciplinary responsibility of a judge was filed and dismissed by the Disciplinary Committee of the Judicial Council on the grounds that it was "submitted for an action that is not prescribed as a disciplinary offense", with no other explanation, although the action matched the description of the offense. The proposal was then submitted to the Commission on the Code of Ethics, which found a violation of the Code. As a result, the level of judge's accountability was lessened, because as opposed to a disciplinary offense, breach of ethics does not require a sanction, but only indirectly and slightly affects the promotion and dismissal of judges and state prosecutors.

Actions that constitute disciplinary offences have not been specified to a sufficient degree and do not differ from the violations of the codes of ethics, all of which creates legal uncertainty and does not help strengthen accountability of the judiciary. In practice, breach of ethics would be punished without providing an explanation as to why in a particular case there was no disciplinary offense. Definitions of nine disciplinary offenses for judges match 21 provisions of the Code of Judicial Ethics, while the definitions of seven disciplinary offenses for prosecutors match nine provisions of the Code of Prosecutorial Ethics. Wording "without a reasonable cause" used to describe actions of disciplinary offenses, as well as definitions of actions of certain offenses, allow that accountability for serious errors in one's work and breach of the law be avoided.

Relevant laws do not prescribe application of the principle of proportionality when deciding on disciplinary offenses and sanctions, as provided for in measure 1.3.1.2 AP 23; thus, for example, in imposing disciplinary sanctions the gravity of a resulting consequence is not taken into account, also, it is not clear which circumstances are to be considered and which are not – which does not contribute to legal certainty.

Unclear division between disciplinary and ethical accountability is worsened by the provisions of the Judicial Council Act (Art. 110, para 3) and the State Prosecutor's Office Act (Art. 110, para 2), which suggest that the authorized proposers of disciplinary action, when there is reasonable suspicion that a judge or a prose-

cutor committed a disciplinary offense, address the Commission on the Code of Ethics with a request for an opinion on whether such conduct is in accordance with the Code. In a situation where disciplinary and ethical obligations of judges are not clearly distinguished, this provision creates additional room for avoiding disciplinary action and determining of accountability for a disciplinary offense.

Circle of authorized proposers of disciplinary action remains too limited; accordingly, proceedings cannot be launched by members of the Judicial Council or Prosecutorial Council individually, or the majority at the council. Commission on the Code of Judicial Ethics failed to initiate disciplinary action in at least three cases in which there were grounds for it, and the Commission on the Code of Prosecutorial Ethics did not initiate disciplinary action in one of the two cases it considered in 2016.

Although each year annual reports on the work of the State Prosecutor's Office contain alarming data on the number of dismissed criminal charges due to time-bar (while data on time-bar of criminal prosecution in the cases in courts is not published, which is particularly concerning), reasons for the occurrence of time-bar go unexamined and accountability of state prosecutors and judges thereof unestablished. A judge or a state prosecutor whose unreasonably delayed actions result in the time-bar of misdemeanour or criminal prosecution is only held responsible for a serious disciplinary offense, which does not lead to dismissal, but entails a fine and/or bans promotion for a period of only two years.

Although in recent years a number of judges and state prosecutors failed to report their assets in accordance with the law, not one disciplinary action was launched to that end in accordance with the law, which recognizes such failure as a disciplinary offense for judges and prosecutors.

### *Recommendations*

- 1 The new AP needs to include the forgotten guideline "continuously monitor the objectivity and transparency of procedures for establishing accountability of judges and state prosecutors".
- 2 All decisions concerning disciplinary responsibility, including those to dismiss the proposal to institute proceedings to determine responsibility, should include proper detailed explanation, making thus the work of the body adopting such decision transparent.
- 3 Compare provisions of the codes of ethics for judges and prosecutors with disciplinary offenses under Art. 108 of the Judicial Council and Judges Act and of the State Prosecutor's Office Act, and ensure their clear distinction.
- 4 Delete wording "without a reasonable cause" from description of actions that constitute an offence in Art. 108, para 2, item 1, para 3, items 2, 3 and 5 and para 6, item 1 of the Judicial Council and Judges Act, and in Art. 108, para 2, item 1, para 3, item 1 and para 6, item 1 of the State Prosecutor's Office Act, which might lead to arbitrary failure to establish accountability
- 5 Revise justifiability of formulation of offences under Art. 108, para 3, items 3 and 4 of the Judicial Council and Judges Act, which tolerate un-

justified exceeding of the legal deadline threefold for adopting a judgment in two cases and failure to seek mandatory exemption in as many as two cases in just one year.

- 6 Prescribe the principle of proportionality modelled on Art. 59 of the Supreme Judicial and Prosecutorial Council of Bosnia and Herzegovina Act “Principles for determining measures”.
- 7 Delete the provision of Art. 110, para 3 of the Judicial Council Act and Art. 110, para 2 of the State Prosecutor’s Office Act.
- 8 Amend Art. 110, para 1 of the State Prosecutor’s Office Act and Art. 110, para 1 of the Judicial Council and Judges Act to ensure that disciplinary action may be initiated by any member of the Prosecutorial/Judicial Council or Prosecutorial/Judicial Council as well as Disciplinary Prosecutor.
- 9 Add paragraph to clearly stipulate that everyone has the right to initiate filing of a proposal to launch disciplinary proceedings against a state prosecutor or a judge.
- 10 Bearing in mind that a judge/state prosecutor commits serious disciplinary violation if “without a reasonable cause he/she fails to act in cases within legally set deadlines, which results in time-bar...” (Art. 108, para 2, item 1 of the State Prosecutor’s Office Act; Art. 108, para 3, item 2 of the Judicial Council and Judges Act), ensure that on the occasion of each time-barred case a committee is formed to conduct a procedure for determining accountability for the occurrence of time-bar in the case.
- 11 Consider stipulating that accountability of heads of state prosecutor’s office and court presidents also be established for the occurrence of time-bar due to their failure to adequately carry out supervision and accelerate the procedure in cases soon to become time-barred.
- 12 The offence under Art. 108, para 3, item 1 of the Judicial Council and Judges Act and the State Prosecutor’s Office Act with the most severe consequences in terms of occurrence of time-bar should be prescribed as the most severe offence, leading to dismissal.
- 13 Stipulate and ensure in practice that sanctioning of a judge/prosecutor in misdemeanour proceedings brought by the Agency for Fight against Corruption be considered as establishment of disciplinary responsibility for violation of Art. 108, para 3, item 8 of the State Prosecutor’s Office Act, and Art. 108, para 3, item 11 of the Judicial Council and Judges Act, that it is entered in the records (personal data sheet) and that it implies ban on promotion (for a period of four years) – a sanction normally provided for a more serious disciplinary offense as is this one. Avoid conducting two proceedings for the same offense and double fine.
- 14 Specify legal basis for dismissal of judges and state prosecutors to avoid discrepancy between constitutional and legal provisions in relation to dismissal for a committed crime.
- 15 After a four-year period delete only data on minor offenses from the records, but not serious ones.
- 16 Extend a ban on promotion, as a sanction for serious offenses, to a four-year term.

- 17 Amend composition of the Disciplinary Council so that the majority of members are not from the ranks of judges and prosecutors, in accordance with the recommendation of the Venice Commission.
- 18 Prescribe a short deadline for deciding on suspension.
- 19 Protect persons on maternity leave from instituting disciplinary proceedings.
- 20 Ensure that appeal against a decision on the establishment of disciplinary responsibility be filed with the Panel of the Constitutional Court, not the Supreme Court Panel, as is now the case, to avoid collegial conflict of interest.
- 21 Stipulate the competence of the Judicial Council and Prosecutorial Council to receive complaints.
- 22 In accordance with explicit criticism from the Venice Commission, revise justifiability of the Courts Act provisions legalizing individual control over the actions of lower courts judges by the Supreme Court judges, apart from the procedures on legal remedies, assessment procedures or disciplinary proceedings.



## 2 STRENGTHENING THE EFFICIENCY OF THE JUDICIARY

2.1 Rationalization of the judicial network and misdemeanor system

2.2 Enhancing criminal and civil law

2.3 Reduction of the number of cases in the backlog

2.4 Enhancing judicial management and administration system

2.5 Enhancing alternative methods of dispute resolution

2.6 Development of the Judicial Information System



## 2 STRENGTHENING THE EFFICIENCY OF THE JUDICIARY

Judiciary Reform Strategy (2014–2018) indicates that main problems which undermine the efficiency of the judicial system are backlog of court cases, long-running court proceedings and inadequate judicial network.<sup>4</sup>

Within chapter 23 Montenegro has committed to meet three challenging provisional benchmarks which pertain to development of “a valid statistical capacity on the basis of Guidelines on Judicial Statistics of the European Commission for the Efficiency of Justice (CEPEJ)”, “continuing rationalisation of judicial network ... which should lead to closure of non-viable small courts”, and “results achieved in further reduction of backlog of cases in courts ... with the increased use of alternative measures such as mediation, judicial settlement and arbitration”.

Strategic goal of strengthening the efficiency of the judiciary should be reached through implementation of the following measures:

- 2.1 Rationalisation of judicial network and misdemeanour system
- 2.2 Enhancement of criminal and civil law
- 2.3 Reduction of backlog of cases
- 2.4 Strengthening of judicial management and administration system
- 2.5 Enhancement of alternative dispute resolution methods
- 2.6 Further development of Judicial Information System (PRIS)

Action plan for Chapter 23 also contains measures pertaining to strengthening the efficiency:

- Providing reliable and consistent judicial statistics and introduction of a long-term monitoring system of length of proceedings (1.4.1.1 – 1.4.1.4);
- Rationalization of the judicial network and efficient functioning of the entire judicial system, with further reduction of the backlog of cases (1.4.2.1 – 1.4.2.7);
- Enhancement of enforcement of judgments in litigation (1.4.3.1. – 1.4.3.4);
- Providing efficient functioning of Centre for education of judicial office holders (1.4.4.1 – 1.4.4.9), and
- Introducing incentive measures that will contribute to voluntary mobility of judges and prosecutors (1.4.5.1 and 1.4.5.2).

It seems that even two years after of implementation of new Judiciary Reform Strategy we cannot ascertain improvement in this area, since conclusions of the European Commission's Report on Montenegro for 2016 point out the basic problem of lack of statistical data in the judiciary.

<sup>4</sup> Judicial Reform Strategy 2014-2018, 2013, pg. 15.

## 2.1 Rationalisation of judicial network and misdemeanour system

Judiciary Reform Strategy 2014–2018 and accompanying Action plan provide seven strategic guidelines for the rationalization of the Montenegrin judiciary (2.1.1 – 2.1.7). As part of the negotiations in Chapter 23 – Judiciary and Fundamental Rights, Montenegro has committed itself to continue rationalization of the judicial network. Also, under this provisional benchmark, Montenegro has undertaken to draft a new analysis of needs that will be the basis for adopting the subsequent steps in rationalization, which should lead to closure of all unsustainable small courts.

