

## **Country Review Report of Montenegro**

### **Executive Summary**

#### **1. Introduction: Overview of the legal and institutional framework of Montenegro in the context of implementation of the United Nations Convention against Corruption (UNCAC)**

Serbia and Montenegro signed the UNCAC on 11 December 2003 and ratified it on 20 December 2005. By succession statement deposited with the Secretary-General on 23 October 2006, Montenegro acceded to the Convention as an independent State. The implementing legislation was adopted on 22 October 2005 and entered into force on 20 December 2005.

Article 9 of the Constitution of Montenegro states that ratified and published international agreements and generally accepted rules of international law constitute an integral part of the domestic legal order, have supremacy over the national legislation and are directly applicable when they regulate differently from the national legislation.

Montenegro's legal framework against corruption includes provisions from the Constitution, the Criminal Code (CC) and the Criminal Procedure Code (CPC). It further contains specific legislation such as: the Law on Prevention of Conflict of Interest; the Law on the Prevention of Money Laundering and the Financing of Terrorism; the Law on Liability of Legal Entities for Criminal Offences; the Law on Witness Protection; and the Law on Mutual Legal Assistance in Criminal Matters.

Montenegro has put in place a multi-faceted institutional framework to address corruption. In the field of prevention of corruption, a number of specialized bodies have been established, including: the Directorate for Anti-Corruption Initiative; the Directorate for Prevention of Money Laundering and Terrorism Financing; the Ombudsman; the Commission for Prevention of Conflict of Interest; the State Audit Institution; the Public Procurement Directorate; and the Commission for the Control of Public Procurement Procedures.

In addition, various specialized sections have been created within the criminal justice bodies and courts, including: the Section for Combating Organized Crime and Corruption within the Criminal Police Department of the Police Directorate; the Division for Suppressing Organized Crime, Corruption, Terrorism and War Crimes within the Supreme Public Prosecution Office; the specialized divisions of the High Court for organized crime, corruption, terrorism and war crimes; and the Joint Investigation Team (as an example of cross-sectoral coordination).

#### **2. Chapter III: Criminalization and law enforcement**

##### **2.1. Observations on the implementation of the articles under review**

Active and passive bribery in the public sector are criminalized through articles 424 and 423 CC respectively. Both provisions refer to the term "person in official capacity", which is defined broadly in article 142 CC to also cover holders of judicial office, whether elected or appointed. The use of the phrase "gift or other benefit", as opposed to the concept of "undue advantage", was reported as an effort

to eradicate the customary practice of giving gifts as an expression of gratitude. The phrase “other benefit” includes any kind of benefit, including material benefits.

In both articles 424 and 423 CC, an element of the established offences is the performance and non-performance by the public official of an “official *or other act*”. The reference to “another act” is interpreted as an approach going beyond the scope of article 15 of the UNCAC, which is restricted to the “exercise of duties”.

Contrary to article 423 CC, which makes express reference to giving a bribe “directly or indirectly”, article 424 CC refers, instead, to “a person who mediates in such bribery of a person in official capacity”. To the review team it was not clear if in these circumstances the perpetrator would also be liable for indirectly bribing the official. The Montenegrin authorities reported that article 424 CC is used to criminalize both the perpetrator and the intermediary and that its interpretation in practice had not encountered difficulties.

While article 423 CC focuses on the acceptance of promise of a gift or any benefit by a person in official capacity for himself/herself or another person, article 424 CC refers to the gift being given, offered or promised to an “other person”. Nevertheless, it was not clear to the review team if this “other person” is to be regarded as a third party beneficiary or a person who is envisaged to perform the “other act” or indeed an “official act”. Although the Montenegrin authorities stated that they interpreted “other person” as a “third-party beneficiary”, they acknowledged during the country visit the need to change legislation to incorporate explicitly the concept of third party beneficiary in the bribery provisions.

During the country visit, an issue was raised with regard to the inconsistency of sanctions within article 424. The maximum penalties provided for active bribery of a public official should follow a uniform approach.

The elements of the offence and the applicable sanctions detailed under bribery of (domestic) public officials apply accordingly to bribery of foreign public officials and officials of public international organizations. The definition of foreign officials is provided in article 142 (3) (5a) CC.

