

# Screening report

# Montenegro

## Chapter 23 – Judiciary and fundamental rights

**Date of screening meetings:**

Explanatory meeting: 26 – 27 March 2012

Bilateral meeting: 30 – 31 May 2012

## I. CHAPTER CONTENT

According to Article 2 of the Treaty on European Union, the Union is founded on the principles of human dignity, freedom, democracy, equality, the rule of law and the respect for human rights. These principles are common to the Member States and need to be complied with by candidate countries. Article 3 (2) of the Treaty on European Union and Article 67 (1) of the Treaty on the Functioning of the European Union establish an area of freedom, security and justice.

EU policies in the area of the judiciary and fundamental rights aim to maintain and further develop the Union as an area of freedom, security and justice. The rule of law principle and the right to a fair trial, as enshrined in Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union, provide that the judiciary must be independent and impartial. This requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Legal guarantees for fair trial procedures must be in place. Likewise, Member States must fight corruption effectively as it represents a threat to the stability of democratic institutions and the rule of law.

Article 83 (1) of the Treaty on the Functioning of the European Union establishes the competence of the Union to draw up minimum rules concerning the definition of criminal offences and sanctions in the area of corruption. The 1995 Convention on the Protection of the European Communities Financial Interests and the 1997 Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of the Member States of the European Union imply that "effective, proportionate and dissuasive" criminal law penalties are required to fight corruption. A solid legal framework and reliable institutions are required to underpin a coherent policy of prevention and deterrence of corruption.

According to Article 6 of the Treaty on European Union and the case-law of the Court of Justice of the European Union, the Union respects fundamental rights, as guaranteed by the Charter of Fundamental Rights of the European Union and as they result from the constitutional traditions common to the Member States, as general principles of EU law. Thus, they are binding on the Union institutions in the exercise of their powers and on the Member States when they implement EU law (Article 51 of the Charter of Fundamental Rights of the European Union). The protection of fundamental rights covers traditional civil rights, such as the right to life, the prohibition of torture and degrading treatment, the right to security and liberty imposing strict limits on pre-trial detention, the freedom of religion, the freedom of speech and the freedom of association and assembly. The European Union also protects the fundamental right to private life and guarantees the protection of personal data, in particular through the directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, the Framework Decision 2008/977 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and the directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (directive on privacy and electronic communications). The *acquis* also contains guarantees to secure equality. There is a general prohibition of discrimination on a variety of grounds; equality between men and women must be ensured; cultural, religious and linguistic diversity is to be respected. Furthermore, the rights of the child need special protection; the contents of these rights may be drawn from the UN Convention on the Rights of the Child ratified by all Member States. According to Article 21 of the Charter of Fundamental Rights of the EU, members of national minorities shall not be discriminated against. Finally, the *acquis* in the field of fundamental rights contains a number of important judicial guarantees.

The EU citizens' rights include the right to vote and stand as a candidate in elections to the European Parliament and in municipal elections; the right to move and reside freely within the European Union; and diplomatic and consular protection.

## **II. COUNTRY ALIGNMENT AND IMPLEMENTATION CAPACITY**

This part summarises the information provided by Montenegro and the discussion at the screening meeting.

Montenegro indicated that it accepts the *acquis* regarding judiciary and fundamental rights. Montenegro pointed out that certain parts of the *acquis* in this area have already been transposed. At the same time, Montenegro acknowledged that further efforts are needed, in particular in building up a solid track record.

### **II.a JUDICIARY**

The Montenegrin judiciary is organised as a three-instance court system. It consists of 15 basic courts, two High Courts, an Appellate Court and a Supreme Court. It also includes two Commercial Courts and an Administrative Court. The judicial power is exercised by 262 judges supported by 1 084 administrative staff. The basic courts act as first instance bodies and have jurisdiction over criminal, civil and labour matters, and also over enforcement proceedings. The High Courts act as first instance on criminal offences punishable by imprisonment of more than ten years and on cases of organised crime and corruption. They act as second instance on appeals against decisions by the basic courts. The Commercial Courts act as courts of first instance on commercial matters, including disputes between Montenegrin and foreign companies. The Appellate Court has jurisdiction over the whole territory of Montenegro to decide on appeals against first-instance decisions issued by the High Courts and the Commercial Courts and resolve conflicts of jurisdiction between basic courts, High Courts and Commercial Courts. The Administrative Court has jurisdiction to decide on administrative disputes and on extraordinary legal remedies in misdemeanour proceedings. The Supreme Court is the highest court in Montenegro. It ensures uniform application of the law by the courts. It acts as the third-instance court on appeals against decisions by the High Courts, the Appellate Court and the Administrative Court. It decides on extraordinary legal remedies against decisions by other courts and on issues of territorial jurisdiction. The Constitutional Court decides on the conformity of laws with the Constitution and with ratified international agreements and on whether the President has violated the Constitution.

The public prosecution broadly follows the structure of the court system. Each State Prosecution Office is headed by a state prosecutor assisted by one or more deputy prosecutors. A Special Prosecution Office for fighting organised crime, corruption, financing of terrorism and war crimes has been established within the Supreme Public Prosecutor's Office. There are a total of 109 prosecutors, of whom 17 are public prosecutors and 92 deputy public prosecutors.

#### **Independence**

Article 11 of the Constitution provides for the separation of powers in Montenegro. Article 118 of the Constitution and Article 3 of the Law on Courts enshrine the principle of independence of judges. Article 118 of the Constitution specifies that in the performance of their official duties, judges shall only be bound by the Constitution, laws and international agreements. The principle of the natural judge is also laid down in this provision. According to Article 134 of the Constitution and Article 3 of the Law on the State Prosecutor's Office, the latter is an independent state body empowered and due to proceed against those who commit a crime. When performing its

function, the State Prosecutor's Office shall only be guided by the Constitution, laws and international treaties.

Article 128 of the Constitution provides that judges, court presidents and lay judges are appointed and relieved of duty by the Judicial Council. The appointment procedure involves the announcement of vacancies by the Judicial Council further to proposals of court presidents. The applications are sent to the Judicial Council which forms its views by requesting information from, *inter alia*, the court where the candidate worked as judicial trainee or in another capacity. An opinion is requested to the immediate superior court for judges being promoted. The selection procedure of candidates to be appointed judges for the first time differs from the one applicable to the promotion of judges. In the latter, only interviews with candidates meeting the requirements for selection are conducted by the Judicial Council. Instead, for candidates to be appointed judges for the first time, the Judicial Council, throughout the Commission for conducting the written tests<sup>1</sup>, conducts anonymous written examinations prior to interviews. The decision of the Judicial Council on the selection of judges is final and an administrative procedure may be initiated against it. According to Article 124 of the Constitution, the President of the Supreme Court is elected and relieved of duty by the Parliament upon proposal of President of Montenegro, the Speaker of the Parliament and the Prime Minister. The President and the judges of the Constitutional Court are appointed and relieved of duty by the Parliament as laid down in Article 82 of the Constitution.

Judges cannot be removed from office except by a judicial decision, when they reach the age of retirement or at their own request. Judges cannot be transferred against their will, except in the event of a reorganisation of courts. They also enjoy functional immunity as provided for by the Constitution<sup>2</sup>.

According to Article 135 of the Constitution, the Supreme State Prosecutor and state prosecutors are appointed for a period of five years and relieved of duty by the Parliament, acting on a non-binding recommendation by the Prosecutorial Council. Vacancies are announced by the Prosecutorial Council. Applications are submitted to the Prosecutorial Council which forms its views by requesting information from previous employers. Interviews are conducted by the Prosecutorial Council in a view to assessing the candidate's knowledge and capacity to perform the prosecution office<sup>3</sup>. The procedure for the first-time appointment of deputy prosecutors follows the same rules as those for the first-time appointment of judges. Deputy prosecutors are appointed and relieved from duties by the Prosecutorial Council<sup>4</sup>, and have permanent tenure. However, by way of derogation from the latter rule, deputy basic prosecutors are appointed for a term of three years when appointed for the first time. State prosecutors and deputies cannot be transferred against their will, except in the event of a reorganisation of the State Prosecutor's Office. They also enjoy functional immunity<sup>5</sup>.

The Judicial Council and the Prosecutorial Council are also responsible for disciplinary matters for judges and prosecutors, respectively. Activities subject to disciplinary action and disciplinary action itself are established by law.

According to Article 127 of the Constitution, the Judicial Council has a President and nine members. The President of the Supreme Court is the President of the Council. Four of its members are judges elected and relieved of duty by the Conference of Judges, two are eminent lawyers

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<sup>1</sup> The commission is composed of three members of the Judicial Council.

<sup>2</sup> Article 122.

<sup>3</sup> The criteria for appointing state prosecutors and deputies are set out in Articles 33a-33c of the Law on the State Prosecutor's Office.

<sup>4</sup> Article 26 of the Law on the State Prosecutor's Office.

<sup>5</sup> Article 137 of the Constitution.

nominated and dismissed by the President of Montenegro, and two are members of the parliament. The Minister of Justice is also a member. The Conference of Judges is composed of all judges and presidents of courts. The Judicial Council is the body responsible for the selection, appointment, promotion, dismissal and disciplinary measures concerning judges. The Secretariat of the Judicial Council is composed of 29 staff and the budget of the Judicial Council for 2012 is €546,250.