The effects of the first phase of rationalization of court network are modest and did not significantly affect the achievement of a greater degree of judicial efficiency. The first phase of rationalization of the network of courts did not meet expectations when it comes to a more detailed and comprehensive approach to rationalization of the court network and state prosecutors' offices. The number of judges is still almost twice as high as the European average. The court network in Montenegro is "extremely dense", with some courts which, according to European standards and criteria, cannot justify their existence (for example, the Basic Court in Danilovgrad, the Basic Court of Žabljak and the Basic Court in Plav). There is much more room for progress and taking further steps in creating a rational and efficient judicial system in Montenegro.

Rationalization plan 2017–2019 defines goals that essentially do not reflect the real needs and goals that lie ahead of Montenegro in the next phase of the judicial network rationalization process. According to the plan, rationalization of number of judges in Montenegro based on criteria defined by Methodology of Indicative Performance Criteria for determining the required number of judges and fair workload distribution of judges will be possible only in 2020, after implementation of a new judicial information system. The plan did not provide a response to basic observations from the CEPEJ reports, which point out problems in Montenegrin judiciary system. The Plan does not mention very important areas that may affect further development of judicial network rationalization process, such as application of information technologies in Montenegrin judiciary and how enhanced use of information technology may impact increasing the efficiency of Montenegrin judicial system.

### *Recommendations*

- 1 One of the first steps towards further rationalization of Montenegrin judicial system should be sustainability review of existing court network, control of increase in number of judges and state prosecutors, and defining number of courts and judges approximate to European average. However, bearing in mind the content of the Rationalization Plan 2017–2020 and the extent to which further activities regarding rationalization of number of judges and prosecutors in Montenegro will be implemented only after 2020, it remains uncertain in which direction activities of the Government will continue in this essential area of judicial reform.

- 2 A working group must urgently be appointed at the level of the Ministry of Justice with the task to draft a new Rationalization Plan 2017–2020 in a detailed and comprehensive manner, addressing all significant issues and recommendations of international organizations and experts. This is particularly significant in the political context, since analysis of the existing Plan brings us to a clear conclusion that the Montenegrin Government does not have the capacity to continue with activities of judicial reform and that there is no political will to make substantial changes when it comes to rationalization of judicial network in Montenegro.
- 3 The second phase of rationalization of judicial network should be focused on reducing the number of first instance courts, followed by a reduction in the number of judges. Making exception from indicative benchmark guideline which suggests one counsellor per two judges should be considered, depending on the degree of workload of specific judges/courts.
- 4 Based on the performed analysis of functioning of the judicial network, it is necessary to prepare a rationalization plan for network of first instance courts, which will primarily include closure of courts which, from point of view of viability, cannot justify their existence. This primarily regards basic courts in Danilovgrad, Žabljak and Plav. Also, the Ministry of Justice needs to create conditions through project activities which would enable legal experts, professors, and NGOs with developed capacities to become actively involved in this process and to contribute with their own analyses to determining effects of specific measures and activities taken in the process of rationalization of the judicial network.
- 5 In April, 2017 three years will have passed since the introduction of bailiffs, therefore a new analysis of effects of their work to this day should be made, as well as analysis of impact their work had on relieving the work of courts in enforcement proceedings. Particular attention should be paid to the issue of responsibility of bailiffs during performance of professional duties, since this has proved to be a serious issue in the past.

## 2.2 Enhancement of criminal and civil law

Action plan 2014–2016 defines five strategic guidelines in this area (2.2.1 – 2.2.5). Action Plan for Chapter 23 in section devoted to strengthening the efficiency of judiciary does not recognize measures related to enhancement of criminal and civil law.

During reporting period, the most important novelties in the area of criminal law were adopted through the Law on Special State Prosecution Office, Law Amending the Law on Witness Protection, Law Amending the Law on Criminal Procedure. In addition these changes of criminal law, the Law on Seizure of Criminal Asset Benefits, the Law on Customs Service and the Law Amending the Law on Responsibility of Legal Persons for Criminal Offenses were adopted.

Within substantive criminal legislation, amendments to the Criminal Procedure Code of Montenegro have been made three times during the previous period

(2010, 2011 and 2013), with the aim of harmonization with relevant international standards. In 2016, the Ministry of Justice decided to form a working group for reviewing certain provisions of the Criminal Procedure Code of Montenegro (CPCM) and preparation of Draft Law Amending the Criminal Procedure Code of Montenegro. The Draft Law on Amending the CPCM underwent a public debate on January 11, 2017. At the time of preparation of this Report, the Draft Law on Amending the CPCM has not yet been adopted. During public debate, the public had the opportunity to comment and propose suggestions for amendments to the Criminal Procedure Code of Montenegro. Numerous proposals of NGOs have been rejected by the working group, although they were referring to the recommendations of international bodies, such as the UN Committee against Torture and the obligations Montenegro assumed by ratification of international conventions (CEDAW, Istanbul Convention, etc.).

In the area of monitoring compliance of civil law with international standards and EU *acquis*, amendments to the Law on Civil Procedure, the Law on Enforcement and Securing of Claims have been made and a new Law on Private International Law has been adopted. At the end of July 2016, the Law Amending the Family Law of Montenegro was adopted. During the month of November 2016, the Government established proposal of the Law Amending the Law on Bailiffs, which is still in the Assembly consideration procedure.

#### *Recommendation*

It is necessary to monitor the implementation of new laws and newly adopted standards and the effects of their application in the national legal system. Also, it is necessary to continuously review and implement recommendations for improving criminal and civil legislation proposed by the relevant monitoring bodies of international organizations.

### **2.3 Reducing the backlog of cases**

Action plan for implementation of the Judicial Reform Strategy 2014–2016 within the goal 2.3 “Reduction of the number of cases in the backlog” stipulates 9 strategic guidelines (2.3.1–2.3.8) and 16 measures for which the Government in semi-annual reports indicated that are continuously implemented, while a smaller number are realized. Indicator of impact of adequate application of these measures is “efficient and effective judicial system in which cases are solved and enforced within a reasonable time, with encouraging the use of alternative ways of solving disputes”.

According to the annual reports on the work of courts, the number of backlog cases is reduced each year. However, declining efficiency in courts – despite the introduction of notaries in 2011 and bailiffs in 2014 – is also a cause for concern. Namely, for the state to successfully address the backlog in the court system, efficiency rate must be over 100%, which means that the courts should resolve annual influx of cases and on top of that part of the backlog. This was achieved in 2008, 2009, 2010 and 2012, but in 2013, 2015 and 2016 the efficiency rate dropped below 100%, which means that the backlog continued to grow. In addition, Eu-

ropean Commission criticized inconsistency of data for 2015 with respect to the efficiency rate.

Statistics regarding the number of old cases is vague and unreliable. For example, the annual report on the work of courts for 2014 indicates that the number of cases from 1996 was much smaller than indicated in the 2015 report, which raises the question of the actual number of these cases and their whereabouts in the meantime!

Reports of the Ministry of Justice on the implementation of the Right to a Trial Within a Reasonable Time Act have not yet been drawn up so as to identify the achievement of the purpose of this Act – effectively speeding up court proceedings and ensuring fair compensation for the breach of rights. The reports do not contain synthesized statistical analysis of the time limits within which the courts act after granting of a request for speeding up the proceedings (request for review). This shortcoming prevents assessment of the effect of application of these remedies, and later comparison of data. Analysis drafted by Human Rights Action on the implementation of the Right to a Trial Within a Reasonable Time Act for the period 2011–2015 showed, *inter alia*, that in this period every fourth request for review was granted, of which as many as 2/3 did not actually lead to acceleration of the proceedings in due time.<sup>5</sup>

In 2013 partial data on deciding on requests for acceleration of court proceedings (requests for review) was delivered to the European Court of Human Rights, based on which that court in its judgment *Vukelić v. Montenegro* concluded that this was an effective remedy. The submitted data deviate significantly from the data from annual reports on the work of courts as well as the conclusions of HRA analysis on the effectiveness of a request for review in practice – in the period in question there were twice as many requests for review filed compared to the number delivered to the European Court, the number of rejected requests for review was four times higher than the number considered by this court, while in practice requests for review were most likely 32% less effective than the ECtHR concluded on the basis of received information.

Different measures are applied to address the backlog of cases and help courts with greater backlog or shortage of judges – from mobility of judges, delegating cases, improving delivery service, to reporting on the work on old cases and engaging advisers. Annual reports on the work of courts for 2016 as well as for 2015 do not specifically present data on the performance of nine Supreme Court judges who work in the High Court in Podgorica. This information is important because the real needs of Podgorica High Court should be examined through the work of these judges, in the context of rationalization of the court network.

The practice of reallocation of cases among courts, which is extensively applied, threatens the right to a random judge – according to the position of the European Commission as well. This measure is often criticized by the parties and other participants in court proceedings, because as a rule they must travel longer distance to attend the trial, which creates additional costs, but also because of the specific nature of some cases that the courts with primary jurisdiction are considered to be more qualified to resolve.

<sup>5</sup> The Analysis is available at: [http://www.hracion.org/wp-content/uploads/TRIAL\\_REASONABLE\\_TIME\\_ACT\\_2011-2015.pdf](http://www.hracion.org/wp-content/uploads/TRIAL_REASONABLE_TIME_ACT_2011-2015.pdf).

### Recommendations

- 1 Keep accurate statistics by the year of the initial document or provide appropriate written explanation for statistical inconsistencies in the annual reports.
- 2 In the Action Plan 2017–2018 provide for further monitoring of the implementation of legal remedies under the Right to a Trial Within a Reasonable Time Act so as to examine and evaluate their effectiveness. Reports to include statistical indicators on the time limits within which the courts act following the granting of a request for review and deliver notification to the party, particularly with respect to deadlines, which would provide a reliable basis for assessing effectiveness of this remedy for accelerating the proceedings.
- 3 Examine circumstances of delivering partial data to the European Court of Human Rights in order to improve trust in the Montenegrin judiciary.
- 4 In all the programs for resolving old cases analyse the structure of cases – year of the initial document, its nature, judge handling the case, and present specific plans to help judges raise their productivity, for example by assigning advisers, trainees, technical staff, through organizing work differently, etc.
- 5 Audio and video recording of trials would greatly contribute to speeding up the proceedings since dictating of minutes takes at least twice as much time, in addition to being tiring to judges. Further reform to envisage introduction of at least audio recording of trials and transcription of the minutes, which is a widely accepted practice in the countries of the region.

