



# ESTABLISHING ACCOUNTABILITY FOR BREACH OF JUDICIAL ETHICS IN MONTENEGRO

OPERATION OF THE COMMISSION  
ON THE CODE OF JUDICIAL ETHICS  
2011 – 2016



Kingdom of the Netherlands



Project “Judicial Reform Monitoring” is supported by the European Union, through Delegation of European Union to Montenegro and the Kingdom of Netherlands.



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Human Rights Action

Podgorica  
2017

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Kingdom of the Netherlands



This document was prepared with the support of the European Union and the Embassy of the Kingdom of the Netherlands. The views expressed in the publication do not necessarily reflect the views and opinion of donors.

The publication is part of the project “Judicial Reform Monitoring” implemented by Human Rights Action (HRA) and Centre for Monitoring and Research (CeMI), funded by the European Union and the Embassy of the Kingdom of Netherlands.

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\*NOTE: The English version of the publication presents the summary of the original version published in Montenegrin language. It excludes analysis of law and of all individual decisions of the Commission on the Code of Judicial Ethics described in chapters 2, 3 and 4.

**Establishing accountability for breach of judicial ethics in Montenegro  
Operation of the Commission on the Code of Judicial Ethics 2011 – 2016**

# 1. Introduction

## 1.1. Judicial ethics in the context of judicial reform and the European Union accession negotiations

Judicial profession requires a high level of expertise, but also readiness to comply with specific requirements of ethics. The Code of Judicial Ethics prescribes rules of judicial ethics in Montenegro. The Commission on the Code of Judicial Ethics decides on initiatives for establishing violations of the Code.

This report deals with the five-year practice of the Commission on the Code of Judicial Ethics - from the beginning of its operation on 1 October 2011 until the end of 2016, within the context of judicial reform in Montenegro and accession negotiations with the European Union (EU).

The need to respect judicial ethics has been prescribed by the Judicial Reform Strategy in Montenegro for the period 2014-2018 in the context of the strategic goal Strengthening Independence, Impartiality & Accountability of the Judiciary. A strategic measure has been set forth to strengthen integrity of judges and state prosecutors through the respect of codes of ethics. In the context of strengthening accountability of judicial officials, continuous monitoring of objectivity and transparency of procedures for establishing accountability of judges and public prosecutors has been envisaged as well.

Montenegro adopted the EU recommendation to “ensure effective monitoring of compliance with the codes of ethics” in the context of negotiations on Montenegro’s accession to the EU within the Chapter 23 and the goal Strengthening Impartiality in the Judiciary (1.2.4). In order to implement the recommendation, six measures were set forth: introducing amendments to the codes of ethics for judges and public prosecutors in accordance with international recommendations (two measures); conducting trainings on compliance with the codes; informing the public on filing of complaints against judges and prosecutors for breach of ethics, and ensuring that the commissions for monitoring of compliance with the codes submit annual reports to the Judicial Council or Prosecutorial Council on the implementation of these codes, including the analysis of compliance with the codes with a special section on compliance with the rules on conflict of interest of judges and prosecutors (1.2.4.4. and 1.2.4.5).

This report indicates that those measures in practice failed to ensure effective monitoring of compliance with the judicial ethics. They failed to ensure that the Commission on the Code of Judicial Ethics passes trustworthy decisions on the basis of objective assessment of fact and with sound reasoning contributing to the interpretation of the Code of Judicial Ethics.

## 5. Conclusions

### 5.1. Shortcomings of regulations

Definitions of nine disciplinary offenses overlap with the provisions of the Code of Judicial Ethics. Such situation is creating legal uncertainty, since disciplinary offenses entail serious sanctions, as opposed to violations of the Code of Ethics\* (2.7).

According to the Act on Judicial Council and Judges (the Act), the content of judges' personal records, kept by the Judicial Council and taken into account in the promotion of judges, does not include established violations of the Code of Ethics, but only information about disciplinary responsibility and removal from office. The Code, on the other hand, stipulates that each violation of its provisions shall be recorded in judge's personal file (1.3).

The Act and the Rules for evaluation of judges unreasonably provide that in the evaluation of a judge's performance in deciding on their promotion, violations of only one section of the Code relating to "judge's relation toward clients, colleagues and court staff" (1.3) are to be considered.

The Rules for evaluation of judges do not take into account the severity of the actual Code violation and contain a vague rule that as much as three complaints against a judge relating to their "relation toward clients, colleagues and court staff" adopted by the Judicial Council shall be valued as a single violation of the Code adopted by the Commission on the Code of Judicial Ethics ("the Commission") (2.7).