The Prosecutorial Council is appointed by the parliament on a proposal by the Supreme Public Prosecutor's Office for a four-year term, in accordance with Article 136 of the Constitution. At present, the Council has ten members, of which six state prosecutors or deputy state prosecutors, one professor of law, two eminent lawyers and one representative of the Ministry of Justice. The Supreme State Prosecutor is President of the Prosecutorial Council. The Law on the State Prosecution Office was amended in 2011, consequently changing the provisions on the composition of the Prosecutorial Council. According to the amended law, the Council has a President and ten members. Five members are chosen from among state prosecutors and deputy prosecutors, four from among eminent lawyers<sup>6</sup> and one representative of the Ministry of Justice. The Supreme State Prosecutor is also member of the Prosecutorial Council but cannot hold the position of president. In terms of administrative capacity, the Prosecutorial Council has only one secretarial staff. The budget of the Prosecutorial Council for 2012 is € 161,174. Neither the members of the Judicial Council nor the members of the Prosecutorial Council are exonerated, even partially, from their regular work.

With regard to the independence of the judiciary, procedures are underway for the adoption of constitutional amendments aimed at further enhancing judicial independence, in particular through de-politicised and merit-based appointments of the Judicial and Prosecutorial Councils' members and of state prosecutors. Following the endorsement of the draft amendments to the Constitution by the Parliamentary Committee on Constitutional Affairs and Legislation in July 2012, they were referred to the Venice Commission for obtaining its opinion. The draft constitutional amendments cover the composition of the Judicial Council, composition of the Prosecutorial Council, competences of the Parliament regarding appointment and dismissal of the President of the Supreme Court, Supreme State Prosecutor, state prosecutors and Prosecutorial Council, as well as competences for appointment and dismissal of the President and judges of the Constitutional Court.

### **Impartiality**

According to Article 17 of the Constitution, all shall be deemed equal before the law, regardless of any particularity or personal feature. Procedural laws provide that judges and state attorneys in cases of conflict of interest are exempted from trying cases.

Impartiality of judges is ensured by random allocation of cases and by conflict of interest rules and disqualification provisions established by the law. Cases are allocated to a judge according to the daily order in which requests to initiate judicial proceedings have been filed. Cases in which an allocated case can be withdrawn from a judge are prescribed by the law.

As regards judicial ethics, the Codes of Judicial Ethics for Judges and Prosecutors were adopted in 2008 and 2006, respectively. Commissions for monitoring compliance with the Code of Ethics of judges and prosecutors, respectively, have been appointed in October 2011. Both judges and prosecutors are obliged to declare their assets every year to the Commission for the Prevention of Conflict of Interest.

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<sup>6</sup> Two lawyers are chosen at the proposal of the competent working body of the Parliament, one at the proposal of the President of Montenegro in consultation with the Protector of Human Rights and Freedoms and one at the proposal of the Bar Association of Montenegro.

## **Professionalism/Competence**

According to the Law on Training in Judicial Bodies, judges and state prosecutors have the right and the duty to attend vocational trainings. Training is carried out by the Judicial Training Centre and, also, by the Judicial Council and the Prosecutorial Council. The Judicial Training Centre is organised as a separate organisational unit within the Supreme Court of Montenegro. Initial trainings are organised for judicial advisors working in courts or prosecution offices, as well as for qualified lawyers who have passed the bar examination and aim to become judges or prosecutors. Continuous trainings are organised for judges and prosecutors with a view to maintaining and upgrading their knowledge and skills. Trainees in courts and state prosecutor's offices perform their two-year apprenticeship following special training programmes. However, due to the lack of funds for continuous training in the budget of the Supreme Court of Montenegro, the Centre has been for years implementing continuous training activities mainly in cooperation with and with the support of international organisations. A system to evaluate the professional performance of judges and prosecutors has not been established yet.

## **Efficiency**

On 31 December 2011, with around 11,500 unresolved cases in all courts in Montenegro, the backlog was approximately 4% lower than at the end of 2010. Out of these unresolved cases, 38% are civil cases, 8% criminal, 1,5% non-contentious and 58% enforcement cases. With the exception of the Basic Court in Podgorica, the backlog of cases is gradually being reduced. Measures to reduce the case backlog include (a) using alternative dispute resolution (mediation), (b) provisions for a trial within a reasonable term, and (c) reducing the backlog of enforcement cases through a number of measures, such as using the services of public notaries and bailiffs.

The rationalisation of the courts network constitutes an objective of the reform of the judiciary and is based on the premises that (a) there is an excessive number of courts in relation to the size of the country and the number of its inhabitants, and (b) the existing network of courts is not financially cost-effective and requires significant structural investments. A new analysis is underway and the results will be made available in the III quarter of 2012. There are currently no incentive-based measures that would contribute to the voluntary mobility of judges and prosecutors.

As regards the introduction of Information Technology, the Montenegrin government has decided to support the Judicial Information System (JIS) and to interconnect all judicial institutions into a single information network and on the Internet. The system enables the electronic handling of cases in all judicial institutions, including courts, prosecution offices, prisons and the Ministry of Justice. On 31 December 2011, all cases were uploaded into JIS. Moreover, in October 2011 the initiative to make decisions of all Montenegrin courts publicly accessible through the Supreme Court's web portal was launched<sup>7</sup>. So far, the Administrative Court and the Appellate Court have uploaded all their decisions.

## **Judicial reform**

The Government adopted a Strategy for the Reform of the Judiciary together with an Action Plan for the implementation of the Strategy in July 2007. The Strategy and the Action Plan cover the period 2007-2012. The Strategy aims at creating an independent, efficient and accessible judicial system by, inter alia, (a) dealing with the large number of pending cases; (b) reducing the duration of court proceedings; (c) modernising the court administration; (d) rationalising the court network; (e) establishing an alternative dispute resolution system as well as a free legal aid system; and (f) providing education and professional training. A Commission for the implementation of the

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<sup>7</sup> [www.sudovi.me](http://www.sudovi.me).

strategy, composed of the Minister of Justice, members of the Ministry of Finance, the President of the Supreme Court, the Supreme State Prosecutor, the President of the Misdemeanour Chamber, the Director of the Institution for the Enforcement of Criminal Sanctions, the President of the Montenegrin Bar Association and the Presidents of the Associations of judges and state prosecutors has been set up. Its main task is to monitor the implementation of the strategy and give guidance. The government adopted amendments to the Action Plan in December 2011.

## **II.b ANTI-CORRUPTION**

### **International and domestic legal frameworks**

According to the Montenegrin authorities, the national legal framework is aligned with the Criminal Law Convention on Corruption of the Council of Europe. The Criminal Code foresees the criminal offences of passive bribery in Article 423, active bribery in Article 424, passive and active bribery in economic transactions in Articles 276a and 276b, active and passive trading in influence in Articles 422 and 422a, money laundering in Article 268, abuse of office in economic transactions in Article 276, computer fraud in Article 352, forging of documents in Article 412, forging of official documents in Article 414, and fraud in service in Article 419. The liability of legal entities for criminal offences is governed by the Law on Liability of Legal Entities for Criminal Offences. This Law sanctions legal persons for criminal offences, including corruption, committed by a responsible person by imposing fines or the penalty of termination of the legal entity. The penalties prescribed for corruption offences in the private sector range from three months to five years of imprisonment; for corruption offences in the public sector penalties range from six months to fifteen years of imprisonment. Legislation also provides for the seizure and confiscation of gains obtained from a criminal offence as well as for the management of seized and confiscated assets<sup>8</sup>.

The Law on Civil Servants and State Employees provides the legal basis for codes of ethics for public officials, employees of the Parliament, the Government, and employees of courts and state prosecution offices. It also contains rules on whistle-blower protection, which is also extended to the private sector by the Labour Law. The Law on Witness Protection governs the conditions and procedures for the provision of out-of-court protection and assistance to a witness, when reasonable fear exists that testifying for the purpose of bringing evidence of a criminal offence would expose the witness to actual and severe danger to life, health, corporal inviolability, freedom or property. The protection and assistance, may, at the request of the witness, be also provided to a person close to him/her.

The Law on Prevention of Conflict of Interest, amended in August 2011, defines conflict of interest as a situation in which an official has a private interest that clashes with the public one, or a private interest that might affect the official's impartiality in the exercise of his/her public office. The law also stipulates that, when taking up their duties, public officials shall submit to the Commission for the prevention of conflict of interest information about assets, permanent income and the assets of their spouse and children. Likewise, public officials should submit asset declarations once a year after taking up their duties. The Commission for the prevention of conflict of interest, whose members are appointed by the Montenegrin Parliament, is responsible for the implementation of the law. The Montenegrin authorities stated that, in a view to improving its supervisory role, the Commission needs to be given access to relevant databases.

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<sup>8</sup> Articles 112-114 of the Criminal Code, Articles 478 - 489 of the Criminal Procedure Code, Articles 35-36 of the Law on Liability of Legal Entities for Criminal Offences, and Law on Custody of Temporarily or Permanently Confiscated Assets.

The Law on Financing of Political Parties was enacted in December 2011. It regulates the supervisory institutional framework, in-kind contributions and the ceiling of membership fees, fixing an upper limit of 10 % of a member's annual income. The State Audit Institution is now responsible for auditing political parties' annual balance sheets and reports on election campaign costs, while the State Election Commission is in charge of monitoring the implementation of other aspects of the law. However, according to the Montenegrin authorities the administrative and professional capacity of the State Election Commission needs to be strengthened.