Articles 420 (embezzlement), 421 (unauthorized use) and 421a (petty fraud in the conduct of an official duty, embezzlement and unauthorized use) of the CC domesticate article 17 of the UNCAC. The reviewing experts raised issues of compliance with article 2 (d) of the UNCAC, as immovable property is not covered by the aforementioned provisions.

Trading in influence, in both its active and passive forms, is established as a criminal offence in articles 422a and 422 CC respectively. The offence in paragraph (1) of article 422a covers using “official or social position” in addition to using “his/her actual or assumed influence”. Article 422a CC appears to be broader in scope than article 18 of the UNCAC, as it does not refer to abuse of influence (on the understanding that the term “use [of influence]” also covers instances of abuse). During the country visit, an issue was raised with regard to the inconsistency of sanctions within article 422a. The maximum penalties provided in paragraphs 1 and 2 of this article should follow a uniform approach.

Article 416 CC covers all elements of article 19 of the UNCAC (abuse of functions). In addition, the article provides for causing damage to another person or gravely violating the rights of another person through unlawful use of official position or authorization. The review team, bearing in mind the optional status of article 19, welcomed the interpretation that article 416 CC does not require cumulative accomplishment of the acts listed. To assist in a broad implementation of the provision, the review team recalled that the element of “damage” was not required by the Convention.

After considering the issue in 2011, Montenegro has chosen not to transpose domestically the optional article 20 of the UNCAC on criminalization of illicit enrichment. Instead, amendments to the Law on Prevention of Conflict of Interest were adopted in July 2012. A detailed analysis on this issue will be undertaken. The reviewing experts welcomed these explanations and invited the national authorities to evaluate the effectiveness of enforcement in the area of asset declarations and conflict of interests with a view to addressing potential inadequacies in the legal framework.

Bribery in the private sector is criminalized both in its active (article 276b CC) and passive form (article 276a CC). The object under article 276b is a “gift or other undue benefit”. Welcoming the relevant explanations given by the Montenegrin authorities, the reviewing experts encouraged them to continue efforts to provide for more certainty, clarity and uniformity as to the interpretation of “third party beneficiaries” in the provisions on active and passive bribery in the private sector.

With regard to article 268 CC on the criminalization of money-laundering, the reviewing experts noted an escalation in sentences throughout its text and the explanation that this is done to facilitate the identification of cases of the offence in question, without excluding any other forms of it. The review team encouraged the national authorities to continue to pursue further clarity on this issue in jurisprudence, especially with regard to the criteria of imposing differing sanctions, in conjunction with article 48 CC on the concurrence of criminal offences.

Montenegro’s legal system allows the prosecution of self-laundering. Further, all criminal offences which generate proceeds, including offences committed outside Montenegro, can be predicate offences for money-laundering purposes. In case of offences committed abroad by foreigners against a foreign country, the CC only applies to offences punishable by the law of that country by a minimum imprisonment of five years.

The review team welcomed the implementation of the optional article 24 of the UNCAC through article 256 CC. In order to assist in the broad implementation of the latter provision, the review team invited the national authorities to explore the possibility of including in its scope the element of “continued retention”.

As regards article 390 CC on “obstruction of evidence”, the review team was of the opinion that in the scope of witnesses, expert witnesses or other participants in criminal proceedings, covered by paragraph 1, should be expanded to also include their family members, and/or close relatives.

Montenegro has introduced in its legal system the criminal responsibility of legal persons through the Law on Liability of Legal Entities for Criminal Offences (2007). Data on relevant cases from three annual reports (2009, 2010 and 2011) have been provided.

The review team noted article 124 CC, in which escalated statute of limitation periods are prescribed in accordance with the level of criminal sanctions. Such limitation periods can be suspended or interrupted when the offender has evaded the administration of justice, or where MLA proceedings have been initiated. However, the Montenegrin authorities acknowledged that issues hampering effective prosecution may emerge in relation to a relatively shorter statute of limitation period for less serious corruption-related crimes falling within the jurisdiction of the Basic Court.

The sanctions applicable to natural and legal persons for most of the corruption offences were found to be adequate and dissuasive, specifically with regard to the bribery offences. The review team noted, however, that the sentencing provision should be harmonized in order to remove disparity between

sanctions for active and passive bribery. Amendments to the CC are being drafted with a view to, *inter alia*, harmonizing the sanctions for active and passive bribery, and consequently the statutes of limitation periods for such offences, as proposed by the review team. The review team welcomed this development, and invited the national authorities to continue ongoing efforts and pass the updated legislation in due time.