## 2.4 Enhancing judicial management and administration system

Action plan for implementation of the Judicial Reform Strategy 2014–2016 stipulates three strategic directions in the field of enhancing the system of judicial management and administration: adoption of Rulebook on indicative benchmarks for determining the necessary number of judges and other court employees (2.4.1); implement special training programmes for court presidents within continuous training aimed at improvement of the court image; develop mid-term and long-term strategy for the management and development of human resources in the judicial institutions (2.4.3). While a guideline relating to the development of specialization and professional training programmes for judicial office holders is listed among the strategic guidelines in the Strategy, for unknown reasons the said guideline is not to be found among the strategic guidelines of the Action Plan.

Ministry of Justice has adopted rulebooks on indicative benchmarks for determining the number of judges and prosecutors employed in courts and public prosecutors' offices. However, these rulebooks are still based on arbitrary determination of so-called "work norm" that judges and state prosecutors have to meet during the year, while the adoption of rulebook that determines indicative benchmarks

based on actual complexity of the cases on which judges work, in accordance with the Methodology of Indicative Performance Criteria for determining the necessary number of judges and fair workload distribution of judges, adopted by the Judicial Council on the basis of the report of the Working group on the tracking time spent by judge on a case (*Case Weighting Study*) has been postponed until 2020. As provided in the Mid-term Plan for rationalisation of judicial network 2017–2019, the application of this Methodology will be possible only after incorporation of a new information system in the judiciary, and the deadline for implementation of this activity is December 2019.

Strategy of Human Resource Management and Development in Judicial Institutions was adopted in June 2016. The Strategy defines strategic directions for further human resource management and development in the judicial institutions, namely: Judicial Council, courts, Prosecutorial Council, state prosecutors' offices, Judicial Training Centre, and State Prosecutor's office, notaries public and bailiffs 2016–2018. The strategy is based solely on findings from the World Bank Analysis and does not provide a detailed analysis of the available capacity of judicial institutions with particular focus on the number of judges, prosecutors and judicial administration employees, i.e. it does not provide a closer explanation of the real needs in terms of human resources development of the judicial system, which would imply not only investing in existing capacities, but would also imply the need to open new vacancies or cut redundant jobs in the judicial system. Bearing in mind that creation of a sustainable system of judicial management and administration is one of the key challenges for Montenegro, the observations presented in this section cannot be isolated from other parts of the report concerning the rationalization of the court network, development of judicial information system etc. In this context, it is very important to review the contents of Mid-term Plan of Judicial Network Rationalization which indicate that the first activities on rationalization of the number of judges will be possible only after 2020, since the application of objective criteria defined by the Methodology of Indicative Performance Criteria for determining the number of judges and fair workload distribution will be possible only after implementation of a new judicial information system. A number of other matters will depend on this issue, such as human resources planning and development in judicial institutions, recruitment of judicial and prosecutorial trainees, engagement of counsellors and judicial administration, etc. This seems to be one of the most demanding tasks in the next phase of judicial reform in Montenegro.

### Recommendations

- 1 Review the contents of the Mid-term Plan of Judicial Network Rationalization which imply that the first activities on rationalization of the number of judges will be possible only after 2020, since the application of objective criteria defined by the Methodology of Indicative performance criteria for determining the number of judges and fair workload distribution will be possible only after the establishment of a new judicial information system.
- 2 Action Plan for the Implementation of the Judiciary Reform Strategy 2017–2018 should include strategic guideline from the Strategy concern-



ing development of specialization and professional training programmes for judicial office holders.

## 2.5 Alternative dispute resolution

In order to reduce the workload of courts and state prosecution office through increased ways for dispute resolution, the Action plan 2014–2016 stipulates five strategic guidelines: continuing trainings for mediators, judges, public prosecutors and lawyers with the aim of alternative ways for dispute resolution (2.5.1); monitor and analyse development of alternative methods of dispute resolution and take measures to strengthen further this mechanism (2.5.2); adopt a separate law on arbitration in compliance with UNICITRAL rules with the aim of ensuring broader use of this type of resolution of commercial disputes (2.5.3); encourage managerial structures in business enterprises to resolve their disputes by using arbitration (2.5.4) and ensure that the successful engagement of judges in alternative methods of dispute resolution is recognized (e.g. in terms of allocation of workload, performance appraisal etc) and that there are no disincentives in practice which would restrain them in this endeavour (2.5.5). Action plan for Chapter 23 stipulates continued implementation of trainings (1.4.2.7.1), promotional activities in public (1.4.2.7.2), especially in relation to arbitration (1.4.2.7.3). The Government believes that there is no unrealized measures, they are realized or are implemented in continuity.

Although the Judicial Reform Strategy 2014–2018 stated that the principle of mediation should be affirmed particularly in court cases in which the respondent is the state of Montenegro, there was no specific measure prescribed to that end. In 2015 cases in which the state was a party to proceedings, there was only one successful case of mediation, while in 2016 there was not a single attempt to make use of mediation. It is estimated that around € 33 million was paid from the state budget in the period from 2012 to 2015 only for the legal costs of disputes that the state lost.

In its report on Montenegro for 2016 the European Commission stressed that alternative dispute resolution is not used systematically. One of the reasons for this is that the judges do not respect the obligation under the Mediation Act to refer parties to meet with a mediator. In 2015 only 1.5% of civil cases in Montenegro were referred to mediation. There is no record kept on whether and to which extent judges individually apply that obligation. Reports on the application of AP 2014–2016 contain no information on the implementation of measure 2.5.5, which was supposed to ensure that the successful application of alternative methods of dispute resolution by judges be recognized, and that in practice there would be no measures to deter judges from that.

Arbitration Act was adopted in late July 2015, and Arbitration Rules before the Court of Arbitration at the Chamber of Commerce of Montenegro as well as Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) were adopted in mid-November 2015. Also, promotional activities were organized in 2016, but in commercial matters the jurisdiction of courts is still contracted by default, while there are few arbitration proceedings.



Other strategic measures aimed at the promotion of alternative dispute resolution methods, monitoring of the application of such dispute resolution, training and awareness-raising have been applied. However, public opinion polls still show that the public is not well informed on this topic, same as the judges and competent persons in commercial entities, who are still not sufficiently aware of the benefits of resolving disputes outside the court.

### *Recommendations*

- 1 Prescribe specific measure in the new Action Plan for the implementation of the Judicial Reform Strategy 2014–2018 to oblige the Government in each case in which it is a party to proceedings to agree and attempt to resolve the dispute through mediation or arbitration instead of trial, and ensure that the Protector of Property Law Interests of Montenegro, representing the Government, acts accordingly. Also, ensure the monitoring and analysis of implementation of this measure.
- 2 The new Action Plan to ensure that the state invest much more in encouragement of all alternative dispute resolution methods. For example, the Government should encourage the use of mediation through subsidies, i.e. take part in the financing, by financing all first meetings with the mediator, all mediations in a certain period or in a certain type of proceedings.
- 3 Increasing awareness about the benefits of alternative dispute resolution should be improved through intensive media campaign; provide the means for more promotional activities and training of judges, prosecutors and commercial entities.
- 4 Ensure that there are mediators in all municipalities in Montenegro, not only in those where there is a court.
- 5 In order to monitor the application of the legal obligation of judges to refer parties to mediation, introduce new sections for judges in the judicial information system PRIS to include questions whether the case was referred to mediation in accordance with Art. 27a of the Mediation Act, and, if not, for which reasons.
- 6 Together with the lawsuit, or reply thereof and notice of the hearing, the court should deliver a brochure on mediation to parties prior to commencing the trial.
- 7 Continue with the practice of organizing “settlements week” and expand it to include all courts.
- 8 Introduce special evaluation of the number of cases referred to mediation by a judge by amending the Rules on the assessment of judges and court presidents.
- 9 Promote mediation also within the principle of opportunity for criminal prosecution and when deciding on property claims, in accordance with the Criminal Procedure Code.

Note: For recommendations for improving the quality of mediation in Montenegro, see the report “Mediation in Montenegro”, Human Rights Action, January 2017.

## 2.6 Further development of judicial information system (PRIS)

Within strategic goal Strengthening Judicial Efficiency, Judicial Reform Strategy 2014–2018 implies “further development of the Judicial Information System (PRIS)”. The Action Plan for Implementation of the Judicial Reform Strategy includes implementation of ten strategic guidelines (2.6.1 – 2.6.10) in the context of realization of this strategic goal.

There have been no positive shifts in the functioning of the judicial information system over the past two years. On the contrary, insufficient reliability of statistical data produced by this system, as estimated in the EC report, used for the most part for the preparation of annual reports on work of the courts, raises doubts about reliability of the information contained in the work reports and overall statistics presented by competent judicial institutions to both domestic and international public. This is also supported by the statement of an independent EU expert who, in the report from August 2016, concluded that PRIS became “a major burden for Montenegro” in context of meeting AP measures for Chapter 23 that have been delayed due to PRIS-related problems and inability to upgrade PRIS. The EU expert also noted a significant number of “undocumented changes in the database and data structure”, which further jeopardized trust in the system and the Judicial Council, which did not take steps to investigate this expert’s statement.

In mid-2016, a new ICT Strategy (Strategy of Information and Communications Technology in Judiciary) was adopted for the period 2016–2020. The Strategy noted that there was no co-ordination between the Ministry of Justice, the courts, the State Prosecutor’s Office and the Directorate for enforcement of criminal sanctions regarding implementation of the Judicial Information System in the past, which caused uneven development and uneven functioning of the system, as well as brought us to current situation where we have no integrated IT system at judiciary level in Montenegro today.

One of key strategic guidelines in AP 2014–2016 is implementation of “paperless court” concept (2.6.2.1), which has not been implemented in practice. However, in the second, third and fourth semi-annual report, this strategic guideline has been evaluated as ongoing, however, no information on realized activities which could confirm this was provided any of the three reports. In all three said reports, the column containing description of activity realization contains blank field, with note that the measure is “continuously implemented”.

Normative framework for keeping court statistics is harmonized. In accordance with the Law on Judicial Council and Rights and Duties of Judges, the Law on Courts and the Guidelines on Drafting of Judicial Statistical Reports on the Work of the Courts, in line with the European Commission for the Efficiency of Justice (CEPEJ) guidelines, issued by the Judicial Council in December 2014, court statistics will be drafted and published by the Secretariat of the Judicial Council.

The Guidelines accepted CEPEJ Guidelines and CR indicator (*clearance rate*) defined as ratio between new cases and completed cases during given period in percentages, thus solving earlier concerns about the problem of defining “promptness” of court work in reports.

However, HRA recommendation on including publication of information on overall duration of the proceedings in Annual Report on the Work of Courts was not accepted, although Guidelines contain “Table 4 – Duration of the proceedings from filing act to the finality of judgement”. In its 2016 report on Montenegro, the European Commission concludes that data on overall length of proceedings are not yet available.