The Law on Public Procurement incorporates the principles of efficiency, competitiveness and transparency of public procurement procedures; anti-corruption and conflict of interest rules; obligation of adopting public procurement plans; precise and clear criteria for selecting the most favourable bid, protection of the public interest and the rights of parties in the public procurement procedure. The law stipulates that corruption may lead to exclusion from public procurement procedures. In December 2011, the Government adopted a Strategy and an Action Plan for the development of the Public Procurement System, and a decision to set up a coordination body for monitoring their implementation. The Public Procurement Commission, which is in charge of implementing the law, was appointed in February 2012.

A new Law on Free Access to Information was adopted in July 2012, with a view to aligning it with the Constitution and Council of Europe Convention on Access to Official Documents. Implementation of this new law will have to demonstrate that it can overcome the shortcomings of the previous law.

### **Institutions and policy**

The Strategy for the Fight against Corruption and Organised Crime and its Action Plan were adopted in July 2010. The Strategy covers the period 2010-2014, while the Action Plan covers the period 2010-2012. A revised action plan 2010-2012 was adopted in July 2011 and contains 109 objectives and 372 measures for 66 institutions/reporting bodies. The Strategy refers to the issues of corruption and organised crime and includes the following chapters: priorities in combating corruption at political and international level; areas of particular risk (privatisation process; public procurement; urban planning; education; health care; local government; civil society, media and sport), and prevention of corruption in law enforcement agencies (police; judicial authorities; state prosecution). Sectorial action plans for the fight against corruption have also been adopted in the following areas: urban planning and construction, education, health care and local self-government. The National Commission for monitoring the implementation of the Strategy for the fight against corruption and organised crime is the principal authority in charge of interagency coordination in the fight against corruption and organized crime. Its main tasks are to manage, organise, coordinate and monitor the activities of state bodies, public administration bodies and other institutions responsible for the implementation of the Strategy. It has so far adopted three reports on its implementation. Statistics on cases with elements of corruption are processed by the representatives of the Tripartite Commission, composed of representatives of the Supreme State Prosecutor's Office, the Supreme Court and the Police Directorate. The Directorate for Anti-Corruption Initiatives (DACI) has mainly a consultative role focusing on soft prevention measures such as education and awareness-raising, and it also serves as Secretariat to the National Commission. The Commission for the prevention of conflict of interest is also active in the field of prevention of corruption by verifying asset declarations of public officials. On the suppression side, the number of investigations and convictions for corruption offences increased from, respectively, 8 and 52 in 2009 to 40 and 59 in 2011. The Division for the suppression of organised crime, corruption, terrorism and war crimes, established within the Supreme State Prosecutor's Office, is the central body in the fight against corruption. Its remit includes criminal prosecution of corruption and organised crime, international cooperation in both of these fields and prevention of corruption. This division is authorised to request information from state bodies and legal entities,



and initiate and conduct inquiries into criminal offences; it concluded separate Memorandum of Understanding with the Police. However, the Montenegrin authorities stressed the need to improve cooperation among national law enforcement bodies as well as cooperation with relevant international bodies, namely EUROJUST, SECI, Europol etc.

## **II.c FUNDAMENTAL RIGHTS**

### **General**

The protection of fundamental rights in Montenegro is based on the Constitution. Part II of the Constitution guarantees civil and political rights as well as economic, social and cultural rights. According to Article 24 of the Constitution, the human rights and freedoms guaranteed in the Constitution may be limited only by the law, within the scope permitted by the Constitution and to the extent necessary to meet the purpose for which the limitation is allowed.

Article 9 of the Constitution provides that international agreements in force are part of the internal legal order of Montenegro and take precedence over domestic legislation. Montenegro has ratified a number of human rights related conventions (full list see annex).

The institutional framework established for monitoring the human rights situation includes the recently established Ministry of Justice and Human Rights whose mandate is, inter alia, to provide analysis on the situation regarding human rights and freedoms in the country and on the compliance of the domestic legislation with the Constitution and international human rights agreements, and propose measures to the Government; the Ministry for Minority Rights; the Ministry of Labour and Social Welfare; the Ministry of Education and Sports, the Ministries of Culture and Health, the parliamentary Committee on Human Rights and Freedom; the Ombudsman, whose remit is to protect the constitutional and legal rights of the citizens before the state administration and bodies vested with public authority; the Anti-Discrimination Council, the Office on Gender Equality, the Social Welfare Centre, the Councils for Social Care and for Disabled Persons, the Council for Children's Rights and the Personal Data Protection Agency. As regards minorities, the institutional framework also includes the Centre for the Protection and Development of Minority Cultures and the Councils for National Minorities which are the official channel of communication between minorities and the government.

### **Human rights**

- ***Human dignity***

Human dignity is a basic principle in the Montenegrin legal framework, explicitly protected by Article 28 of the Constitution. It is enshrined in all fundamental rights legislation and aims at recognising the value of every person as well as promoting equal rights. Article 17 of the Constitution stipulates the principles of equality and non-discrimination.

- ***Right to life and to the integrity of the person***

According to Article 26 of the Constitution, the capital punishment is prohibited in Montenegro. Prison sentences are provided for under Articles 143 - 150 of the Criminal Code for the following criminal offences against life: murder, aggravated murder, manslaughter, murder of a child at birth, mercy killing, instigation to suicide and assisted suicide; and unlawful termination of pregnancy.

Article 28 of the Constitution protects both mental and physical integrity.

- ***Prohibition of torture and inhuman or degrading treatment or punishment***

According to Article 28 of the Constitution, no one can be subject to torture or inhuman or degrading treatment and according to Article 31 any form of violence, inhuman or degrading treatment against a person deprived of liberty or whose liberty has been limited is prohibited.

Montenegro ratified the European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment together with its Protocols 1 and 2, as well as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 11 of the Criminal Code prohibits the infliction on a person of physical or mental pain or suffering with the purpose of obtaining information or a confession. Cruel and degrading treatment is a qualification element in several criminal offences. As regards protection of prisoners and detainees, the Criminal Procedure Code (Article 182) provides that detention is executed in conditions that do not offend the dignity of the detainee.

- ***Prohibition of slavery, servitude, and forced or compulsory labour***

According to Article 28 of the Constitution, no one can be kept in slavery or servile position. Article 63 stipulates that forced labour is forbidden. Furthermore, Article 62 states that everyone shall have the right to work, to free choice of occupation and employment, and to fair and human working conditions.

Aspects related to labour law are dealt with in chapter 19 – Social Policy and Employment; aspects related to trafficking in human beings are dealt with in chapter 24 – Justice, freedom and security.

- ***Respect for private and family life and communications***

Article 40 of the Constitution guarantees respect for private and family life. Articles 40 and 41 provide, respectively, for the inviolability of the home and the confidentiality of correspondence and all other forms of communication.

These rights are also protected under the Criminal Procedure Code, the Criminal Code, the Law on Juvenile Justice, the Law on Enforcement of Criminal Sanctions, the Civil Procedure Code, the Law on Enforcement Procedure, the Family Law, the Labour Law, the Law on Contracts and Torts, the Law on Protection from Domestic Violence, the Law on Police, the Law on Armed Forces, the Law on the National Security Agency, the Law on Media, the Law on Electronic Media, the Law on Civil Servants and State Employees, the Law on Free Access to Information, the Law on Conditions for Publishing Private Diaries, Letters, Portraits, Photographs, Films and Phonograms, the Law on Prohibition of Discrimination, the Law on Foreigners, the Law on Health Care, the Law on Patients' Rights, the Law on Protection and Enforcement of Mentally Disabled Persons' Rights, the Law on Social and Child Protection, the Law on Pre-School Education, the Law on Minorities Rights and Freedoms, the Law on Library Activities and the Law on the Status of Religious Communities.

- ***Right to marry and right to found a family***

Under Article 71 of the Constitution, marriage shall be based only on the free consent of a woman and a man, and on equality of spouses. The right to marry and the right to found a family are also provided for in the Family Law<sup>9</sup>.

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<sup>9</sup> Articles 2, 3 and 15.

- ***Freedom of thought, conscience and religion***

Freedom of thought, conscience and religion is provided for under Article 46 of the Constitution. The right to express religious beliefs may only be limited if so required in order to protect life and health of others, public peace and order, as well as other rights guaranteed by the Constitution.

Article 14 of the Constitution stipulates that religious communities shall be equal and free in the exercise of religious rites and religious affairs, and are separated from the state. Article 48 of the Constitution as well as Article 177 of the Law on Military recognise to everyone the right to conscientious objection.

Legislative acts intended to further ensure freedom of religion include the Law on the Legal Status of Religious Communities and the Law on the Celebration of Religious Holidays. Separate agreements have been concluded so far between the Government of Montenegro and the Islamic, Jewish and Catholic communities.

- ***Freedom of expression including freedom and pluralism of the media***

Article 47 of the Constitution guarantees freedom of expression and specifies that it may be limited only by the right of others to dignity, reputation and honour, and if it threatens public morality or the security of Montenegro. Article 49 recognises freedom of the press and other forms of public information. According to Article 50, censorship is prohibited in Montenegro. However, courts may prevent the dissemination of information via the public media if it is required in order to protect the public order; preserve the territorial integrity of Montenegro; prevent wars, incitements to violence, racial, national and religious hatred or discrimination.