In the Act there is a vague provision advising the presidents of courts, in case of a reasonable suspicion that a judge has committed disciplinary offense, to address the Commission with a request for an opinion on whether such conduct of a judge is in accordance with the Code of Judicial Ethics. In a situation where disciplinary and ethical obligations of judges are not clearly distinguished - as explained above - this provision leaves room for avoiding liability for disciplinary offenses (3.4).

The requirements and procedure for dismissal of members of the Commission have not been prescribed at all. The Chairman of the Commission, as a member of the Judicial Council, may be dismissed only due to negligent and unprofessional performance of duty. Furthermore, neither the exemption of the Commission members has been regulated, nor their substitution in such a case (2.4).

There is no right to appeal the Commission's decision to reject a complaint of alleged violation of the Code (3.3).

## 5.2. Statistical review of the Commission's practice

Since its establishment on 1 October 2011 until 31 December 2016, over the period of five years and three months, the Commission decided on 47 initiatives for establishing violation of the Code.

The Commission found a violation of the Code in five cases (10.6%), did not find any violation in 32 cases (68%), declined its competence in 8 cases (17%), in one case the applicant withdrew so the proceeding was suspended and in another case the initiative was dismissed. In the case elaborated under Chapter 4.5, where a complaint was lodged against a member of the Commission, there had been no feedback from the Commission whatsoever.

Year	Total initiatives	Outcome
2016	20	9 no violation; 4 violations; 1 proceedings suspended upon applicant's request, 6 declined competence <sup>1</sup>
2015	15	13 no violation; 1 dismissed; 1 declined competence <sup>2</sup>
2014	7	7 no violation
2013	3	1 no violation; 1 violation; 1 declined competence <sup>3</sup>
2012	0	0
2011	2	2 no violation
TOTAL	47	32 no violation; 5 violations; 1 proceedings suspended; 1 dismissed; 8 declined competence

It never happened that a judge reported another judge to the Commission. Presidents of courts reported violations of the Code in four cases (8.5%), while other cases were initiated by citizens, mostly parties to the proceedings led by judges against whom initiatives were filed (37 or 79%), but also others who complained

- 1 All 6 decision with the same reasoning: "The Commission has informed the applicant that Art. 11 of the Code of Judicial Ethics does not allow the Commission to examine and comment the procedure and decision reached in court," Report for the period January - December 2016, p. 3 and onwards.
- 2 "Acting on initiative Ek.br. 14/15 of 9 December 2015, the Commission on Code of Judicial Ethics determined that legal definitions of the Code of Judicial Ethics do not allow the Commission to examine the legality of a decision of the High Court in Podgorica gž.br. 4548 /12-04, in which the mentioned judges acted, and which was upheld by the Supreme Court ruling Rev.br. 196/14", Report for the period January - December 2015, p. 4.
- 3 "The Code of Judicial Ethics (Sl. list CG, 45/08 and 17/12) establishes ethical principles and code of conduct of judges which the judges must adhere to in order to preserve, affirm and promote dignity and reputation of judges and the judiciary, while the provision of Art. 14 of the Code stipulates that judges are obliged to observe the Code of Judicial Ethics, and that violations of the Code of Judicial Ethics shall be established by the Commission on Code of Judicial Ethics. The above provision does not allow the Commission to decide as per your request – examine the legality of a decision of the council of Podgorica Basic Court." Decision Ek.br. 2/2013 of 3 July 2013.

about the conduct of judges outside the courtroom (6 or 13%). In one case, the first one in which the Commission ever acted in 2011, the court employees filed the complaint.

Of the 5 cases in which a breach of the Code was found, two initiatives were filed by the Supreme Court President, one each by the presidents of basic court and misdemeanour court, and one initiative by a lawyer.

The Commission did not decide at all in 2012, since there were no complaints filed vis-à-vis ethics of judges. On the other hand, that same year, citizens submitted 320 complaints on the conduct of judges to the Office for Complaints with the Supreme Court of Montenegro and 75 complaints to the Office for Reporting Corruption with the Judicial Council, but none had been handled or submitted to the Commission.

Over the years the number of initiatives increased, with most initiatives (20) filed in 2016.

As regards anonymous initiatives - there were none.

In two cases judges filed an objection against the Commission's decision with the Judicial Council. Both were rejected.