Recommendation that the annual report should include information on obsolescence of criminal cases and obsolescence in execution of criminal sanctions was not accepted, therefore keeping statistics on this information is not required by the Guidelines, nor is it included in Annual Report. Record on obsolescence of execution of the sentence in the Annual Report is kept only for Misdemeanour courts.

The Guidelines do not provide for keeping special statistics on divorce proceedings, dismissal labour disputes, robbery and premeditated murder cases (according to GOJUST), although this would be useful for comparing data with other countries.

The new ICT Strategy is not harmonized with the priorities of the Judicial Reform Strategy 2014–2018, since the Judicial Reform Strategy 2014–2018 does not include development of a new “Integrated Information System (ISP)” as provided by the ICT Strategy, and this should be amended. It turned out that the plan from the Judicial Reform Strategy 2014–2018 on upgrading existing PRIS is not possible without implementation of a new information system.

### *Recommendations*

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Regarding recommendations supplied by HRA and CeMI in Report from July 2015, the following should be taken into account:

- 1 Provide an investigation into the findings of the EU expert on a significant number of undocumented changes in PRIS structure and database.
- 2 Guidelines on the Creation of Judicial Statistics on the Work of Courts should include information on overall length of court proceedings, number of cases of obsolescence in criminal cases and obsolescence in execution of criminal sanctions, special statistics on divorce proceedings, dismissal labour disputes, robbery and premeditated murder cases (according to GOJUST).
- 3 Judicial Reform Strategy and the new AP should be harmonized with ICT Strategy.
- 4 Access to new information system should be provided to citizens as well, like it has been done in Croatia (<http://epredmet.pravosudje.hr/>), so that citizens can check the status of a particular case based on daily updated data (this not only keeps citizens informed, but also relieves the courts of the obligation to provide such information).

### 3 MONTENEGRIN JUDICIARY AS PART OF THE EUROPEAN JUDICIARY

3.1 Further development of the international and regional judicial cooperation

3.2 Further development of institutional cooperation at the international and regional level

3.3 Capacity building of judicial office holders and employees in judicial institutions in the area of implementation of EU law

### 3 MONTENEGRIN JUDICIARY AS PART OF THE EUROPEAN JUDICIARY

The Strategy for the Reform of the Judiciary 2014–2018 recognized a new strategic goal – Montenegrin judiciary as a part of the European judiciary. Measures and activities that Montenegro will undertake in regional and international judicial cooperation, within the framework of a new phase of reforms have been planned within this goal. The goal is divided into three strategic guidelines: further development of international and regional judicial cooperation (3.1); further development of institutional cooperation at the international and regional level (3.2); capacity building of judicial office holders and employees in judicial institutions in the area of implementation of the European Union law (3.3).

In the area of normative changes, in the field of the international legal aid in civil matters, the International Private Law Act came into force in early 2014, regulating the rules designating applicable law in private law matters with international implications, the rules on the jurisdiction of judicial and other authorities to hear such actions, rules of procedure, as well as rules for the recognition and enforcement of foreign judgments and arbitration awards, and of decisions of other authorities. Pursuant to the obligations from the accession process in Chapter 24, during 2017, based on the recommendations of the European Commission and EU experts in order to achieve harmonization of national legislation with the EU *acquis* in the field of judicial cooperation in criminal matters there will be on amendments to the Law on Mutual Legal Assistance in criminal matters. In fact, a uniform law on judicial cooperation in criminal matters with EU member states will be developed.

In the field of institutional cooperation, on 3 May 2016 Montenegro signed an agreement on cooperation with EUROJUST (EU body dealing with judicial cooperation in criminal matters).

During 2015 and 2016 international judicial cooperation in civil and criminal matters intensified. An increase of cases in the context of judicial cooperation in criminal matters is especially apparent. In two cases of the legal assistance in criminal matters which caused great public interest, it was observed that Montenegro demanded extradition contrary to Art. 8, paragraph 1, item 3 of the Extradition Treaty between Montenegro and Serbia. In both cases, the Court of Appeals in Belgrade rejected as unfounded the request of the Ministry of Justice for the extradition of citizens of Montenegro and referred to the Treaty, which provides that extradition shall not be granted if the offense, for which extradition is sought, was committed in the territory of the requested State.

The new electronic system for monitoring in the field of judicial cooperation (Luris) has been fully operational since January 2016, as noted by the European Commission in its recent report on Montenegro for 2016. This system allows the Ministry of Justice to process data and keep records of cases of international legal assistance in both civil and criminal matters.

Bearing in mind that all four semi-annual report on implementation of the AP 2014–2016 noted that in the reporting period there were no new hiring in the Directorate for International Legal Assistance at the Ministry of Justice, it can be concluded that the Ministry of Justice currently does not have sufficient capacity to effectively respond to numerous requests in the function of the central organ of communication procedures to provide mutual legal assistance.

In the field of improving capacity of judges and prosecutors and employees in judicial institutions in the field of application of the EU acquis, trainings have been carried out continuously.

### *Recommendations*

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- 1 Amend AP to include the measure that will consider amendments to the bilateral agreements with the countries of the region, taking into account the conclusions of the analyzes of the Ministry of Justice that these contracts in the part regulating direct cooperation are incomplete or cooperation is limited to the so-called general legal aid. In this process, consider requirements presented by NGOs to Croatian and Montenegrin governments' regarding inclusion of subsequent extradition of their own citizens charged with war crimes.
- 2 Urgently strengthen the capacity of the Ministry of Justice regarding the recruitment of new employees in the Directorate for International Legal Assistance.
- 3 Continue with the implementation of training programs for judges, prosecutors and employees in judicial institutions in the field of application of the EU acquis.



## 4 INCREASING THE ACCESSIBILITY, TRANSPARENCY AND PUBLIC TRUST IN THE JUDICIARY

4.1 Further harmonization and  
publication of case law

4.2 Improvement of the free legal aid  
system

4.3 Improvement of transparency of the  
work of judicial institutions

4.4 Enhancing judicial buildings'  
infrastructure and security systems and  
physical access of special categories of  
people to judicial institutions



## 4 INCREASING ACCESSIBILITY, TRANSPARENCY AND PUBLIC TRUST IN JUDICIARY

### 4.1 Further harmonization and publication of case law

In order to achieve uniform and available case law that is in line with the standards of the European Court of Human Rights (ECtHR), the AP 2014–2016 prescribed the following strategic guidelines: Work on harmonization of the national case law and European Court of Human Rights case law (4.1.1); Continuously raising the level of awareness of holders of judicial function about the case law of the European Court of Human Rights (4.1.2); Strengthen capacities of the Supreme Court Department for monitoring European Court of Human Rights case law particularly in the part for analysing, translating and accessing the overall case law for judges and public prosecutors (4.1.3); Increase the level of knowledge and information that holders of judicial function have about the legal system of the EU, role and case law of the European Court of Justice (4.1.4). Measures and activities set forth for the application of these guidelines include translation of ECtHR decisions with respect to Montenegro, selection and translation of other relevant decisions and their publication on the website of the Supreme Court, following the ECtHR practice through PRIS and organizing trainings. Government reports indicate that these guidelines, i.e. measures and activities are implemented continuously, and provide information on the specific activities carried out.

Although the Strategy envisages work on the “harmonization of national case law and case law of the European Court of Human Rights”, the AP does not provide specific activity to that end apart from publishing translations of the decisions of this court. In addition, although the Strategy calls for strengthening the capacity of the Supreme Court Department for monitoring European Court of Human Rights case law – particularly with regard to analysing the case law, the only activity for the implementation of this measures envisaged by the AP is publishing of translations of the ECtHR decisions in cases against Montenegro.

Through the website of the Supreme Court of Montenegro, judges, prosecutors and the general public have access to translations of almost all judgments and several decisions of the European Court of Human Rights in relation to Montenegro, as well as translations of over 80 judgments rendered in important cases against other states. Judges and prosecutors were informed that they can also access Database of European case law on human rights that is intended for the countries of South-eastern Europe <http://www.ehrdatabase.org/Index>, which also contains translations of judgments that are classified in line with the article of the European Convention on Human Rights to which they relate. A number of trainings were carried out on the subject of the European Convention on Human Rights and the European Court of Justice. In other words, preconditions have been provided for the consistent application of international human rights standards in the practice of regular courts and state prosecutor's offices, without having to

protect human rights only before the Constitutional Court or the European Court of Human Rights.

The Supreme Court of Montenegro should have a decisive role in the harmonization of case law, in accordance with its constitutional jurisdiction. Through adoption and publication of legal positions and legal opinions of principle importance, this court should also ensure implementation of the standards of the European Court of Human Rights.

Judges and prosecutors at the highest instance must also participate in the continuous training on international human rights standards. In this context, we wish to draw particular attention to the fact that in its annual reports on Montenegro the European Commission concluded that rulings of the Supreme Court of Montenegro pertaining to war crimes were contrary to both domestic and international law, while the ECtHR in nine judgments found that the Supreme Court of Montenegro violated the European Convention on Human Rights, as well as that in two cases the state prosecutors were responsible for failure to carry out criminal prosecution in the case of torture.

### *Recommendations*

- 1 Prescribe specific activities in the new AP to harmonize national jurisprudence and case law of the ECtHR, such as making analysis of judgments in relation to Montenegro in which this court established a breach of the European Convention on Human Rights and taking concrete measures to prevent similar situations.
- 2 Strengthen capacity of the Supreme Court Department for analysing case law of the ECtHR and prescribe the obligation to draft and publish annual reports on the work of this Department.
- 3 Set forth the obligation of the Supreme State Prosecutor's Office to make a comparative analysis of the ECtHR case law relevant to the work of state prosecutors, e.g. in relation to the obligation to conduct an effective investigation and prosecute violations of the right to life and absolute prohibition of torture and other ill-treatment, in relation to the practice of the state prosecutor's office in Montenegro, with conclusions and recommendations for further action in practice

## **4.2 Improvement of the free legal aid system**

Within the strategic goal of strengthening accessibility, transparency and public trust in the judiciary, improvement of the free legal aid system has been identified as one of the key goals in Judicial Reform Strategy 2014–2018. The following strategic guidelines were set for the improvement of free legal aid system: ensure higher level of awareness of the general public on the free legal aid system (4.2.1); improve the legal framework through the amendments of the Law on Free Legal Aid (4.2.2); develop mechanisms and indicators for monitoring the quality of the process of provision of free legal aid (4.2.3); improve cooperation between the legal aid services in basic courts and NGOs that deal with protection of vulnerable

social categories with the view to promoting the institute of free legal aid among the potential users from this group (4.2.4); affirm the free legal aid system among students of law through the implementation of the curricula for legal clinics in the schools of law of the universities in Montenegro (4.2.5).