The internal legal framework consists of the Law on Media, the Law on Electronic Media, the Law on Public Broadcasting services of Montenegro, and the Law on Obligations. Further to amendments to the Criminal Code in July 2011, prison sentences for libel have been abolished.

The Code of Ethics of Journalists of Montenegro was adopted in 2003 by six media associations. The same year, these associations established the Journalist Self-Regulatory Body (JSRB) in charge of monitoring the implementation of the Code of Ethics. In March 2012, this body was replaced by the Media Self-Regulation Council whose Assembly consists of nineteen Montenegrin printed, electronic and on-line media. Two other media self-regulatory bodies have also been established respectively in March and April 2012, namely the Press Council grouping three printed media and a self-regulatory body in Pljevlja consisting of representatives of local printed media.

- ***Freedom of assembly and association, including freedom to form political parties and the right to establish trade unions***

Article 52 of the Constitution recognises the freedom of peaceful assembly. This freedom may be temporarily restricted by a decision of the competent authority in order to protect public order, health, morality, security or property, in accordance with the law. Article 53 guarantees freedom of association, including freedom to form political parties and trade unions.

The internal legal framework consists of the Law on Public Assembly, the Law on Political Parties, the Labour Law, the Law on Civil Servants and State Employees, the Law on Representation of Trade Unions, the Law on Non-Governmental Organisations, and the Law on Amendments to the Law on the Public Administration.

Aspects related to social dialogue are dealt with in chapter 19 – Social Policy and Employment.

- ***Treatment of socially vulnerable and disabled persons and principle of non-discrimination***

Article 8 of the Constitution prohibits direct and indirect discrimination on any ground. This prohibition is specified by several pieces of legislation, including the Law on Prohibition of Discrimination, which bans discrimination on any grounds, including sexual orientation, birth and gender identity.

The national legislation in the field of prohibition of discrimination also includes the Law on Gender Equality, the Law on Prohibition of Discrimination against Persons with Disabilities, the Law on Media, the Electronic Media Law, the Law on Public Broadcasting Services of Montenegro, the Law on Higher Education, the Labour Law, the Law on Health Care, the Law on Child and Social Protection and the Family Law.

The Criminal Code sanctions with imprisonment the following criminal offences: infringement of equality (Article 159), infringement of equality in employment (Article 225), causing national, racial or religious hatred (Article 370), and racial or other discrimination (Article 443). A draft law on child and social protection and the law on ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence are in the adoption procedure.

A Strategy against Homophobia is under preparation; a Strategy for the Integration of Persons with Disabilities 2008 – 2016 and a Strategy for the Development of Social Protection for Elderly People are in place.

An Anti-Discrimination Council has been established which is composed of the Prime Minister and seven (line) ministers. NGOs are also involved in the work of the Council. In August 2011, the Prime Minister's Cabinet appointed an adviser for human rights and anti-discrimination. Furthermore, the Ministry of Human and Minority Rights adopted a Rulebook on the contents and manner of keeping records of cases of reported discrimination. The reported cases of discrimination are included in the special report on discrimination submitted to the Parliament of Montenegro by the Ombudsman.

Aspects related to people with disabilities, anti-discrimination as well as to social inclusion and social protection are dealt with in chapter 19 – Social Policy and Employment.

- ***Right to education***

Article 75 of the Constitution guarantees the right to education. Primary education (9 years) is compulsory and free of charges, and the autonomy of universities, higher education and scientific institutions is guaranteed.

The right to education is further regulated in the Law on Primary Education, the Law on Adult Education, the Law on Gymnasium, the Law on Vocational Education, the Law on Higher Education and the Law on Scientific Research Activities.

Aspects related to cooperation in the field of education policies, EU programmes and access to education of EU citizens are dealt with in chapter 26 – Education and Culture.

- ***Right to property***

Article 58 of the Constitution guarantees the right to property and specifies that no one shall be deprived of or restricted in property rights, unless it is required in the public interest upon payment of a fair compensation.

The Law on Private Property Relations provides for equal treatment of foreign citizens and Montenegrin citizens.

The right to property is further regulated in the Law on Expropriation, the Law on Restitution and the Criminal Code.

- ***Gender equality and women's rights***

According to Article 18 of the Constitution, the state shall guarantee the equality of women and men and shall develop the policy of equal opportunities.

The protection of gender equality is also regulated in the following acts: the Law on Gender Equality, the Law on Protection against Domestic Violence, the Family Law, the Labour Law, the Law on Employment and Unemployment Insurance, the General Law on Education, the Law on Health Insurance, the Law on Social and Child Protection, the Law on Retirement and Disability Insurance, the Law on the Election of Councillors and Member of Parliament, and the Criminal Code.

The basic strategic documents in this field are the 2008 – 2012 Action Plan for the Achievement of Gender Equality, the 2011 – 2015 Strategy on the Protection against Domestic Violence, and the Protocol on Action, Prevention and Protection against Domestic Violence. Moreover, numerous activities have been conducted aiming at implementing the Law on Gender Equality.

Recent amendments to Law on Election of Councillors and Members of Parliament oblige all political parties to have electoral lists with at least 30% of female candidates.

Montenegro is a party of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its optional Protocol. Montenegro's Initial Report on the implementation of CEDAW was reviewed by the CEDAW Committee in October 2011.

Employment and social aspects of gender equality are dealt with in chapter 19 – Social Policy and Employment.

- ***Rights of the child***

According to Article 74 of the Constitution, a child shall enjoy rights and freedoms appropriate to his/her age and maturity. A child should be guaranteed special protection from psychological, physical, economic and any other exploitation or abuse. According to Article 72, parents shall have the duty to bring up, support and educate their children, and children born outside a marriage have the same rights as the children born in a marriage. Article 73 states that mother and child shall enjoy special protection, and the state shall create the conditions that encourage childbirth. Furthermore, the Constitution provides that anyone, including children, shall have the right to health protection from public revenues, if they do not exercise this right on some other grounds (Article 69).

The Family Law stipulates that everyone shall act in the best interest of the child in all child related activities. The state shall respect and improve the rights of the child and undertake all the necessary measures to protect children from neglect, abuse and exploitation.

The Law on Social and Child Protection ensures the protection of the family, children at risk and persons in need of social care, i.e. the socially excluded persons. The social and child protection is exercised in accordance with the Strategy for the development of social and child protection of Montenegro. The law also defines the basic rules of social protection: family support subsidy; disability allowance; custodial care; placement in an institution; foster care; and health protection.

As regards juvenile justice, the Law on the Treatment of Juveniles in Criminal Proceedings, adopted in December 2011, provides for new alternative sanctions and educational measures and establishes professional services which would provide courts and prosecution offices with experts' support. Proceedings against juveniles are conducted by a public prosecutor for juveniles, a judge for juveniles and a council for juveniles of the competent court.

The Criminal Code sanctions, *inter alia*, offences such as displaying pornographic material to children and production and possession of child pornography; murder of a child at birth; trafficking of children for the purpose of adoption; sexual intercourse with a child; and illegal changes of the family status of a child.

Montenegro has ratified the UN and European conventions on the rights of the child and adopted a number of strategies aimed at strengthening children's rights, namely the 2012 – 2015 Strategy for the development of fostering in Montenegro as well as the 2008 – 2012 Strategy for the development of a social and child protection system.

One of the deputy Ombudsmen is responsible for the protection of the rights of the child.

Aspects related to social inclusion and social protection are dealt with in chapter 19 – Social Policy and Employment.

### **Procedural safeguards**

- ***Liberty and security***

The Constitution provides that everyone shall have the right to personal liberty. Deprivation of liberty is allowed only in the cases provided for by the law. Persons deprived of liberty shall be notified immediately, in a language they understand, of the reasons for the arrest thereof. The arrested person shall have the right to defence counsel of his/her own choice. Unlawful deprivation of liberty shall be punished (Article 29). According to Article 30 of the Constitution, persons suspected with reasonable doubt to have committed a crime may, on the basis of the decision of the competent court, be detained and kept in confinement only if it is necessary for the pre-trial procedure. Detainees shall be informed of the reasons of the detention immediately or at the latest 24 hours from being put in detention. Detainees have the right to lodge an appeal against the decision of detention, upon which the court shall decide within 48 hours. The duration of detention shall be reduced to the shortest possible period of time. Detention by decision of a first-instance court may last up to three months, and detention ordered by a higher court may be extended for additional three months. If no indictment is raised by that time, the detainee shall be released. Detention of minors may not exceed 60 days.

The Criminal Procedure Code in Article 175 prescribes that a person may be arrested if (a) the suspect hides or his/her identity cannot be established, or if other circumstances exist indicating that the suspect may abscond; (b) circumstances exist that indicate that the suspect would destroy, hide,

modify or fabricate evidence or traces of a criminal offence or indicate that he/she would hinder the procedure by influencing witnesses; (c) circumstances exist that indicate that the criminal offence would be repeated, completed or a threat may be executed; (d) in the event of a criminal offence punishable with imprisonment of ten or more years, when exceptional circumstances exist indicating that the liberation would lead to a serious threat to the preservation of public order and peace, and the circumstances of the offence are particularly grave; and (e) duly summoned defendants evade appearing at the main hearing. Members of the family of the arrested, except when the arrested does not wish so, should also be informed about the reasons for the arrest. The Criminal Procedure Code also provides for the right to compensation for unjustified detention (Article 498). Unlawful deprivation of liberty is sanctioned with imprisonment by the Criminal Code (Article 162).