### 5.3 Assessment of the Commission's practice

In the first five years of its operation the Commission did not fulfil expectations regarding strengthening impartiality and accountability of judges. The Commission itself did not come across as impartial, as it most often relied on the statements of judges, without objective fact-finding and sound reasoning. The Commission never initiated a single disciplinary proceeding, on occasions declared itself incompetent without reasoning and failed to provide interpretation of the Code that would be useful for its future implementation.

The reasoning of the Commission's decisions was generally vague, unclear and incomplete. The decisions did not always indicate actual reasons of the complaint sometimes overlooked some of the allegations raised in the complaint, and often lacked clear statement as to the basis for adopting a decision. Certain improvement in this regard was recorded only in 2016.

Already in its first case in 2011, which attracted the public's attention, the Commission failed to thoroughly and objectively establish facts about all allegations filed by the complaint and this approach had remained the rule throughout 2016. In the majority of decisions adopted on the merits (19 of 37), the Commission accepted judges' position uncritically, without taking into consideration other sources of information. In several cases, the Commission did examine the case file or sought information from other authorities, but not in all cases where this was necessary. It has never heard a single witness to a disputed conduct of a judge, and in some

cases - without an explanation - failed to examine presented evidence, a CD recording, for example.

The Commission missed the opportunity to interpret whether particular conduct, covered by the initiatives for establishing violations of the Code, may be considered violation of the Code, which was important for its future implementation. Some of the questions left unanswered were:

- Whether engaging in activities such as renting of apartments, failure to declare one's property in accordance with specific regulations or hate speech such as "we are not Gypsies here" may be considered in accordance with judicial ethics;
- Whether a judge who complies with the Code is expected to greet a party to the court proceedings with "hello" and "goodbye";
- Whether the fact that a husband and daughter of a judge share office space with attorneys who represent a party to the proceedings in which this judge acts casts doubt on the judge's impartiality;
- Whether a judge who publishes a statement in the judgment: "it is impossible that the prime minister leads an immoral life" may be perceived as impartial;
- Whether a judge acts impartially if his conclusion in the judgment about a private prosecutor is that "it is utterly illogical that the one who held public office of the Deputy Supreme State Prosecutor could have possibly committed such a serious crime ... especially since holders of that office, in addition to professional references, must have high reputation in both professional and personal life...";
- Whether it is justified and to which extent for a judge to wait for an attorney to appear in his courtroom prior to concluding the hearing and declaring withdrawal of the lawsuit, if the attorney reported before his presence at another trial in the same court;
- Whether it is necessary to insist that the elderly stand up when testifying as a party in civil litigation, etc.

The Commission did not submit a single proposal for establishing disciplinary responsibility of judges. In three cases, in which the conduct of judges fit the description of the disciplinary offense, the Commission did not explain why it did not initiate disciplinary action in accordance with its competences (2.5.2).

The Commission at times unreasonably restricted its competence, or at least failed to explain why in a particular case it should not have been competent. In five decisions in 2016, the Commission declared itself not competent, referring only to Art. 11 of the Code stating that the Commission establishes violations of the Code. Despite the principle laid down in Art. 2 of the Code ("Legality"), which speaks of the duty of judges to adjudicate lawfully, the Commission, all the while providing no explanation, emphasized that it was not competent to assess the legality of the work of judges (2.5.5).

The Commission demonstrated lack of capacity to decide on complaints involving its members, as well as that it is not independent of the Judicial Council (4.5).

On the basis of obligations from the Action Plan for Chapter 23 (1.2.4.5) and Action Plan for implementation of the 2014-2018 Judicial Reform Strategy (1233B), on 21 October 2015 the Commission published a superficial annual analysis of compliance with the Code of Judicial Ethics (hereinafter “Analysis”). The Analysis did not include a special section on judges’ compliance with the rules on conflicts of interest, although the said measure under the Action Plan for Chapter 23 stipulates otherwise. There was no such analysis in 2016 (2.5.4).

The following is presentation of conclusions on the Commission’s practice per year, based on decisions presented and commented in Chapter 4.