The law was improved in 2015 by recognizing that the victims of domestic violence are also entitled to free legal aid. However, free legal aid in administrative procedures has not yet been envisaged; the same applies for victims of abuse by government officials. In addition, the law does not stipulate that, in addition to lawyers, free legal aid can be provided at the expense of the state by non-governmental organizations dealing with human rights, trade unions, political parties, university legal clinics and other entities that have the necessary expertise and already provide legal assistance.

Free legal aid offices have been opened in all basic courts in Montenegro. In the period from 2012 to 2016 (1 October 2016), a total of 3009 requests were filed for the provision of free legal aid, of which 2414 (80.22%) were granted. Implementation of the Free Legal Aid Act indicates that the most frequent users of the right to free legal aid are welfare beneficiaries and indigent persons, slightly less represented are persons with disabilities and victims of crimes of domestic violence and human trafficking.

During 2016 non-governmental organizations CEMI and HRA conducted a public opinion poll that showed that citizens do not have sufficient information and knowledge about the rights and possibilities offered by the Free Legal Aid Act. As many as 78.7% of citizens are not familiar with the rights offered under this law.

The situation has not changed significantly since the previous HRA and CeMI report from July 2015; therefore, we reiterate the same recommendations.

### *Recommendations*

- 1 Prescribe measure by the AP to develop analyses with the aim of improving the Free Legal Aid Act. Priority should be developing expert analyses on: examining the possibilities of providing free legal aid in administrative procedures; defining the status of NGOs as entities authorized for providing free legal aid; considering the possibility of expanding the circle of direct beneficiaries of the right to free legal aid to certain categories such as victims of torture or ill-treatment, children who do not receive alimony, etc.
- 2 It is necessary to urgently define an authority/body to monitor the provision of free legal aid services and specific methodological basis for monitoring the work of lawyers and assessing the quality of provided free legal aid.
- 3 Include measure and activities in the new AP to improve cooperation between judicial institutions and non-governmental organizations that provide free legal aid by defining and organizing events together (round tables, debates, etc.), defining procedures for referral of cases from the courts to NGOs, promotional activities, research opinion polls, etc.
- 4 Continue affirmation of the free legal aid system among law students through implementation of programs of clinical education for young lawyers in Montenegro.

### 4.3 Improvement of transparency of the work of judicial institutions

Action Plan for the period 2014 – 2016 is considerably more substantial when it comes to this strategic guideline as compared to previous action plans and includes a set of measures: continuously improve the level of awareness of the citizens about the possibilities to obtain information from judicial institutions (4.3.1); further strengthen transparency of the operation of the Judicial and Prosecutorial Council (4.3.2); develop capacities of judicial institutions for public relations through the training for public relations officers (4.3.3); regularly update websites of the court, state prosecution service, Judicial Council and Prosecutorial Council (4.3.4); improve the level of awareness of citizens about the work of court experts, notaries, public enforcement officers and other professions (4.3.5); publish all judgments and annual reports on the operation of courts promptly in the Internet (4.3.6).

Although creating of websites of courts has somewhat improved availability of information on the practical work of judicial authorities and their decisions, the work of these institutions in this respect was not satisfactory, particularly bearing in mind the findings of NGO CDT according to which 11 courts still very rarely update their website.

Web portal of Montenegrin courts [www.sudovi.me](http://www.sudovi.me) remains the most important source of information for professional and general public that provides a certain level of information on the functioning of courts, the Judicial Council and Training Centre for Judges and Prosecutors. Final, i.e. enforceable decisions of courts are uploaded to the portal, but not the first instance decisions, even in cases which cause particular interest of the public, which jeopardizes the principle of publicity of the courts. Uploading of final court decisions still takes too long and is not done regularly due to lengthy process of anonymization, which prevents the general and professional public to obtain timely access to court decisions.

Practice has been established recently to upload audio recordings of closing arguments of the parties and defence in criminal proceedings to the websites of all courts, as well as decisions of the panel or a single judge, in all cases for which there is great public interest. During 2016, audio-visual recording of the trial in a criminal case was approved for the first time.

Judicial and Prosecutorial Councils have in the previous period improved the transparency of their work through publishing of decisions, minutes of meetings, etc., as well as by enabling representatives of NGOs to monitor their sessions. There are documents relating to evaluation and disciplinary liability that the Prosecutorial Council refused to submit, even anonymized; we find this to be unjustified, and we have launched proceedings against such decisions before the Agency for the protection of personal data and free access to information.

In the previous period, the practice of holding regular press conferences at the level of all courts in Montenegro was established, with the aim of presenting the results of work to the local community and wider interested public through the media on a national level. This is certainly one of the positive steps that has been made in the past.

Transparency of work of the state prosecutor's office has improved in the previous period, with further room for improvement as regards publication of integral texts of confirmed indictments and plea agreements at the level of all offices.

Transparency of work of the Constitutional Court is limited, given that this Court has not developed the practice of uploading decisions to its website.

### *Recommendations*

- 1 All courts should establish the practice of regular updates to their website, particularly with regard to publishing of judicial decisions, which is still very slow due to anonymization. The courts should establish a practice of publishing of all decisions – including the first instance, especially in cases that cause particular interest to the public.
- 2 Although in the past period transparency of state prosecutor's offices has improved, confirmed indictments and plea agreements should be published, too.
- 3 Seeing that the transparency of the Constitutional Court raises serious concerns, it is necessary to define additional measures in the Action Plan 2017–2018 to improve the transparency of the Constitutional Court of Montenegro through publication of decisions and information relevant to this institution's work on its website.
- 4 The AP for implementation of the Strategy for the period 2017–2018 should include activities to particularly influence representatives of the academic community and trade union organizations to contribute to better informing of citizens about the work of judicial bodies.

## **4.4 Enhancing infrastructure and security systems of judicial buildings and physical access to judicial institutions for special categories of persons**

Strategic goal concerning the improvement of infrastructure and security of judicial facilities and physical access to judicial institutions for special categories of persons provides for the implementation of four strategic guidelines: improve spatial capacity of judicial institutions (4.4.1); continuously improve security of judicial buildings and conditions for adequate placement and equipment in judicial authorities (4.4.2); invest additional effort to adapt entrances to the buildings of judicial institutions for persons with disabilities, and equipping the buildings with special equipment that will ensure easy movement for persons with disabilities and their exercise of the right to access to justice fully in all judicial institutions in Montenegro (4.4.3); improve rules and practices for treating vulnerable categories (minors, victims, persons with disabilities) (4.4.4).

There have been no significant changes when it comes to this subject. Very little is invested in the construction of new and renovation or modernization of existing buildings of judicial institutions.

Security at court buildings is extremely low. Analysis of the state of security at judicial facilities from May 2016 shows no improvement compared to the situation shown in the 2008 analysis. Other questions that remained open are uniform education of security staff, the number of staff, technical equipment and physical preconditions of facilities accommodating judicial institutions.

The Supreme Court's analysis of access to the courts for persons with disabilities from 2015 found that the state of the justice system in this regard is not satisfactory, since of 21 courts full and unimpeded access to the court premises is possible in only three. A lift was installed in the Basic Court in Podgorica, but heavy doors lead to it, which hinders approach to the lift on one's own. A lift was also installed in the building accommodating the High Court, Appellate Court and Supreme Court. Research conducted by UMHCG (*Association of Youth with Disabilities of Montenegro*) showed that out of 10 basic public prosecutor's offices, none have met the accessibility standards.

Neither the Directorate of public works nor the representatives of judicial institutions consulted with representatives of non-governmental organizations in the preparation of infrastructure projects related to improving the accessibility of buildings of judicial institutions for persons with disabilities, which has led to adaptation of judicial building not in accordance with standards.

Considering that the recommendations addressed by CeMI and HRA in July 2015 to judicial institutions have not been realized to date, once again we wish to point out that it is necessary to take concrete and urgent measures for ensuring unimpeded access to persons with disabilities to all judicial institutions.

The Act on the Compensation of Victims of Violent Crimes was adopted on 26 June 2015. One of the main characteristics of this law is that it will be applied only upon the accession of Montenegro to the European Union. Although the measure from the AP has thus been realized, the position of this vulnerable category is not substantially improved. On the contrary, given the content of the law and its application only after the accession of Montenegro to the EU, which is uncertain, the state has not expressed its readiness to provide effective protection of legal interests of victims of violent crimes. In this context, initiative of NGO Centre for Women's Rights is quite an important one – proposing that the amendments to the Act on the Compensation of Victims of Violent Crimes in more detail and more comprehensively regulate the conditions and procedures for exercising the right to compensation for victims, and the establishment, competence, organization and financing of the Fund for compensating victims of violent crimes.

### *Recommendations*

- 1 Include concrete measures, actions and deadlines in the new AP to urgently provide access to persons with disabilities to all judicial institutions.
- 2 Prescribe measure for the strategic guideline 4.4.3. so as to set a deadline for ensuring physical access to buildings of all courts and prosecutor's offices, with preliminary development of project documentation for the execution of works in the mentioned facilities in the shortest possible time.
- 3 Harmonize term "persons with special needs" (activity and indicator under measure 4.4.3.1. in the AP 2014–2016) with the UN Convention on the Rights of Persons with Disabilities.

- 4 Involve NGOs (e.g. Association of Youth with Disabilities of Montenegro) in the preparation and implementation of infrastructure projects related to improving the accessibility of buildings of judicial institutions for people with disabilities.
- 5 The Ministry of Justice should urgently consider the initiative of NGO Women's Rights Centre for amending the Act on the Compensation of Victims of Violent Crimes and establish a working group to work on proposals of this organization for improving the legal framework in this area – particularly in terms of a final position on the establishment of Fund for compensating victims of violent crimes, which would be financed from the budget of Montenegro (0.1%) and other sources (from perpetrators of criminal offences, funds obtained by selling confiscated proceeds acquired through criminal activity, assets acquired by concluding plea agreements, payments incurred by applying the institute of deferred prosecution, fines, donations of domestic and foreign natural and legal persons, payments of companies based on insurance contracts and from revenue from games of chance, etc.).

# 5 DEVELOPMENT OF JUDICIAL INSTITUTIONS AND OTHER INSTITUTIONS WORKING WITH JUDICIARY

5.1 Ministry of Justice

5.2 Judicial Council

5.3 Prosecutorial Council

5.4 Judicial Training Centre

5.5 Judicial and other  
professions

5.5.1 Lawyers

5.5.2 Notaries

5.5.3 Public enforcement  
officers

5.5.4 Mediation Centre  
and mediators

5.5.5 Court experts

5.5.6 Court interpreters



## 5 DEVELOPMENT OF JUDICIAL INSTITUTIONS AND OTHER INSTITUTIONS WORKING WITH JUDICIARY

The fifth objective “Development of judicial institutions and other institutions working with the judiciary” envisages development of the Ministry of Justice, Judicial and Prosecutorial Councils, Training Centre for Judges and Prosecutors, as well as judicial and other professions working with the judiciary (lawyers, notaries, bailiffs, mediators, expert witnesses and court interpreters).