- ***Right to a fair trial***

Under Article 32 of the Constitution, everyone has the right to a fair and public trial within a reasonable time before an independent and impartial court established by the law. Articles 35 and 37 further define the rights of the suspect, accused and prosecuted person in line with Article 6, paragraphs 2 and 3, of the ECHR.

As regards the right to a trial within a reasonable time and with the aim to establishing an effective domestic remedy as laid down in Article 13 of the ECHR, the Law on the Right to Trial within a Reasonable Time provides for two remedies, namely the request for expedited proceeding and the procedure to obtain fair compensation. As regards the first remedy, the party may file the request if he/she believes that the court fails to render a timely decision. The request for review is filed with the court in which the trial is underway. The president of the court decides on the request. If the president of the court rejects the request or fails to render a decision within 60 days, the applicant may lodge an appeal before the immediately higher instance court. The procedure to obtain fair compensation may be filed by the party who has previously filed the request for expedited proceeding or by the party who objectively has not been able to file such request. The lawsuit is filed with the Supreme Court within six months from the notification of the final and enforceable decision. The Supreme Court is obliged to render a decision on the lawsuit within four months from the day of receipt of the lawsuit. If the Supreme Court finds that there has been a violation of the right to trial within a reasonable time, a monetary compensation is recognised to the applicant.

The guarantee of the right to a fair trial provided for in Article 32 of the Constitution implies the right of access to justice under equal conditions for all. Article 21 of the Constitution recognises the right of everyone to legal aid. Legal aid shall be provided by the bar, as an independent and autonomous body, and by other services. Legal aid may be provided free of charge, in accordance with the law. The Law on Free Legal Aid entered into force in January 2012 to provide free legal aid to disadvantaged people. All defendants, either Montenegrin or foreign citizens<sup>10</sup>, have the right to a defence counsel. Lawyers providing legal aid are entitled to 50% of the lawyers' fees.

As regards *legal aid in criminal matters*, Article 69 of the Criminal Procedure Act defines the cases of mandatory defence with court-appointed defence counsels. This includes cases when the defendant is physically not capable of defending him/herself, when he/she is in detention or tried *in absentia*, etc. Article 70 provides for the appointment of a defence counsel in cases other than those provided for in Article 69 when circumstances so require and the defendant cannot afford the services of a defence counsel.

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<sup>10</sup> Persons eligible to obtain free legal aid according to Article 12 of the Law on Free Legal Aid are: Montenegrin nationals, stateless persons lawfully residing in Montenegro, asylum seekers and foreign national with permanent or approved temporary residence in Montenegro.

## **Respect for and protection of minorities and cultural rights**

Under Article 17 of the Constitution, everyone shall be deemed equal before the law regardless of any particularity or personal feature. Part V of the Constitution covers minority rights. Article 79 provides that persons belonging to minorities shall be granted the following rights and liberties, which they can exercise individually or collectively with others: (a) the right to exercise, protect, develop and publicly express national, ethnic, cultural and religious particularities; (b) the right to choose, use and publicly post national symbols and to celebrate national holidays; (c) the right to use their own language and alphabet in private, public and official use; (d) the right to education in their own language and alphabet in public institutions and the right to have included in the curricula their history and culture; (e) the right, in the areas with significant share in the total population, to have the local self-government authorities, state and court authorities carry out the proceedings in their language; (f) the right to establish educational, cultural and religious associations, with the material support of the state; (g) the right to write and use their own name and surname also in their own language and alphabet in the official documents; (h) the right, in the areas with significant share in the total population, to have traditional local terms, names of streets and settlements, as well as topographic signs written in their language; (i) the right to be represented in the Parliament of the Republic of Montenegro and in the assemblies of the local self-government bodies in which they represent a significant share in the population; (j) the right to proportionate representation in public services, state authorities and local self-government bodies; (k) the right to information in their own language; (l) the right to establish and maintain contacts with the citizens and associations outside Montenegro, with whom they have common national and ethnic background, cultural and historic heritage, as well as religious beliefs; and (m) the right to establish councils for the protection and improvement of special rights. Article 80 of the Constitution prohibits forceful assimilation of persons belonging to minorities.

The protection of minorities is also regulated by a wide range of legal acts, including a Strategy guaranteeing protection of minorities, in particular in the fields of education, culture, access to information and use of minority languages and a Strategy to improve the status of the Roma, Ashkali and Egyptian communities. Montenegro has ratified the Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional Minority Languages. The Ministry for Human and Minority Rights and the Ombudsman, with a deputy for minority rights, form the core of the institutional framework. Minority Councils are the official channels of communication between minorities and the government. The State provides financial support to the Minority Councils from the state budget for their administrative functioning and the Minority Fund for minority-related projects.

Montenegro states that it envisages to amend the Law on Minority Rights and Freedom to better define the selection, use and public display of national symbols; to adopt by-laws to better define the composition and selection procedure of members of the Minority Councils; and to strengthen the administrative capacity of the bodies involved in the protection of national minorities.

## **Measures against racism and xenophobia**

The Montenegrin Constitution prohibits direct and indirect discrimination on any grounds. This prohibition is specified by several pieces of legislation, including the Law on Prohibition of Discrimination, which bans discrimination on any grounds including race, colour, national affiliation, and ethnic origin. Also, the Constitution provides that any call for, or incitement to war, or resort to violence, national, racial or religious hatred, or any form of intolerance is prohibited and punishable.

Under the Criminal Code prison sentences are foreseen for violations of fundamental rights on the basis of difference in race, colour, nationality or ethnic origin. Imprisonment is foreseen for the



following criminal offences: infringement of equality (Article 159), causing national, racial or religious hatred (Article 370), racial or other discrimination (Article 443). Also, prison sentences are foreseen for publicly expressing or spreading ideas of superiority of one race over another, or spreading racial hatred, or encouraging racial discrimination.

### **The EU Fundamental Rights Agency**

The EU Fundamental Rights Agency is open for participation of candidate countries – including Montenegro – as observers, after a decision of the relevant Association Council, which will indicate in particular the nature, extent and manner of this country's participation in the Agency's work, taking into account the specific status of each country. Montenegro expressed its interest to become observer in a letter sent to FRA in March 2010. The procedure for obtaining observer status is underway.

### **Protection of personal data**

Article 43 of the Constitution guarantees the protection of personal data and prohibits the use of personal data for purposes other than those for which they were collected. Everyone shall have the right to be informed about the personal data collected about him/her as well as the right to court protection in case of abuse.

Montenegro has ratified the CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its Additional Protocol regarding supervisory authorities and transborder data flows.

In July 2012, amendments to the Personal Data Protection Law were adopted with a view to aligning it with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to processing of personal data and free movement of such data. The Montenegrin authorities consider that the amended law is fully harmonised with the directive. However, according to the Montenegrin authorities the Law on Electronic Communication is only partially harmonized with Directive 2002/58/EC as amended by Directive 2009/136/EC.

The Personal Data Protection Agency was established in 2010 as an independent body and has legal personality. The Parliament of Montenegro appoints the chairman and two members of the Council of the Personal Data Protection Agency. The term of office is 5 years. The Agency's remit includes supervision of personal data protection legislation and activities, and cooperation with state bodies in the drafting of legislation relating to personal data protection.

Under Article 176 of the Criminal Code, fines or prison sentences are foreseen for the unauthorised collection, processing or use of personal data.

## **II.d EU CITIZENS RIGHTS**

### **Right to vote and stand as a candidate in elections to the European Parliament**

The Montenegrin authorities indicated that implementation of this right requires amendment of the legislation.

## **Right to vote and stand as a candidate in municipal elections**

The Law on Election of Municipal Councillors and Members of Parliament regulates the election of the representative bodies of municipalities and towns. It provides that Montenegrin citizens above the age of 18 elect members of these bodies and have the right to stand in the elections for such bodies. To ensure EU citizens' rights to vote and stand as a candidate in municipal elections, Montenegro will need to harmonise its national legal framework with the EU *acquis* and especially with Council Directives 94/80/EC and 93/109/EC.

## **Right to move and reside freely within the European Union**

EU citizens are not required to hold a visa when entering Montenegro. Family members might need a visa depending on their citizenship. EU citizens and their family members need a temporary residence permit when first residing in Montenegro for work, education or family reunification or when they reside for periods longer than 90 days. Implementation of this right requires alignment of the current legislation.

## **Diplomatic and consular protection**

The Law on Foreign Affairs regulates the management of foreign affairs, organisation of diplomatic missions and consular offices, as well as offering of protection to the Montenegrin citizens abroad.

The Montenegrin authorities stated that Montenegro needs to amend this law to meet the requirements of the Decision of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations. It should also be amended to ensure compliance with the Decision of the Representatives of the Governments of the Member States meeting within the Council of 25 June 1996 on the establishment of an emergency travel document.

### **III. ASSESSMENT OF THE DEGREE OF ALIGNMENT AND IMPLEMENTING CAPACITY**

Montenegro has demonstrated good awareness of the EU's strategic and policy framework in this area and undertaken important reform efforts to align itself with the *acquis* and meet the European standards. However, further efforts are needed, in particular in fully ensuring judicial independence and in building up a solid track record of investigations and convictions in corruption cases.