In Montenegro, immunity is granted to the President and Members of Parliament, Prime Minister and Cabinet Members, President of the Supreme Court, President and Judges of the Constitutional Court and the Supreme State Prosecutor (article 86 of the Constitution). The Parliament decides on immunity rights (article 82 of the Constitution), and can lift immunities so as to enable criminal prosecution. Judges enjoy functional immunity, which is lifted upon decision of the Judicial Council in case of a criminal offence (articles 122 and 128 of the Constitution).

The principles of legality and mandatory prosecution are fundamental in the domestic legal context. In certain cases, however, the exercise of prosecutorial discretion leading to the release of the offender from criminal prosecution is afforded by the law (articles 272-273 CPC). In that sense, the review team was satisfied of the compliance of Montenegrin legislation with article 30, paragraph 3, of the UNCAC.

The reviewers noted the new legal framework regarding competence to conduct criminal investigations, which assigns competence to the prosecutorial authorities. However, the decision on detention during pre-trial proceedings is still in the hands of the investigation judge due to the need for judicial control of actions that may have an impact on the protection of human rights. Criminal offenses committed within the context of organized crime and grave corruption cases fall within the competence of the Joint Investigation Team (JIT), which reports to the Supreme State Prosecutor.

Measures are in place to enable the confiscation of objects (as a security measure), the confiscation of property, the extended confiscation of property gain and the seizure of assets. The terms and conditions for confiscation of property gain are stipulated in article 113 CC. Confiscation may also target the value of benefits derived from criminal conduct, as well as property gain transferred to other persons.

Through amendments to the CC adopted in 2009 and 2010, the Montenegrin legislation allows for extended confiscation of property gain. In order to check the legality of the origin of the property where extended confiscation of property gain is possible, the CPC also enables the conduct of financial investigation. As a result of incremental statutory amendment, the provisions on confiscation, seizure and freezing of criminal assets and instrumentalities approaches a comprehensive framework. The review team noted, however, that, although it is a matter for State Parties to determine the form of legislative compliance with the Convention and that reliance on several laws is not in itself objectionable, the recent amendments have added, to a degree, to the complexity and fragmentation of the legislation, which may hinder its effective implementation.

Witness protection measures are implemented through the relevant provisions of the CPC and the Law on Witness Protection. The latter governs the out-of-court protection of a witness who testifies on the commission of, *inter alia*, offences punished by imprisonment of ten or more years, including serious corruption offences. This threshold would exclude a series of offences covered by the UNCAC. During the country visit, the national authorities explained that this reflected the balance of resources in the domestic criminal justice system and noted that they might consider changing the threshold once they are reforming the Law.

Evidentiary rules are also in place to ensure that the giving of testimony does not prejudice the safety of the spouse, close relatives or persons of witnesses (article 120 CPC).

Montenegro is a party to the Balkan Agreement on witness protection. No cases of relocation of witnesses to another State were reported. The reviewers encouraged the competent national authorities to explore the possibility of concluding further agreements on witness protection, including relocation of witnesses, in line with article 32, paragraph 3, of the UNCAC.

Bearing in mind the optional nature of article 33 of the UNCAC, the review team noted that, despite the existence of a nexus of provisions of labour law and civil servants legislation on the protection of reporting persons, there was still no special legislation in Montenegro ensuring such protection. It was highlighted, in response, that the national authorities have undertaken steps to adopt a special law on persons who report corruption. The review team encouraged the Montenegrin authorities to continue ongoing efforts to adopt such a law.

Articles 125 and 129 CPC enable a person participating in organized crime activities to provide information for investigative and evidentiary purposes. The review team encouraged the expansion of the scope of these provisions to motivate perpetrators of crimes other than organized crime to cooperate with law enforcement authorities. Measures in this regard may include the granting of immunity or providing for mitigating punishment and/or applying witness protection measures, as well as lowering the threshold of punishment of offences for which witness protection measures are implemented, as per article 37 of the UNCAC.