### 5.1 Ministry of Justice

Three strategic guidelines provided for the development of the Ministry of Justice are: improvement of the professional capacities to monitor the process of European integration (5.1.1), through the strengthening of professional capacities, training and recruitment of new staff; increasing the number of employees in the Directorate for Judiciary, Directorate for Execution of Criminal Sanctions and Directorate for International Cooperation and European Integration (5.1.2) and continuous training of staff (5.1.3). The Government’s semi-annual reports indicated that the measures have been carried out, or are carried out continuously, except for the measure 5.1.2.1 considered to be not yet implemented with regard to increase in the number of employees (5.1.1.1).

Implementation of the measure which calls for reorganization of job systematization and recruiting of new employees (5.1.2.1) has been delayed.

#### *Recommendation*

Given that the Ministry of Justice currently employs just over 60% of the planned number of staff (58 of 96), and that the recruitment of new workforce is delayed because of delays in drafting of the new Rules on systematization, it is necessary to urgently draft the new Rules and hire necessary staff accordingly. With regard to strengthening the capacity of the Ministry of Justice to supervise the work of notaries, see 5.5.2, and with regard to the Directorate for International Legal Assistance see chapter 3.

### 5.2 Judicial Council and 5.3 Prosecutorial Council

For the Judicial and Prosecutorial Councils see chapter 1.1.4 “Improving administrative capacity of the Judicial Council and Prosecutorial Council”, and chapter 1.1.6 “Strengthening financial independence of the judiciary”.

## 5.4 Training Centre for Judges and Prosecutors

The AP foresaw the strategic guideline: “Improve organizational structure and institutional capacities of the Centre to contribute to the improvement of the human resources of the Centre, which will have a positive impact on strategic planning, improvement of the evaluation, analysis of the needs for training, reduction of overlapping of activities and development of realistic plans for annual training curricula” (5.4.1). Its application was planned through three measures: “develop the needs assessment” (5.4.1.1) through development of the analysis of budgetary funds necessary for financing implementation of initial and continuous trainings, with recommendations for future model of the organization and functioning of the Centre, followed by “define and adapt legislative framework” (5.4.1.2) and “ensure sufficient administrative capacities” (5.4.1.3). The Government considers all the measures implemented except the last, which is considered to be partially realized.

In the AP 23, under recommendation 1.4.4. “Ensure effective operation of the Centre for Judicial Education” almost identical activities as in the AP were specified. Last fourth semi-annual report on implementation of the AP for Chapter 23 shows that this recommendation has been implemented in part because resources for the Centre were only partially provided.

The Centre did not dispose of funds in accordance with the Act on Training in Judiciary. There were delays in implementation of the measure which was due in December 2015, because of the failure to provide sufficient budget resources to the Centre and employ enough people in accordance with the act on systematization.

### *Recommendation*

Ensure the necessary conditions for operation of the Training Centre for Judges and Prosecutors in the form of funds provided for by law and enable employment at the Centre as planned.

## 5.5 Judicial and other professions working with the judiciary (lawyers, notaries, bailiffs, mediators, expert witnesses, court interpreters)

### 5.5.1 Lawyers

Strategic guidelines envisaged for lawyers were: Amend the Law on Law Practice with the view to ensure that it is in line with the EU standards – so that lawyers from EU Member states can do representation before judicial bodies in Montenegro (5.5.1.1); Strengthen the system of responsibility of lawyers in terms of accountability for unconscientious provision of legal assistance (5.5.1.2); Revise the Decision on the amount of fee for the work of lawyers appointed ex officio (5.5.1.3); Adopt new tariff for lawyers services in line with the amendments to the Law Practice (5.5.1.4).

Of those four strategic guidelines the Government considers that two as realized, and some of the activities to be realizing in continuity, while revision of the Decision on the amount of fee for the work of lawyers appointed ex officio was not realized (which was under the jurisdiction of the Bar Association) and new tariff for lawyers services is not yet adopted.

In March 2017 the Law on Advocacy, was amended. The Law prescribes the rules of engagement of a lawyer from the EU member states in Montenegro, which will enter into force when Montenegro becomes member of the EU. By these amendments it is provided that the Government of Montenegro gives its consent to the tariff for lawyers.

Although fundamentally nothing has been done in relation to the strengthening of the accountability of lawyers in terms of quality of providing free legal aid, the measures envisaged to establish a mechanism of control were not implemented, especially in terms of prescribing clear and responsible criteria for assessing the performance and quality, as it was planned, it was concluded that the activities were implemented because such a mechanism already existed i.e. unneeded activities are prescribed because “the body before which the proceedings are conducted in which legal aid was granted takes care on quality of legal assistance ex officio” and a Bar Association has disciplinary prosecutor and the court, etc.

In this context it was pointed to a case from 2015, when the disciplinary prosecutor denied competence on the complaint by the three NGOs filed against a lawyer who represented ex officio a foreign national by practically not doing anything for the defense, while competent judges did not react. This case, other knowledge of NGOs and the prevailing sense of clients helplessness that otherwise receive free legal aid, speak in favor of the establishment of the control system of providing free legal aid that is unjustifiably not established. This issue is also discussed in chapter 4.2.2.

### *Recommendations*

- 1 In a new Action Plan reintroduce the measure of monitoring cases of free legal aid and quality of legal aid as lawyer's services (5.5.1.2.1) and apply all the originally planned activities in a serious way.
- 2 Revise the Decision on the amount of fee for the work of lawyers appointed ex officio which was supposed to be done in 2015, or disclose why it is no longer necessary to do so.

## **5.5.2 Notaries**

The AP in relation to notaries envisages the following strategic guidelines: amend the Notaries Act, particularly in the part that refers to the reasons for liability of the notaries and the procedures for establishing liability (5.5.2.1), further develop the service of notaries with the view to appointing notaries on all positions and official seats (5.5.2.2), strengthen capacities of the Ministry of Justice and the courts for supervising the work of notaries (5.5.2.3), establish electronic networking of all offices of notaries (5.5.2.4), ensure electronic networking of all offices of notaries with the records of the Real Estate Administration (5.5.2.5) and conduct

continuous education of notaries (5.5.2.6). The Government considers the measures provided under these strategic guidelines to be realized or states that they are carried out continuously.

The Act Amending the Notaries Act has been adopted. Further development of notarial system in the direction of the appointment of notaries on all positions and at all official seats was ensured in terms of completed annual analyses of the work of notaries and announcement of ads for the appointment, as well as promotion of notarial system by the Notary Chamber through distribution of flyers to courts and public appearances in the media. With regard to strengthening the capacity of the Ministry of Justice and the courts for the purpose of supervising the work of notaries, activities were carried out on drafting the Analysis of existing administrative capacities, supervision plan was announced, also, Analysis of the work of notaries was carried out with special emphasis on their work in probate cases in June 2016. Trainings for notaries are implemented continuously in accordance with the Plan of the Notary Chamber.

Notaries were not appointed in the municipalities of Plav, Plužine, Žabljak, Šavnik, Kolašin, Mojkovac and Andrijevica to date, despite the fact that the Rules on the number of positions and official seats of notaries for the territory of Montenegro specify establishing official seats of notaries in the said municipalities.

Neither the Action Plan, nor the latest Report on its implementation provides concrete measures to motivate relevant workforce to carry out notary functions in these municipalities.

In the context of strengthening supervision of the Ministry of Justice, it was noted that even though the action plan for IV quarter of 2015 envisaged additional employment of staff in the Directorate for supervision with the Ministry of Justice for carrying out supervision over the work of notaries and bailiffs, this activity was not implemented because of delays in development of the Rules on internal organization and systematization of the Ministry of Justice, which is ongoing.

For technical reasons in the Real Estate Administration, software platform to network together notary offices and Real Estate Administration has not yet been put into operation. Even the original plan to network together all notary offices was stalled because the Notary Chamber was informed by the Real Estate Administration that its electronic system would network together all offices of notaries simultaneously with establishing the connection between notaries offices and this Administration.

### *Recommendations*

- 1 It is necessary that the Notary Chamber and the Ministry of Justice jointly determine a plan of activities and concrete measures to encourage adequate workforce to carry out notarial services in municipalities in the north where not a single notary has been appointed, as the measures foreseen in the Action Plan have proved to be ineffective, with special emphasis on municipalities Kolašin and Žabljak, in order to unburden the courts in the area of mandatory certifying of documents and conducting of probate procedures.

- 2 Consider the possibility of subsidizing notaries appointed to work in the said municipalities by the state – the Ministry of Justice, in the part related to establishing and equipping of a notary's office as well as employment of personnel working in notarial offices, and possibly some tax incentives – exemption, because these are municipalities with reduced scope of economic activity and a small population.
- 3 Set a deadline for the Government to adopt amendments to the Rules on internal organization and systematization in the Ministry of Justice. Upon its adoption, it would be possible to immediately continue to advertise vacancies for employment in the Ministry of Justice to perform more frequent and more effective supervision over the work of notaries and bailiffs, improve their efficiency and quality in work, with the purpose of monitoring efficiency of the implementation of specific goals defined in the Strategy.
- 4 Harmonize the Plan of direct supervision of notaries with the courts as well, and determine the required number and structure of personnel carrying out such supervision with regard to the quality of work in dealing with entrusted probate cases, given that so far only indirect control has been carried out through drafting of semi-annual reports, which the notaries in accordance with the Non-contentious Proceedings Act submit to basic courts that entrusted these cases to them.
- 5 Continue with networking together all notary offices pending the establishment of an information system which would connect notary offices with the Real Estate Administration, since the software solution for the implementation of these activities has already been completed, as well as the plan for maintenance of this software system.

NOTE: Human Rights Action will shortly publish a special report on notaries in Montenegro, including a detailed description of the current state and additional recommendations related to the development and improvement of the quality of work of notaries in performing activities within their jurisdiction, establishing of legal certainty in the activities of trade in real estate which are the responsibility of notaries, as well as in relation to implementation of the Act on State Surveying and Cadastre of Immovable Property.

### 5.5.3 Bailiffs

After a couple of years of preparatory activities, work of bailiffs was legally regulated with the Law on bailiffs, adopted in 2011 and applied in 2014 ("Official Gazette", no. 61/11). The work of bailiffs is also regulated with the Law on enforcement and security which was as well adopted in 2011 ("Official Gazette", no. 36/2011).