#### **III.a JUDICIARY**

##### **Independence**

The independence of the judiciary and of the prosecution service is, in principle, provided for by the Constitution (Articles 118 and 134). However, existing rules present a number of shortcomings and create risks for undue political influence. Judges are appointed by the Judicial Council, but the majority of the Council members are appointed by the parliament, the president and the government. The President of the Supreme Court, who is also President of the Judicial Council, is appointed by simple majority in parliament for a five years period. The Supreme Public Prosecutor and all Public Prosecutors also are elected by parliament for a five years period, which is particularly problematic due to the hierarchical structure of the prosecution service. Deputy Public Prosecutors are nominated by the Prosecutorial Council, which itself is elected by the parliament. This excessive political influence is not in line with European standards.

In order to address some of the existing shortcomings, Montenegro launched a procedure to amend the Constitution in the area of the judiciary in June 2011 and adopted amendments to the existing so-called "sub-constitutional" legislation in July 2011. Changes to the Law on the Judicial Council provide for the establishment of the Judicial Appointment Commission and thus for increased transparency and involvement of the judiciary in the procedure of appointment of judges and renowned jurists to the Judicial Council. They also provide for the involvement of the Judicial Council in the process of proposing candidates for the post of President of the Supreme Court and new rules on the procedure for election of the two members of the Judicial Council by the President of Montenegro (without *de lege* limiting the discretion of the President). The new Law on the State Prosecutor's Office regulates the criteria for the appointment and promotion of deputy prosecutors, for the selection of State prosecutors and for the appointment of special prosecutors. It also defines the composition of the Prosecutorial Council and broadens its scope of action, including on the appointment of the Special prosecutor and in disciplinary proceedings. The President of the Prosecutorial Council shall be appointed from among State Prosecutors and deputies who are members of the Prosecutorial Council. The Supreme State Prosecutor may not be the President of Prosecutorial Council. Criteria for the first-time appointment of judges, court's presidents and deputy State prosecutors and their subsequent promotion, as well as for the appointment of court presidents and the permanent tenure of State prosecutors have also been laid down.

However, the "sub-constitutional legislation" only has the status of regular laws and therefore cannot go beyond the scope provided for by the Constitution and will have to be further amended once the constitutional changes are adopted. According to the current Constitution, the appointment of the President of the Supreme Court, the Supreme State Prosecutor, the President and the judges of the Constitutional Court and all state prosecutors by simple parliamentary majority continues to apply. In addition, the rules for the selection of the President of the Supreme Court (Article 28a of the Law on the Judicial Council) do not fully comply with recommendations of the Venice Commission. The extended session of the Supreme Court continues to play an important role through the opinions it has to deliver on the candidates. The selection of three candidates, which are then proposed to the Parliament for the final appointment, is not adopted by a majority of 2/3 of members of the Judicial Council, as suggested by the Venice Commission, but by a simple majority, which limits significantly the influence of the non-politically appointed members, who do not have a majority. The composition of the Judicial and Prosecutorial Councils is also maintained. It consists of nine members and its President. Only four members are judges elected by their peers. Two of the other members are members of parliament elected by the parliament and two are lawyers elected by the President. Also the Minister of Justice is a member. In order to find a sustainable solution in line with the European standards and notably the recommendations of the Venice Commission, Montenegro will have to amend its Constitution and then adapt its legislation accordingly.

In September 2011, the Judicial Council established the Commission for conducting the mandatory written tests for the first-time appointment of judges and the Commission for the control of courts. The first written tests for judges were held in February 2012. The amended legislation on the Judicial Council and the State prosecutor's office established a set of criteria for the promotion of judges and prosecutors. However, vacancies continue to be published for specific courts and a country-wide single recruitment system remains to be established. Oral tests, based on vague criteria, continue to account for 60% in each appointment decision. Promotion criteria lack clarity and objectivity due to the lack of periodical professional assessment of judges and prosecutors' performance. Objective criteria and clear procedures for the permanent transfer of judges and prosecutors also remain to be introduced.

The functioning of the Judicial and Prosecutorial Councils is hampered by their insufficient administrative capacity and budget allocations. Their members are not even partially exonerated from their ordinary work.

### **Impartiality**

Impartiality of judges *de lege* is ensured by random allocation of cases, as laid down in the amended Law on Courts, and by provisions on disqualification. However, the rules for random allocation do not fully guarantee genuinely random allocation of cases, especially in small courts. This situation could be amended through case allocation by the IT system and through a re-organisation of the court network, including a merging of small courts. While the conditions under which an allocated case can be withdrawn from a judge are prescribed by law, current rules do not seem to provide for sufficient safeguards for protecting the independence and impartiality of the judiciary.

There are concerns that disqualification procedures for cases where judges have a personal interest are not always strictly followed. So called "conflict of interest" rules require judges and prosecutors to provide asset declarations. However, these declarations are not cross-checked with other data, such as registers of immovable property or data collected by tax authorities, which significantly hampers the impact of these rules. Publicity of court rulings, although foreseen for all courts, has only partially been implemented. Codes of ethics for judges and prosecutors were adopted. Commissions to monitor compliance with these codes were recently established. Reporting and awareness-raising is at an early stage.

### **Accountability**

Certain efforts have been made to ensure accountability of the judiciary by means of the monitoring role of the Judicial and Prosecutorial Councils and their role in disciplinary proceedings.

However, accountability remains an issue of concern. The system of disciplinary responsibility for judges and prosecutors is divided into disciplinary and dismissal procedures. Disciplinary procedures can only lead to very mild disciplinary sanctions and therefore fail to produce a deterrent effect. As regards dismissal procedures, the grounds for dismissals are not specified clearly. Also procedural rules are not comprehensive and could, for example, jeopardise the full right to defence. Since 2008, five judges were dismissed, while others received disciplinary sanctions. For prosecutors, disciplinary proceedings are carried out by parliament, on a proposal by the Prosecutorial Council, while for deputy prosecutors the proceedings are conducted by the Prosecutorial Council. No dismissal procedures against prosecutors have taken place since 2003. The disciplinary system needs to be further strengthened and differentiated in accordance with the principle of proportionality. The double competence of the Disciplinary Commission in investigating and deciding on disciplinary proceedings needs to be reviewed in view of fair trial principles.

Judges and prosecutors enjoy functional immunity (Articles 122 and 137 of the Constitution). Although Montenegro informed that this only protects from detention, the scope of application of these provisions and the procedures for removing functional immunity are not fully clear and need to be reviewed to ensure full accountability of judges and prosecutors under criminal law.

As indicated above (independence), Montenegro lacks a system of individual and periodical evaluation of judges and prosecutors. This weakens their accountability and prevents a fair and transparent system of promotions.

## **Professionalism/Competence/Efficiency**

The 2012 budget for the judiciary and the prosecution amounts to around EUR 25 million. Montenegro continues to be one of the countries with the highest number of basic courts, judges, prosecutors and administrative staff per capita in Europe. This high number of personnel in the judiciary with a limited budget results in the majority of funds being allocated for salaries and shortfalls in the infrastructure and equipment, which continue to hinder efficiency. Recently undertaken steps with regard to the rationalisation of the court network need to be pursued. In order to be able to strengthen overburdened courts or prosecution offices, incentive-based measures that would contribute to the voluntary mobility of judges and prosecutors should be considered.

As the IT system in place is not yet used for statistical reporting, concerns persist about the quality of the statistics and the soundness of the method used. There is no reliable and complete statistical information on courts' performance, the duration of trials and the human and financial resources allocated. The quality of judicial statistics needs to be improved and a system for monitoring the length of trials introduced. In order to further reduce backlog cases, these could be flagged automatically to the hierarchy and dealt with as a matter of urgency.

The independence and the administrative and financial self-sustainability of the Judicial Training Centre remain to be strengthened and initial training with set curricula for all members of the judiciary to be established.

## **Judicial reform**

Implementation of the judicial reform strategy and action plan is underway. However, despite the legislative and organisational changes that have been made, judicial reform in terms of concrete results is at an early stage and severe shortcomings have to be tackled, in particular at constitutional level.

## **RECOMMENDATIONS**

In view of the above, Montenegro should adopt one or more Action Plan(s), addressing in particular the following issues:

### Independence:

- Montenegro should amend its Constitution in line with the Venice Commission recommendations and European standards, ensuring independence and accountability of the judiciary. Changes should include, *inter alia*, the following points:
  - The Judicial Council and the Prosecutorial Council should be composed by at least 50% of members stemming from the judiciary. These members should be selected by their peers, representing different levels of jurisdiction, without involvement of the Parliament (unless solely declaratory).
  - Prosecutors should not be appointed by the Parliament.
  - Reasons for dismissal of judges and prosecutors should be included in the Constitution.
- The recruitment process needs to be transparent and merit based. A single, nationwide recruitment system should be introduced, which could be based on anonymous tests for all candidates and obligatory training before being appointed judge/deputy prosecutor. The Judicial Training Centre could be involved in the testing process.

- A fair and transparent system of promotion of judges and prosecutors needs to be established together with a periodical professional assessment of judges and prosecutors' performance.
- Ensure internal independence of judges and review the system of orders within the prosecution system.
- Sufficient administrative capacities and financial means need to be ensured to the Judicial and the Prosecutorial Councils to effectively perform their tasks.