The cooperation between national investigating and prosecuting authorities and the private sector seemed to refer only to cases of money-laundering and financing of terrorism (article 4 of the Law on the Prevention of Money Laundering and Terrorist Financing). The review team was also referred to the obligation of postal agencies and legal entities registered for transmission of information to provide to the police and prosecution data obtained through secret surveillance measures ordered for organized crime and corruption-related crimes (articles 157-160 CPC). Furthermore, article 283 CPC obliges private sector entities to assist in the investigation of all criminal offences. The review team considered these as steps in the right direction and invited the national authorities to continue encouraging cooperation with the private sector.

The Montenegrin legislation was found to be in compliance with article 40 of the UNCAC on bank secrecy when investigating corruption and money-laundering cases (article 271, paragraph 3 CPC and article 85 of the Law on Banks).

Jurisdiction principles, including rules of territoriality and active and passive personality, are established in articles 134 to 137 CC. Bearing in mind the optional nature of the relevant UNCAC requirement, the review team invited Montenegrin authorities to explore the possibility of widening the scope of criminal jurisdiction to include: (1) offences against the State or its nationals, without requiring for the offence in question to involve a national of Montenegro; (2) offences committed by stateless persons who are habitually resident in Montenegro.

## **2.2. Successes and good practices**

The following were identified as good practices by the review team:

- The criminalization, in the context of the bribery provisions, of performing an “official *or other act*”, as opposed to the UNCAC requirement that the national public official acts or refrains from acting “in the exercise of duties”. The reference to “another act” allows the prosecution of

bribery designed to induce an official to perform an act as a result of generally discharging official functions;

- The broad scope of application of the domestic provisions on trading in influence, as none of them refers to “abuse of influence”, as stipulated in article 18 of the UNCAC;
- The adoption of legislative amendments enabling the extended confiscation of property gain and the conduct of financial investigation; and
- The establishment of liability of legal persons for criminal offences.

### **2.3. Challenges in implementation, where applicable**

While noting Montenegro’s continuous efforts to harmonize the national legal system with the UNCAC criminalization and law enforcement provisions, the reviewers identified some challenges in implementation and/or grounds for further improvement and made the following remarks to be taken into account for action or consideration by the competent national authorities (depending on the mandatory or optional nature of the relevant UNCAC requirements):

- Update legislation to include *expressis verbis* the phrase “directly or indirectly” in the relevant provisions on active and passive bribery of national public officials, in line with the UNCAC;
- Construe the offence of active bribery in the public sector in a way that unambiguously covers instances where the advantage is not intended for the official himself/herself but for a third-party beneficiary;
- Ensure that the domestic legislation and/or its interpretation provide clarity and consistency regarding the nature of the advantage and its qualification as “undue” in the provision on bribery in the private sector *vis-à-vis* the corresponding references to “gift or other benefit” in the public sector provision;
- Clarify the interpretation of existing legislative provisions implementing article 17 of the UNCAC to ensure that immovable property falls within their scope of application, in line with article 2 (d) of the UNCAC;
- Continue efforts to pursue, where necessary, further clarity in jurisprudence on the interpretation and scope of application of the different sections in the money-laundering provision, especially with regard to the criteria of imposing differing sanctions, in conjunction with article 48 CC on the concurrence of criminal offences;
- Continue efforts to further broaden the scope of measures to encourage cooperation between national investigating and prosecuting authorities and the private sector on matters relating to the commission of offences covered by the UNCAC;
- Continue efforts to ensure that the domestic legislation and/or its interpretation on the confiscation, seizure and freezing of criminal assets and instrumentalities provides a clear, consistent and less fragmented framework to assist police and prosecutors in tackling corruption;
- Amend, as appropriate, the legislative provision on obstruction of evidence/justice to expand the scope of witnesses, expert witnesses or other participants in criminal proceedings so as to include their family members and/or close relatives;
- Ensure that ongoing update of the CC includes the issues of harmonization of sanctions on active and passive bribery, so as to avoid disparity, enhance coherence of the sanctioning system and remove potential uncertainties and difficulties that may arise from varying statute of limitations periods; and pursue similar action with regard to sanctions against active trading in influence;
- Ensure that the domestic legislation provides for a longer statute of limitations period for minor corruption offences carrying imprisonment falling within the jurisdiction of the Basic Court.