<b>2011</b>	
1.	The reasoning provided for both decisions adopted in 2011 is vague and incomplete, and does not respond to the issues raised in complaints.
2.	Decisions are useless from the standpoint of interpretation and application of the Code, because it has not been established whether judges had indeed displayed contentious behaviour toward court staff in the first case, or a party in the second, and whether such behaviour is ethical or not.
3.	The Commission dealt with issues which were not the subject of complaints.
4.	By avoiding to assess the ethics of a judge’s conduct on which the media reported, the Commission failed to instil confidence in its objectivity and impartiality at the very beginning of its work.
<b>2012</b>	
No decisions.	
<b>2013</b>	
5.	There is notable progress in this year’s decisions of the Commission in presenting the allegations contained in initiatives and gathering of evidence.
6.	Reasoning for the decisions is still either completely missing or inadequate, i.e. it does not explain on what grounds the Commission established a breach of the Code.
7.	Despite the principle under Art. 2 of the Code, which speaks of a judge’s duty to adjudicate lawfully, the Commission declined its competence to assess legality of the work of judges without providing an explanation thereof.
<b>2014</b>	
8.	The Commission’s decisions this year failed to establish important facts, did not quite objectively determine factual information, failed to convincingly examine doubts about impartiality of a judge toward a party who was a former judge, or completely ignored some of the presented serious objections, for example, whether a judge said to the parties “we are not Gypsies”.

9.	The Commission did not apply its competence in relation to the report that a judge had failed to adequately declare his property.
10.	The Commission did not at all decide on one initiative, although it is not authorised to do so, regardless of what type of initiative it is.
11.	The Commission also expressed the view that the initiative is manifestly ill founded if the party failed to enter their objection concerning judge's conduct in the minutes from the contested hearing. However, the lack of entry of objection may be considered only in the context of the lack of evidence for the allegation, and not as evidence proving that such conduct never happened, given that the party is not obliged to enter comments on judge's unethical conduct in the hearing minutes.
12.	The Commission has demonstrated that it lacks the capacity for decision making when a complaint involves its members, and that it is not independent of the Judicial Council's decisions.
<b>2015</b>	
13.	Practice of the Commission is characterized by incomplete establishing of facts and lack of reasoning. In several decisions, the Commission has rather uncritically accepted the position of a judge without any examination or basis in other evidence, for example the case file.
14.	The Commission has failed to respond to very important ethical questions, such as: whether renting of rooms and apartments is incompatible with the exercise of a judicial function; whether it is ethical for a judge not to say "hello" and "goodbye" when entering the courtroom; whether the fact that judge's husband and daughter share office space with attorneys who represent a party to the proceedings in which this judge acts justifiably casts doubt on impartiality of the judge; whether in the case when the lawyer says that she is in trial in the same building, expecting the recording clerk to call the lawyer and notify her that the judge is ready to begin the hearing could be considered collegial and ethical conduct; an opportunity to assess whether it is necessary to insist that the elderly stand up when testifying as a party in civil litigation was also missed.
<b>2016</b>	
15.	Of a total of twenty decisions taken this year, only six contained a well-substantiated reasoning – there are no objections with regard to the two decisions to adopt and four to reject initiatives.
16.	In the case where it established that a judge violated the Code because she had not herself requested exemption, the Commission has not commented on the fact that the judge acted lawfully, informing the president about the reasons for her exemption, but not ethically, as the Code requires that judges expressly require to be exempted, even if the parties do not require so, and the very president considers that it is not necessary.
17.	Reasoning was also omitted in one of the four decisions in which the Commission found breach of the Code this year.

18.	In five cases, the Commission decided to decline competence without providing an explanation, invoking Art. 11 of the Code, which in itself does not answer this question. It especially failed to explain the position it took about not being competent to handle cases that also represent a reason for the appeal, as in practice it based its competence in relation to the exemption of judges, which is precisely such a reason.
19.	In some decisions, the Commission still failed to objectively establish the facts, for example by inspecting the case file.
20.	It was also noted that the Commission did not respond to a party's request to 'legally sanction' a judge, finding most likely this request to be inadequate as it is competent to examine violations of the Code, not law. However, the Commission is obliged to initiate disciplinary proceedings in case of judicial conduct prohibited by law. Furthermore, the Commission should also attentively respond to requests by uninformed parties and thus contribute to public confidence in the judiciary and its work.

#### 5.4. Assessment of the Judicial Council's role

The Judicial Council should correct shortcomings in the system of accountability of judges, in accordance with its legal obligation to ensure accountability and professionalism of the courts and judges.

However, the Judicial Council, which adopted annual reports on operation of the Commission, had in no way influenced the Commission to improve the manner of establishing the facts, making conclusions and providing for a reasoning, although such influence had been much needed.

Furthermore, the Judicial Council failed to object to the mentioned superficial and incomplete Analysis of compliance with the Code of Judicial Ethics for 2015, whose production was envisaged by the Action Plan for implementation of the Judicial Reform Strategy 2014-2016 (measure 1233B) and the Action Plan for Chapter 23 (measure 1.2.4.5). This analysis has led neither to an objective assessment of the Commission's work, nor to improvement of its work in the current unchanged composition.