#### Impartiality:

- Improve the system of random allocation of cases, possibly also through streamlining the court network.
- Review application of disqualification procedures and amend where necessary.
- Amend "conflict of interest" rules, ensuring that there is an effective monitoring of asset declarations and cross-checking with other relevant information.
- Ensure effective monitoring of compliance with the code of ethics.

#### Accountability:

- Review rules on disciplinary and dismissal procedures and their implementation and amend where necessary.
- Review the system of functional immunity for judges and prosecutors. Procedures for removing functional immunity need to be strengthened to ensure full accountability of judges and prosecutors under criminal law.

#### Professionalism/Competence/Efficiency:

- Ensure reliable and consistent judicial statistics and introduce a system to monitor the length of trials.
- Review and rationalise the court network and ensure sufficient funding for the efficient functioning of the entire court system. Further reduce the existing backlog, especially as regards civil cases.
- Strengthen the enforcement of judgements in civil cases.
- Ensure effective functioning of the Judicial Training Centre.
- Take incentive-based measures that would contribute to the voluntary mobility of judges and prosecutors.

### **III.b ANTI-CORRUPTION**

Overall, corruption in Montenegro is prevalent in many areas and continues to be serious cause of concern. Despite improvements of the legal and institutional framework, evidence shows that implementation has not yet been able to produce sufficient results on the ground. The assessment of the situation in Montenegro is also based on the organised crime threat assessment prepared by Europol at the request of the Council in June 2012.

The general framework for the fight against corruption is broadly in place (including the Criminal Code and the Criminal Procedure Code), although shortcomings persist in the legislative field and the institutional setup is scattered. Montenegro has aligned itself with the major international instruments against corruption, but needs to work on ensuring their consistent implementation. In line with the findings of the risk assessment adopted by the Government in July 2011, local self-government, spatial planning, public procurement, privatisation, education and healthcare are high risk areas for corruption. The risk for corruption is also high in the tax administration and customs, within the judicial system and the police.

A National Commission on Anti-corruption monitors the implementation of the strategy papers. The Directorate for Anti-Corruption Initiatives (DACI), has mainly a consultative role focusing on soft prevention measures such as education and awareness-raising, as well as on screening new legislation from an anti-corruption perspective. It also centralises complaints about corruption, but due to the absence of investigative powers or influence on the follow up given by other authorities, this has limited added value. DACI's competencies would need to be strengthened in order for it to take a central role in the fight against corruption.

Montenegro has a system of wealth and interest disclosure for public officials, which is defined in the Law on prevention of conflict of interest. The law also prohibits the holding of dual public offices. Following the full entry into force of the amended Law on prevention of conflict of interest in March 2012, all 36 MPs who were also members of management boards of state-owned companies resigned from these positions and all 16 MPs who also held executive positions (including 2 mayors) resigned from one of their functions. However, the asset disclosure regime presents a number of shortcomings, as the declarations of public officials are not being checked on substance to establish cases of illicit enrichment. The Conflict of Interest Commission cannot effectively meet its supervisory tasks as it has no investigative powers and access to relevant databases and lacks adequate administrative and professional capacity. Criminal sanctions provided by the law are not sufficiently dissuasive. Actual control of conflicts of interests in specific cases – going beyond the prohibition of dual public offices – or supervision of business links of Members of Parliament is lacking.

A Law on financing of political parties and a Law on financing of election campaigns are in place. However, the supervisory mechanisms for both laws is inadequate and reporting and accounting obligations for political parties need to be further strengthened. Political parties have to provide financial reports, but due to data protection rules, donors are not sufficiently identified. Even more importantly, no effective follow up is given. The State Electoral Commission only publishes the reports without carrying out further verifications. Its professional capacity has to be strengthened to ensure a fully effective independent oversight. The State Audit Institution, responsible for auditing political parties' annual balance sheets and reports on election campaign costs, also does not have sufficient access to information nor the capacity to detect fraudulent behaviour. In case of violations of the law, misdemeanour procedures can be launched and illegal donations can be confiscated. The enforcement mechanism for possible sanctions is unclear and needs to be further specified in the legal framework, and the sanctioning system is insufficiently dissuasive and undifferentiated. So far, very few sanctions have been imposed to political parties for breaching the rules on financing.

Legislation on access to information is in place. However, problems exist in its implementation. Authorities remain reluctant to disclose information. Legal deadlines are not always respected. In the absence of reliable statistics on applications and follow up, no final assessment on the respect for free access to information can be made. Integrity plans are envisaged for a number of state institutions. Municipalities and health care and educational institutions have been encouraged to develop anti-corruption plans. DACI and the Human Resources Management Authority have

conducted anti-corruption training and awareness-raising campaigns. However, the impact of these activities has been limited so far.

The Law on public procurement is generally a good basis to regulate this area, but implementation needs to be closely monitored. In particular, supervision of implementation of awarded contracts needs to be upgraded. Anti-corruption measures at local government level need to be stepped up.

The Parliament amended its rules of procedure in May 2012. The new rules provide, *inter alia*, for the set-up of a stand-alone parliamentary committee on anti-corruption. Its key competences are to monitor and analyse the work of state authorities in the fight against corruption and organised crime, to monitor implementation of laws pertaining to the fight against corruption and organised crime and propose amendments thereof, as well as to suggest additional measures for the improvement of strategies, action plans and other documents. A political agreement has been reached, according to which the Anti-Corruption Committee shall be chaired by an opposition representative. However, the Parliament needs to significantly strengthen its role in fighting corruption by further improving the scope and quality of the legal framework and by stepping up supervision of the executive. Civil society and non-governmental organisations are very active in awareness-raising and watchdog activities. Cooperation between the government and civil society needs to be actively pursued.

The track record of investigations, prosecutions and final convictions in corruption cases at all levels remains weak and the number of cases, in particular those concerning high and medium level corruption, remains low. Shortcomings in the collection of detailed statistics persist. The Criminal Procedure Code is an improvement compared to the previous law, but still has shortcomings, such as excessive limitations for special investigative techniques and house searches, as well as an unclear confiscation regime. Expertise in modern investigation techniques is often missing. Financial investigations are sometimes used for confiscation of assets, but rarely to investigate the money trail of crime and to pro-actively uncover criminal activities beyond the initial case. There is a serious lack in expertise how to effectively use such financial investigations. Also the link between corruption, money laundering, tax evasion and organised crime is rarely made.

Prosecutors have difficulties in taking effective lead in investigations as their powers towards the police are limited and do not have access to relevant databases. Operational and investigative capacities of the law enforcement authorities have been strengthened, but overall remain insufficient. The Special Division of the Supreme Prosecutor's Office (SSPO), tasked to deal with high level corruption cases, is overburdened with relatively low level cases and lacks sufficient administrative capacity. The Police Directorate, the Public Prosecution Office and the Administration for prevention of money laundering and terrorism financing (the FIU) have expertise to carry out their activities, but lack sufficient resources. The Special Investigative Team (SIT), which brings together experts from different administrative bodies (the police administration, the Office for prevention of money laundering and terrorism financing, the tax and customs administrations) is operational since October 2011. The team has been provided with additional financial resources; however, it still lacks sufficient capacities and competences, in particular access to relevant databases.

Threat assessment and risk analysis are not used to guide investigations. Inter-agency cooperation has improved to a certain extent, but needs to be further developed. There are serious gaps in coordination between law enforcement agencies, reaching from the initial phases of investigations to the trial phases. There is not sufficient control over the prosecutor's decision to close cases, as only private prosecution is foreseen as remedy in such cases. Furthermore, the potential for direct or indirect political interference in the appointment of judges and prosecutors could have negative impact on their readiness to carry out effective investigations into high-level corruption. Amendments made to the Law on civil servants and State employees, and the Labour Law



introduced provisions to protect whistle-blowers, but this has not significantly increased reporting of corruption in practice.

The capacity of the judiciary to fight corruption has been strengthened through further training, support and additional equipment. Since October 2011, the special investigative team within the Special Prosecutor Office is being supported by specialised staff from the police, the office for the prevention of money laundering and terrorism financing, and the tax and customs administrations. The team has been given additional financial resources, and a special allowance has been granted to those judges working on corruption cases. However, the capacity of the judiciary to fight corruption, in particular high level corruption, needs to be further reinforced, in particular by improving the capacity of prosecutors to conduct financial investigations, trace criminal assets and present related evidence before the courts, granting them access to relevant databases and strengthening the administrative capacity of the Special Prosecutor Office.

## RECOMMENDATIONS

In view of the above, Montenegro should adopt one or more Action Plan(s), addressing in particular the following issues:

### Preventive action against corruption:

- Strengthen and possibly review the institutional framework for the fight against corruption. In particular, DACI's competences need to be upgraded and its capacities reinforced.
- Improve the system of asset declarations, strengthening in particular the supervisory competencies and the professional capacity of the Commission for prevention of conflict of interest to ensure effective and substantial checks on assets, and introduce measures preventing conflicts of interest going beyond holding double public offices (such as public decision makers holding stakes in private companies etc.).
- Review the rules of procedure of the public administration, including appointment and internal control, to fully integrate prevention of corruption and conflicts of interest aspects.
- Improve the system of political party funding, ensuring reliable reporting as well as effective supervision and sanctioning powers by an independent authority. Strengthen the capacities of the monitoring bodies (the State Audit Institution (SAI) and the State Election Commission) and ensure a clear division of tasks and cooperation framework. Accounting obligations for political parties should be increased and all in-kind donations should be reported. The recommendations of GRECO should be followed-up.
- Ensure effective implementation of free access to information rules, *inter alia*, with regard to sensitive information with economic value. The provisions of the Law on prevailing public interest need to be clarified. Appropriate interaction between the Law on Free Access to Information and the Laws on Protection of Personal Data and on Data Secrecy should be ensured.
- The control system for public procurement is to be strengthened as well as the supervision of implementation of awarded contracts. Anti-corruption measures at local government level need to be stepped up.