New Law on amendments to the Law on bailiffs and Law on amendments to the Law on enforcement and security, adopted in 2017, made a strong and efficient intervention in the significant part of the problematic areas of previous legal solutions.

Action Plan for the implementation of the Strategy for the Reform of the Judiciary for the period 2014–2018 also foresaw implementation of the series of measures for regulating the issues of bailiffs.

Namely, the first area in this document referring to the position of the bailiffs is the guideline 2.1.3 which determines the basis and the way of rationalization of judicial network and misdemeanour system. This guideline foresees a measure on monitoring the results of work of bailiffs in the area of taking over the executive cases from the courts. Activity that carries out this measure is the preparation and publication of the report on work of bailiffs with conclusions on impact of the work on system relief. This report was done as the “Efficiency analysis of the functioning of system of execution” for the period by the end of 2015, and a new report for 2016 still hasn’t been done. However, even though this analysis contains quite a big overview of data on work of bailiffs, due to the questionable accuracy of statistical data and the lack of relevant database on work of bailiffs and courts in the system of execution, all collected data are questionable and can be considered only as a starting point for general orientation regarding achieved results in the system of execution for the period 2014–2015.

Second area of Action Plan related to the bailiff is placed in the guideline 2.2.3 which follows harmonization of the civil legislation with international standards and acquis of EU. This guideline foresees a measure of ensuring the harmonization of legislative framework through the activities related to bailiffs. More precisely, it foresees the amendment of the Law on execution and security, which has been done with great level of success in adopting new solution in March of 2017.

Third part, dedicated to monitoring the efficiency of the system of execution is placed in the guideline 2.2.5. and foresees a measure of continual monitoring of the work of bailiffs through activities of work analysis of bailiffs, publishing reports on work on websites, holding regular meetings of the Working group for providing professional help to bailiffs, preparation of the Plan for monitoring the work of bailiffs and execution of such a plan. This measure is implemented partially since the report was done only for 2014 and 2015, and the monitoring was done unsystematically and it still is not done and standardized in the way which would understand clear and coherent methodology of monitoring execution, including the structure and the content of minutes, which are not standardized and therefore not clear enough and precise in relation to the entity of monitoring and actions which were the subject of monitoring.

The part included by the guideline 2.3.7, regulating the nomination of bailiffs for acceleration of the proceeding, strengthening legal discipline and reducing the number of executive cases, foresees a measure of continual filling in of the places of bailiffs provided by the rulebook, and those activities are: call for tenders for the nomination of bailiffs, to determine fulfilment of all conditions for the work of newly pointed bailiffs, issue a decision on the beginning of carrying out the bailiff activities, conduct the monitoring of work of bailiffs, make an efficiency analysis of functioning of the system of execution, including the work of bailiffs and an impact of the reform on productivity of courts after the beginning of work of bailiffs. This measure has been carried out to the greatest extent (29 out of 32 bailiffs were nominated, but 3 have already been removed, whether they were released of duties or resigned themselves). However, the greatest problem is still in the activities which include measure of effect of bailiffs, since there’s a lack of database to make a reliable analysis of the work of bailiffs, including their impacts on productivity of courts.

One of the most problematic areas still remains related to the guideline 2.6.8 – establishing a reliable statistical system in accordance with the guidelines of CEPEJ, which in the area of execution should be able to measure rates of cost collection and the duration of an executive proceeding. This measure is still being implemented, but even at this phase entered data, operational and real possibilities of the system are being questioned. Another issue in question is implementation of activities of defining and introducing the standardized patterns of statistical reports in accordance with CEPEJ guidelines.

Strategic guidelines for the work of bailiffs can be found in the area 5.5.3, which is entirely dedicated to them.

First of those guidelines, 5.5.3.1, is dedicated to nomination of bailiffs, which we have already commented on and which is implemented to the greatest extent, but not without difficulties, especially during 2014, when only 16 persons applied on the tender, and it was necessary to fulfil 32 places for bailiffs.

Guideline 5.5.3.2 which includes continual monitoring of the work effects of bailiffs, includes a whole set of activities out of which only a part has been implemented. Thus the already mentioned report on work of bailiffs which should contain data on the number of cases in work of bailiffs, workload of each bailiff, quality of work of bailiffs and a number of cases of execution, was done only for 2014 and 2015. On the other hand, activities on raising public awareness about the work of bailiffs through promotional materials have had little effect on the public, and there is still a great level of ignorance when it comes to their rights and obligations. Especially problematic is the absence of continual education of bailiffs which has the aim to improve the performance of the work activities. This activity has been implemented only partially (ten seminars with OSCE) and there is no Plan and programme for continual education, nor the plan for eventual evaluation of knowledge on a temporary basis.

Guideline 5.5.3.3, for establishing a unique software system for case management with bailiffs has already been commented and it hasn't been implemented up to date, even though it's being worked on.

In the last part of this document referring to the bailiffs, guideline 5.5.3.4 is committed to enabling access to databases of state bodies and public administration bodies necessary for implementation of execution. This guideline is carried out to the greatest extent, so today the bailiffs have access to all the data relevant to their work.

Taking into account all the stated and listed system, legislative and practical doubts and problems which occur in the system of execution, it can be concluded that the following additional interventions in the area of précising the rights and obligations are necessary:

- disciplinary liability of bailiffs,
- election and dismissal,
- additional education of bailiffs and related institutions,
- control and monitoring,
- status of bailiffs as public officials,

- tariffs and debt collection system,
- informing the citizens about the rights and obligations in the system of execution
- statistics and database on work of bailiffs

Finally, when we take into account all the lacks and problems found in the system of execution, but also all successes and positive effects it brought, we can say that, for now, the project of introducing the system of bailiffs can be evaluated as a successful example of implementation of the judicial reform in Montenegro, but noting that further efforts must be invested in the following years when it comes to system solutions which could remove existing problems and lacks.

NOTE: CeMI is to publish a special report on Public Bailiffs in Montenegro.

### *Recommendations*

- 1 The new Action Plan for the implementation of the Judicial Reform Strategy should provide for developing the plan and program of continuing education and professional training of bailiffs in connection with the legal framework and practice of the system of execution, as well as other elements of the legal system, which are necessary to remedy the problem in the work of bailiffs and further improve efficiency in their work. The plan and program of training must be coordinated and created by the Chamber and the Ministry of Justice and must include: the time-frame and frequency of training, methodology and detailed description of the educational activities, institutions involved in educational activities, mandatory educational programs and other information needed for successful implementation of educational programs.
- 2 The new Action Plan should foresee the adoption of new amendments to the Law on bailiffs and Law on enforcement and security, as well as of relevant regulations and documents related to the issues and problems listed in the recommendations 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 14 which are defined and discussed in this analysis.
- 3 It is necessary to revise and amend Article 73 that defines supervision over the legality of work of bailiffs and the Chamber of Bailiffs to further specify and amend the provisions on the methodology of supervision exercised by the Ministry. Within these amendments, special attention should be given to specifying the deadline and the form of obligation to inform the authorities in case of detection of elements of crime.
- 4 Also, in conjunction with Article 73 and Article 39, since they do not address the issue of supervision over the legality and orderly keeping of financial documentation, it would be necessary to introduce a new article or amend the existing to define institution, form, methodology and deadlines for control of financial documents of bailiffs.
- 5 In relation to supervision over the work of bailiffs, which is in the hands of the Chamber of Bailiffs, in view of the total corpus of events related to the work of bailiffs and the number of problems and concerns that may arise from such “self-control”, and taking into account the need to



strengthen public credibility, efficiency and reliability of the very profession of bailiffs, there is a need for amendments to Articles 52 and creation of an independent body – external or mixed type (composed of representatives of judicial institutions or representatives of judicial institutions and representatives of the Chamber), to independently carry out control in line with the pre-defined legal provisions, the amended Article 52 or any new article introduced to the Law on bailiffs. It is necessary to further specify this control system by ordinance that would regulate: the time frame of control, content of control, control procedure, communication of members of this body with other relevant authorities and the publication and distribution of the findings.

- 6 In connection with recommendations 3 and 4, it is advisable to consider merging of control of work and financial control to be conducted by joint external or mixed body, which, in addition to representatives of judicial institutions and representatives of the Chamber, would also include representatives of institutions responsible for financial control.
- 7 In relation to recommendations 1, 3 and 4, the question of mandatory further education and frequency of control in certain public bailiffs, among other things, should be tied to the criteria of efficiency, disciplinary responsibility and disciplinary measures. The frequency of training, work control and financial control should be higher in relation to those bailiffs who show less efficiency in their work, whose work is burdened with various aspects of problems that result in the initiation of disciplinary proceedings, as well as the defining of disciplinary measures.
- 8 With respect to the uniform distribution of cases in which the executive creditors are public enterprises or institutions to all bailiffs from one area, and with the aim of preserving the principle of free competition, it is recommended to introduce additional criteria for the distribution of cases by way of determining the number of completed cases in percentages, the existence of disciplinary measures imposed, percentage of reversed decisions on execution and percentages of collected decisions of the total number of cases (the current solution involves only the total amount of collected money).
- 9 The new Action Plan should provide for the necessary amendments to the Law on Prevention of Corruption in connection with final defining of the status of bailiffs as public officials. In this regard, it is necessary to make changes to all other supporting legal and regulatory documents, with the aim of ensuring effective implementation of all the rules and obligations arising from the status of public officials.
- 10 It is necessary to specify legal provisions in relation to the meaning and content of the concept of “authentic documents” in the part referring to the invoice with the delivery note, where the change has to include specifying that the delivery note must be signed by the client who was served or who received the goods.
- 11 It is necessary to extend the deadline for filing objections to the executive decision, because a significant majority of parties (80.3%) who were debtors in the enforcement procedures said that a five-day deadline was

extremely short and inadequate for timely submission of objections. This suggestion gains on gravity if one considers the widespread practice of bailiffs to send executive decisions at the end of the working week, so that the deadline is shortened for the weekend days and delivery day – a total of 3 of the legally prescribed five days. It is therefore suggested that the deadline for delivery be extended to at least 7, but no longer than 10 working days, in order to provide reasonable and fair deadline for appeal by the debtor.