Without a basis in law or other regulations, the Judicial Council declared that neither the Council nor the Commission are competent to evaluate the conduct of judges in cases in which a final decision had been reached. Such position was supposed to justify disregarding the complaint regarding scandalously biased conduct of judges in the case in which a victim of abuse and trafficking had been sentenced *in absentia* to a year in prison for allegedly giving false testimony (section 4.5 of the report).

## 6. Recommendations

### 6.1. Proposals for amendment of legislation

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. By specifying Art. 89 and 91 of the Judicial Council and Judges Act, as well as Art. 20 of the Rules for evaluation of judges ensure that each violation of the Code is taken into account when deciding on the promotion of judges.
3. Specify by law the difference between nine disciplinary offenses of judges and violations of the Code to keep to a minimum the room for arbitrary assessment by the Commission members of what constitutes an offense versus a violation of the Code and avoid conducting two proceedings for the same behaviour of a judge.
4. Having regard to the competence of the Judicial Council to receive complaints, ensure that in addition to the presidents of courts and the Commission on Code of Judicial Ethics, the Judicial Council too may submit a proposal to establish disciplinary responsibility of a judge.
5. Delete the provision of Art. 110, para 3 of the Judicial Council and Judges Act which suggests that prior to submitting the proposal for establishing disciplinary responsibility, the presidents of courts should address the Commission for an opinion on whether a violation of the Code has occurred.
6. 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.
7. 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.
8. The Rules of Procedure should stipulate that the Commission could also consider anonymous reports.
9. 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.

## 6.2. Proposals regarding practice of the Commission

10. 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. The Commission should clearly state why it decides to dismiss the initiative and provide reasoning for such decision, also if it finds itself lacking jurisdiction.
11. The approach of the Commission to fact-finding needs to be objective. The Commission should attempt to establish the facts using various sources and not solely rely on the statement of a judge in question.
12. 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 not be the subject of its consideration and why, especially when it comes to the principle of legality (including legality of decisions of judges and compliance with the procedural laws in terms of deadlines and procedures in specific cases).
13. In each case in which a conduct of a judge fits the description of a disciplinary offense, the Commission should stay the proceedings and submit the proposal to initiate disciplinary proceedings.
14. Lack of competence to decide upon a complaint needs to be adequately justified. Referring only to Article 11 of the Code does not provide with justification.
15. The Commission should particularly thoroughly examine cases in which one reports a biased conduct of a judge towards his/her long-time fellow judge who then becomes a lawyer, and provide a detailed reasoning for decisions in such cases.
16. The current composition of the Commission should be changed, as it has been emphasized in all yearly reports of the Commission that all criticised decisions in the passed five years were unanimously adopted.

## 6.3. Proposals regarding practice of the Judicial Council

17. Ensure composition of the Judicial Council that is prepared to act objectively and impartially by providing for inclusion of representatives of civic associations in the composition of the Judicial Council.

18. Specify competence of the Judicial Council to act on complaints.
19. Prescribe explicit right of all the parties that lodged an initiative to appeal the Commission's decision to the Judicial Council, in order to ensure oversight in case of superficial handling of complaints, such as criticized in the report.
20. Allow the Judicial Council to also submit proposals for the establishment of disciplinary responsibility of judges.
21. The Judicial Council should take an active role in terms of monitoring the work of the Commission and implementation of the Code of Judicial Ethics, rather than declining competence with regard to complaints that indicate unethical behaviour of judges that undermines the reputation of the judiciary.
22. The website of the courts and the Judicial Council and Commission (<http://sudovi.me/sscg/komisija-za-eticki-kodeks/>) should be updated to include information on how to report violations of the Code to the Commission, modelled on the website of the Supreme State Prosecutor's Office that entails such information: <http://www.tuzilastvocg.me/index.php/kodeks-tuzilacke-etike>.

*Note:* Members of the Commission unanimously decided not to submit comments on the content of this report, because its author "had no legal authority to comment on final decisions. It is concluded that the author of the analysis gave herself authority that positive regulations do not recognize".

The author notes with regret that the attitude of the members of the Commission is contrary to freedom of expression. It also displays lack of understanding of the principle of transparency of the work of courts and other state bodies. It is particularly concerning that the view is shared by members of the Commission who are judges of the Supreme Court of Montenegro and who hence have the authority to decide cases involving freedom of expression.

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