### **3. Chapter IV: International cooperation**

#### **3.1. Observations on the implementation of the articles under review**

Extradition is domestically regulated through the Law on Mutual Legal Assistance in Criminal Matters of 2008 ("LMLACM") unless otherwise provided in international treaties or agreements.

Montenegro does not make extradition conditional on the existence of a treaty. However, a number of bilateral extradition agreements have been concluded. Reciprocity can also be a legal basis for extradition.

The LMLACM provides for the conditions for extradition, including grounds for refusal of an extradition request. In particular, article 13 sets the threshold for the identification of extraditable offences (imprisonment of six months and remainder of four months of prison sentence if extradition is requested for enforcement of sentence).

Double criminality is a requirement for extradition, either in any case where extradition is regulated by the domestic law (article 11 LMLACM) or subject to the provisions of an applicable treaty or agreement.

No ad hoc provision in the domestic law covers the issue of accessory extradition (article 44, paragraph 3 UNCAC). Instead, this issue is covered in bilateral extradition treaties. The Montenegrin authorities acknowledged that accessory extradition may need to be considered when updating the LMLACM.

Article 12 LMLACM includes the exception of political offences to extradition, referring further to the European Convention on Extradition of 1957. Due to the general applicability of this provision, the reviewers drew the attention of the Montenegrin authorities to possible interpretation issues in future extradition cases involving persons "entrusted with prominent public functions" (article 54, paragraph 1 UNCAC), whereby allegations of the political nature of the offence/political persecution in the requesting State may arise.

The extradition procedure is being regulated by articles 15-33 LMLACM. The detention of the person can be authorized for a period of no longer than six months with possible prolongation for two more months, upon a reasoned request by the requesting State. During the country visit, the Montenegrin authorities reported their intention to consider extending the maximum duration of extradition detention to up to one year without submission of the relevant request by the requesting State.

No time frames were given for the completion of the domestic extradition proceedings. During the country visit, the Montenegrin authorities reported that it takes approximately four months, including the remedies, to surrender the fugitive.

Relevant LMLACM provisions are in compliance with article 44, paragraph 11, of the UNCAC.. Moreover, the issue of conditional surrender of nationals is regulated in bilateral agreements.

The Montenegrin authorities reported their intention to amend the LMLACM with a view to making it more efficient in the light of new developments, including those relating to UNCAC. During the country visit, it was confirmed that the domestic work to update the Law would start imminently.

The review team raised the issue of the lack of practical examples of implementation and statistics. During the country visit, explanations were provided enabling the reviewers to gain a better picture of how the legal framework is implemented in practice. In addition, statistics on cases of active and passive extradition within the period 2010-2012 were submitted. However, the national authorities noted that they were intending to start creating early 2013 a case management system containing a database with statistics and practical cases for both extradition and MLA.

Montenegro is a party to the Convention on the Transfer of Sentenced Persons (1983) and its Additional Protocol (1997). The country has signed bilateral agreements on transfer of sentenced persons and on mutual recognition and execution of judgments in criminal matters, including enforcement of penalties. Montenegro is also a party to the European Convention on the International Validity of Criminal Judgments. The enforcement of foreign criminal judgments is further regulated in articles 38-41 of the LMLACM.

Mutual legal assistance is provided in accordance with international treaties or agreements in force. Montenegro is a party to European Convention on Mutual Assistance in Criminal Matters of 1959 (“MLA European Convention”) and its Additional Protocols. The country has also signed a number of bilateral agreements in this field. In the absence of such treaties or agreements or when certain matters are not regulated therein, assistance is provided pursuant to the LMLACM on the condition of reciprocity. It can also be afforded in relation to offences for which a legal person may be held liable.

Assistance may be provided under the condition of double criminality (article 5 LMLACM). The Law does not provide for the types of assistance to be provided in the absence of dual criminality, but this issue is dealt with on a case-by-case basis. The grounds for refusal of MLA requests are stipulated in articles 46 and 47 LMLACM. Bank secrecy cannot be a ground for refusal.

The Ministry responsible for the Judiciary is the designated central authority for dealing with MLA requests. In absence of international agreement or reciprocity, MLA requests are transmitted through diplomatic channels. If an international agreement exists or there is reciprocity, the requests are transmitted directly between the competent authorities. In urgent cases, provided that there is reciprocity, MLA requests may be transmitted through Interpol channels. The incoming MLA requests are executed in accordance with the Montenegrin legislation. The length of MLA proceedings depends on the complexity of the case.