- 12 It is necessary to strengthen the control over the issuance of invoice by bailiffs for acts performed in the process of execution, because the trend of not issuing invoice by bailiffs is evident. In this regard, it is necessary to amend the legal framework for disciplinary responsibility and revise existing article with the addition for more severe disciplinary responsibility for public enforcement in case of non-issuance of the invoice. Confirmation for these trends can be found in the reports of the Ministry of Justice, or in the opinion poll conducted by CEMI, where as many as 35.5% of those who pay the costs of execution said they did not get adequate invoice or certificate for committed payments by bailiffs.
- 13 It is necessary to review the system of delivery of executive decisions and control of the execution of delivery, related to frequent complaints about untidy debtors or uncompleted decision delivery, and therefore in connection with the denial of the possibilities of appeal against such a decision. The research that CEMI conducted on a representative sample of citizens, 16.4% of respondents who were in the process of execution stated that they did not get an executive decision.
- 14 It is necessary to take urgent measures on the implementation of an information campaign on informing citizens about their rights and obligations in connection with the execution procedure, since a significant number of people with low or inadequate level of awareness about the protection of their rights in the execution procedure was determined (CEMI's research shows that one-fifth of the total number of citizens do not know that they have the right to appeal or believe that nothing can change in the process). All forms of information and promotion campaigns related to this issue should be coordinated by the Chamber of bailiffs and the Ministry of Justice, and also recommended the coordination and participation of civil society representatives that are involved in this area of judicial reform.
- 15 The new Action Plan is necessary to provide for the exercise of legislative amendments in the field of debt collection from the debtor's bank account, due to the widespread practice of unselective removal of funds from the debtor, without taking into account the legal constraints related to salaries, pensions and other earnings. In this regard, it is necessary to specify the legal obligations of banks and bailiffs which would enable compliance of existing legal obligations in this area. When defining the new legal provisions, it is advisable to take account the existing good practice by individual bailiffs who carry out the collection of receivables in communication with the employer of the debtor or the Pension Fund, where only legally prescribed part is deducted from personal earnings.

- 16 It is necessary to take all measures with the aim of earliest possible completion of the activities on the establishment of a database with information on the work of bailiffs, as well as the coordination of these data with data from the judiciary (PRIS) regarding the effectiveness of all segments in the system of execution. Data entry, their control and processing must be subject of continuous monitoring and improvement and in this regard it is necessary to make the necessary regulations and rules of procedure, for each of the subjects of the system of execution. Also, there is a need for constant communication and consultation between the institution and the execution system of the supplier and the base data and the accompanying information system in view of its improving, adjustment and increasing its efficiency in the coming years.

#### 5.5.4 Mediation Centre and mediators

Strengthening of the Mediation Centre and work of mediator is planned through implementation of three strategic guidelines: improve the system of statistics which ensures monitoring of the use and effects of mediation (5.5.4.1), strengthen administrative capacities of the Mediation Centre to provide better support to mediators (5.5.4.2) and conduct continuous trainings and specialization of mediators (5.5.4.3).

These guidelines are considered to have been realized since records are kept in an orderly manner on conducted mediation procedures, analysis was completed of the existing number of mediators and their work, and this analysis also discussed all issues of importance for improving the work of mediators in Montenegro. In addition, Plan for training of mediators for 2016 has been adopted and implemented in practice.

Analysis of the application of mediation in Montenegro prepared by HRA indicates that the courts do not refer parties to mediation enough, that the prescribed fee for mediators is extremely low and discourages from pursuing a career in this profession, and that with regard to supervision over the work of mediators – in addition to records of the completion of proceedings in agreement – there is no evaluation of their work. The reason for insufficient use of mediation in Montenegro is still a low level of awareness of citizens about mediation and its benefits. Prior to their contact with mediators, parties as a rule do not have relevant information about what mediation implies. Although the Judicial Reform Strategy 2014–2018 includes a proposal to affirm the principle of mediation in court cases in which the respondent is the state of Montenegro, specific measure has not been foreseen to that end. Professional training of mediators, as well as supervision meetings, at which mediators exchange their experience under the guidance of the most experienced mediators, are held *ad hoc*, not regularly, depending on the foreign donor projects.

NOTE: The report *Mediation in Montenegro* by Human Rights Action contains detailed information on the results of mediation in Montenegro with further recommendations. Some of the recommendations of this report are set out in section 2.5 Alternative dispute resolution within the objective Strengthening the efficiency of the judiciary.

### Recommendations

- 1 The new AP should prescribe a specific measure to oblige the Government of Montenegro to: accept mediation in each proceedings to which it is a party; increase the fee for mediators by amending the Decree of the Government of Montenegro on the amount of remuneration and compensation of costs of mediators; encourage the use of mediation through subsidies, i.e. take part in the financing by supporting all first meetings with a mediator, all mediations in a certain period or a certain type of proceedings; provide funds for the Mediation Centre to organize more promotional activities; provide funds for the Mediation Centre to regularly organize supervision meetings – at least once a year, as well as other programs of professional training of mediators.
- 2 Inform the media on publishing annual reports of the Mediation Centre. This is a good opportunity to further promote mediation and discuss its development in Montenegro.
- 3 Annual report of the Mediation Centre should encompass information about the average duration of mediation and who initiated it, the number of cases referred to mediation by judges (which judges and from which court), prosecutors, and the police annually, as well as cases in which the parties themselves have initiated mediation prior to launching of the court proceedings along with information on how they came up with this idea. An important statistic for comparison with other countries is monitoring the percentage of the total number of civil cases referred from the courts during the year for mediation.
- 4 Analyse the quality of work of mediators, introduce adequate measures to recognize and reward successful mediators.

### 5.5.5 Court experts

In relation to the court experts Action plan envisaged three strategic guidelines: Amend the Law on Court Experts – with the view to strengthen their responsibility (5.5.5.1); Improve system of responsibility of court experts (5.5.5.2) and Conduct continuous trainings of court experts (5.5.5.3).

First two guidelines are considered realized by adopting the Law on Court Experts in August 2016 (Official Gazette of Montenegro, no. 054/2016).<sup>6</sup> The Law improved the procedure for appointment and dismissal of court experts from the office (5.5.5.1.1), as well as the system of responsibility of court experts (5.5.5.1.2). The adoption of the Law on Court Experts created favorable legal grounds for raising the importance of expertise and experts in Montenegro, but not to a sufficient degree.

Trainings of court experts, that the Association of court experts was in charge of, are still not adequately implemented in practice. Even though in 2015 and 2016, there is a practice of submitting reports on the education of court experts within the annual reports of management of professional sections and the report of the

<sup>6</sup> The law was published in the “Official Gazette of Montenegro”, no. 54/2016 from 15/82016 and entered into force on 23/8/2016.

Executive Board of the Association of Court Experts of Montenegro, and although every year Annual Meeting is held in order to submit mentioned reports, this association gathers less than 15% of court experts in Montenegro, which leads to inadequate implementation in relation to those who are not part of this organization.

Professional and lay public still did not sufficiently recognize the importance of court experts in the legal system of Montenegro. Thus, in the process of adopting three important bylaws (Rules on the programs of testing of professional knowledge and practical experience for a particular area of expertise, the Rules on the content and form of court experts identification and the Rules on the content, form and manner of keeping a court experts register) none of the interested public responded to the call, including representatives of court experts.

Fees and rewards for the work of court experts are still low and demotivate the experts.

It is necessary to work on the increase of confidence in court experts. According to a public opinion survey conducted by CEMI and HRA in March 2017, it is surprising that only 3.8% of respondents had contact with court experts in the procedures in last two years (7.5% of the total number had contact with the experts once). It is commendable that almost two thirds (64.7%) thought that court experts are unbiased, but we also believe that this rating is still not good enough because it is related to a profession that must characterize the expertise, objectivity and impartiality, so this percentage should be higher.

NOTE: CeMI is to publish a special report on the Court Experts in Montenegro, containing more detailed overview and recommendations.

### *Recommendations*

- 1 Begin with the implementation of the measures 5.5.5.3 ("Conduct continuous trainings of court experts"). It is necessary to develop the plan and program of continuing trainings and professional development of all experts in Montenegro. These trainings cannot be left to the Association of court experts as there are many experts who are not part of this professional association. This obligation is necessary to be envisaged in future Action plan and Strategy.
- 2 Ensure that public authorities settle their obligations properly (without delay).
- 3 Award for the work must be increased. The solution envisaged by the Law on Court Experts is better than the previous one but it is not enough for the quantity of the obligations and the responsibility that experts have.
- 4 Make a plan of activities and ensure implementation of concrete measures to encourage motivation of adequate staff to perform the duties of expertise in those areas (traffic engineering, information technology, medicine ...) where it is necessary, in order to avoid or minimize the involvement of expert witnesses from abroad.
- 5 We recommend a balanced representation of experts in court proceedings. It is necessary to maintain and regularly update the list of court experts as well as their involvement in the judicial process.

- 6 Continue networking court experts through one or more associations. Anticipate greater and closer relationship between court experts, as well as their representatives, as well as significant involvement in the adoption of certain laws and bylaws. The Ministry of Justice has sent a public invitation to citizens, professional and academic institutions, state authorities, professional associations, political parties, NGOs, the media and other interested bodies, organizations, associations and individuals to be involved in the preparation of bylaws, including the text of the Rules on the programs of testing of professional knowledge and practical experience for a particular area of expertise. This is a very important bylaw and as such is recognized in the Strategy for the Reform of the Judiciary and Action Plan for its implementation. However, after the deadline for consultation it was concluded that there were no interested parties in the process and that in due time the Ministry of Justice did not receive any initiatives, suggestions or comments on the texts of bylaws.
- 7 We recommend the lower cost of examination before the Commission for experts, because the current price (about 90% of the average salary in Montenegro) is too high for local standards.

### 5.5.6 Court interpreters

Three strategic guidelines were laid down by the AP: legislate this area with the focus on the requirements for appointment of court interpreters and reasons for liability (dismissal) of court interpreters, as well as limiting the time they are appointed for (5.5.6.1), improve the system of liability of court interpreters (5.5.6.2) and conduct continuous training of court interpreters (5.5.6.3). According to the Government, the first two guidelines were implemented through adoption of the Interpreters Act in July 2016, while the third has not been realized.

Training of court interpreters is not implemented. A large number of court interpreters (121) submitted an initiative before the Constitutional Court to review the constitutionality of the Interpreters Act provisions which stipulate that the interpreters previously appointed in line with the Rules on permanent court interpreters from 2008 would have to take an exam for assessing the fulfillment of conditions for exercising this profession in accordance with the new Act.

A number of court interpreters has expressed concern vis-à-vis possible interpretations of a legal provision envisaging dismissal of interpreters who “unreasonably” refuse to comply with the request of a court, state prosecutor or other body conducting proceedings, in cases when they refuse this request because they were not paid for their previous work or payment was significantly delayed.

#### *Recommendations*

- 1 Immediately begin implementation of the measure 5.5.6.3 (“conduct continuous training of court interpreters”).
- 2 Draft an analysis of application of the Interpreters Act, clarify whether interpreter’s refusal to act upon the request of the court, public prosecutor’s office or other authority when they were not paid for previously performed work (or payment was significantly delayed) can be considered justified.
- 3 Ensure that national authorities duly fulfill their obligations to interpreters.