The reported article 19 LMLACM refers exceptionally to the reasoning of refusal of extradition requests, and not MLA requests. The issue concerning refusal of MLA requests is dealt with in bilateral agreements. However, it was acknowledged that, in the absence of a treaty, the scope of the article needs to be expanded to cover MLA requests as well. This is an issue for consideration when updating the legislation.

The transfer of criminal proceedings is regulated in articles 34-37 LMLACM. Montenegro is also a party to the European Convention on the Transfer of Proceedings in Criminal Matters (1972).

In the area of law enforcement cooperation, Montenegro fulfils its obligations on the basis of national legislation and relevant conventions and bilateral agreements, as well as through membership in international police organizations. During the country visit, one case of law enforcement cooperation with U.S.A. was reported, whereby the UNCAC was used as a legal basis (in the absence of a bilateral agreement).



Montenegro has also signed and ratified an agreement on strategic cooperation with EUROPOL. Training programmes are undertaken in the context of this agreement. Concrete cooperation with foreign liaison officers is promoted through the NCB Interpol and the Department for International Police Cooperation and European Integration. The Police Directorate has one liaison officer at the Interpol Headquarters in Lyon.

Negotiations for the conclusion of an agreement between Montenegro and Eurojust will start in due time. Montenegro has also established cooperation with the Camden Asset Recovery Inter-Agency Network (CARIN) and is currently participating under an observer status.

In order to conduct joint investigations with other countries, Montenegro has ratified the Second Additional Protocol to the MLA European Convention.

Montenegro has not signed bilateral or multilateral agreements for the use of special investigative techniques, but rather decides on such use on a case-by-case basis pursuant to the LMLACM, the MLA European Convention and its Second Additional Protocol. Articles 157-162 CPC provide the framework to ensure that secret surveillance is in line with the legality principle and that related evidence is legally adduced before the courts.

### **3.2. Successes and good practices**

The review team concluded that Montenegro had established a solid framework of international cooperation. The following were identified as good practices by the review team:

- Montenegro's status as party to regional instruments on different forms of international cooperation per se, as well as multilateral instruments on corruption, money-laundering and organized crime, containing provisions on international cooperation; and
- The conclusion of a strategic agreement with Europol, as well as the concrete cooperation with foreign liaison officers through Interpol aimed at facilitating law enforcement cooperation.

### **3.3. Challenges in implementation, where applicable**

The following remarks are brought to the attention of the Montenegrin authorities for their action or consideration (depending on the mandatory or optional nature of the relevant UNCAC requirements) with a view to enhancing international cooperation to combat offences covered by the UNCAC:

- Consider the inclusion of a provision on accessory extradition, in line with article 44, paragraph 3 of the UNCAC, when updating the LMLACM;
- Continue to ensure that any offence established in accordance with the UNCAC is not considered as a political offence that may hinder extradition, especially in cases involving persons "entrusted with prominent public functions", whereby allegations of the political nature of the offence/political persecution in the requesting State may arise;
- Extend, when updating the LMLACM, the maximum duration of detention for the purpose of extradition without submission of a relevant request by the requesting State;
- Ensure, when updating the LMLACM, that the provision on the reasoning of refusal of extradition requests is expanded to cover MLA requests as well;
- Streamline efforts to create a case management system containing a database with statistics and practical examples/cases for both extradition and MLA, which will provide a better picture of how the relevant legal framework is implemented in practice;

- Continue to explore opportunities to actively engage in bilateral and multilateral agreements with foreign countries (particularly non-European countries), with the aim to enhance the effectiveness of different forms of international cooperation; and
- Consider the allocation of additional resources to strengthen the efficiency and capacity of international cooperation mechanisms.

#### **3.4. Technical assistance needs identified to improve implementation of the Convention**

The Montenegrin authorities indicated that they would benefit from receiving technical assistance on the following:

- Updating of the LMLACM with a view to making it more efficient in the light of new developments in the field of international cooperation in criminal matters, including those relating to the UNCAC;
  - Creation of a case management system containing a database with statistics and practical examples/cases for both extradition and MLA.
-