- Develop specific measures to tackle corruption in particularly vulnerable areas, such as those identified in the findings of the risk assessment of July 2011. For these areas, separate Action Plans could be envisaged. Ensure that risks assessments are being used systematically.
- Strengthen the Parliament's role in fighting corruption by stepping up supervision of the executive. The Parliament should also pay specific attention to anti-corruption issues when revising and improving the legal framework. Ensure a thorough integrity system within the Parliament.
- Ensure that NGOs are involved in the anticorruption agenda.

#### Repressive action against corruption:

- Ensure independent, effective specialised investigation/prosecution bodies, in particular through:
  - Constitutional and legal amendments strengthening the independence of the judiciary (see above) and to protect all investigative bodies from (potential) political pressure.
  - Provision of adequate resources (financial resources, staffing etc) to all investigation and judicial authorities involved in the fight against corruption, making corruption cases priority matters. A review of the definition of "high level corruption" in view of the SSPO's area of competence would be recommendable.
  - Ensure that prosecutors have real-time access to relevant databases and sufficient capacity to effectively implement of the Criminal Procedure Code.
  - Review the competences of the Special Investigative Team and ensure its access to relevant databases.
  - Ensure sufficient training, well qualified staff and international exchange of expertise to allow for modern investigative techniques to be applied efficiently and on a regular basis. Similar training must be ensured for judicial authorities.
- Amend the Criminal Procedure Code where needed and ensure its effective implementation.
- Improve the use of financial investigations, possibly through establishing a team of highly qualified investigators for this purpose.
- Improve the cooperation and information exchange between authorities involved in the fight against corruption, including also tax and other only indirectly linked authorities.
- Improve the collection of unified statistics on corruption, distinguishing clearly between different types of criminal activities and allowing for a detailed assessment of length of the cases, outcome etc.
- The procedures for seizure, confiscation and management of proceeds of crime need to be further regulated and the professional capacity of the relevant State Agency strengthened.
- Take the necessary steps to make the system of whistle-blower protection more effective in practice.
- Review the system of immunities and ensure that effective procedures for lifting of immunities are in place.

- Review the procedure for closure of criminal cases and consider possibilities for appeals or complaints.

### **III.c FUNDAMENTAL RIGHTS**

#### **General**

The Montenegrin Constitution protects fundamental rights and the general legal and institutional framework is in place. Montenegro has ratified a number of international agreements regarding the protection of these rights.

The competences on fundamental rights have been moved to the recently established Ministry of justice and fundamental rights, directly under the portfolio of the Deputy Prime Minister. The Ombudsman is the main institution responsible for monitoring the protection of fundamental rights, but the capacities of his office remain to be strengthened.

Shortcomings persist in the practical implementation of the protection of human rights, including by judicial and law enforcement authorities. Administrative capacity and financial means to implement fundamental rights remain limited.

#### **Human rights**

- ***Human dignity and right to life and to the integrity of the person***

Human dignity is protected by the Constitution. The Constitution also protects the right to life and prohibits capital punishment. No significant problems in the enforcement of these rights have been reported.

- ***Prohibition of torture and inhuman or degrading treatment or punishment***

Torture and inhuman or degrading treatment are prohibited by the Constitution and constitute criminal offences under the Criminal Code; the relevant international instruments have been ratified. Monitoring is provided by the Ombudsman's office as the national prevention mechanism. However, its competences in this area need to be further developed and staff necessitates further training. The legal and institutional framework on the prohibition of torture still needs to be aligned with international standards. This includes, *inter alia*, full implementation of the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The number of cases of ill-treatment remains low, but the processing of reported cases continues to be slow.

Regarding prison conditions, the parliamentary committee on human rights and freedom became more involved in monitoring the situation in the detention centres. The enforcement of the alternative sanctions has contributed to the decrease of the prison population. As a consequence, penitentiary living conditions started to improve, but are still not fully aligned with the European standards, in particular as regards education and medical treatments.

- ***Prohibition of slavery, servitude, and forced or compulsory labour***

Slavery, servitude and compulsory labour are prohibited by the Constitution. No problems in the enforcement of these rights have been reported.

Aspects related to labour law are dealt with in chapter 19 – Social Policy and Employment; aspects related to trafficking in human beings are dealt with in chapter 24 – Justice, freedom and security.

- ***Respect for private and family life and communications***

The respect for private and family life and communications is ensured by the Constitution, in accordance with Article 8 of the ECHR. However, it will have to be further assessed whether limitations of these rights in Montenegro are exercised in accordance with art. 8(2) of the ECHR, in particular whether the use of special investigative means is sufficiently well regulated and supervised to effectively prevent abuses. Enforcement of children's privacy in the media needs to be ensured.

- ***Right to marry and right to found a family***

The right to marry, for a man and a woman, is ensured by the Constitution and by the Family Law. Unlike Article 12 of the ECHR, the Family Law defines the family as a community with children.

No major problems in relation to the right to marry and right to found a family have been reported in practice.

- ***Freedom of thought, conscience and religion***

The freedom of thought, conscience and religion is ensured by the Constitution and no significant problems in its implementation have been reported.

Tensions persist between the Serbian and Montenegrin Orthodox Churches over canonical recognition and property issues.

- ***Freedom of expression including freedom and pluralism of the media***

Freedom of expression is ensured by the constitutional and by the national legal framework. The Criminal Code was amended in July 2011 to abolish prison sentences for libel, thus contributing to decrease the number of lawsuits against the media. Guidelines from the Supreme Court of Montenegro were circulated in March 2011, to align the amount of reimbursement for non-material damage caused by breach of honour and reputation through media to the case law of the ECtHR. The backlog of libel and defamation cases in the courts is being gradually reduced, in accordance with these guidelines. Interpretation of the scope and implementation of restrictive measures to "preserve the territorial integrity of Montenegro" will need to be further assessed, as this could lead to undue limitations of the freedom of expression.

Shortcomings in the implementation of the legal framework exist, in particular as regards the freedom of the media. Threats and violence against journalists remain an issue of concern; authorities, although not involved directly, need to do more to prevent such cases. This includes creating a climate where such crimes are not tolerated and ensuring effective prosecution. Further progress needs to be made on certain recent and earlier cases of violence against media, which still have to be thoroughly investigated and prosecuted, including the most recent physical attack on an investigative journalist in March 2012.

In some old cases of defamation, fines not paid have been converted to custodial sentences. These cases need to be brought in line with the ECtHR case-law in particular to ensure that prison sentence is not imposed in case of unpaid fines. The new Law on Amnesty provides, *inter alia*, for the possibility of direct pardon by the President of individuals convicted for defamation.

Three media self-regulatory bodies have been set up. Additional staff has been hired to increase the monitoring capacities of the Electronic Media Agency. The public broadcaster is undergoing a structural reform, aimed at making it more modern and self-sustainable. The lack of financial

sustainability and operational resources could undermine the functioning of the media, as well as of the audio-visual self-regulators.

Recent legislative amendments to the Law on electronic media put at risk the independence of the audio-visual regulator, as the Agency for Electronic Media is required to submit operational and financial plans and reports to the Parliament for approval. Its lack of resources to monitor media throughout the country is cause for concern. Professionalism and independence of the public broadcaster are not yet fully achieved.

- ***Freedom of assembly and association, including freedom to form political parties and the right to establish trade unions***

The legal framework is generally in place. No significant problems in relation to the freedom of assembly and association, including freedom to form political parties and the right to establish trade unions, have been reported in practice. However more attention is needed to ensure full transparency of representativeness and the right to establish new unions, in line with the relevant national regulations.

- ***Treatment of socially vulnerable and disabled persons and principle of non-discrimination***

The national legal framework is in place, and the relevant international conventions have been ratified. A law on the fight against discrimination against persons with disabilities is in place, but has shortcomings, notably as regards definitions, sanctions and the obligation of employers to provide reasonable accommodation. An Action Plan to implement the strategy for the integration of persons with disabilities for the years 2012-2013 was adopted and the Council for the care of persons with disabilities has been re-established. The financial and human resources of the institutions dealing with persons with disabilities need to be further strengthened, as well as their monitoring mechanisms. Steps were taken towards deinstitutionalisation. In the absence of unified definitions of disability, access to specific social rights for persons with disabilities is not always ensured. Limited access to buildings and public institutions is still of concern.

Non-discrimination is provided for in the Constitution and monitored by the Ombudsman. The national legislation presents shortcomings, notably concerning the Ombudsman's independence and the scope of definitions in the anti-discrimination law. Authorities generally show commitment towards anti-discrimination policies: the annual allocation for the Ombudsman office was increased in 2012, and the competence over human rights was moved to the new Ministry of Justice and Fundamental Rights, under the portfolio of the Deputy Prime Minister. The government also showed greater openness towards protecting lesbian, gay, bisexual and transgender (LGBT) rights and willingness to increase the dialogue with the civil society active in this field. However, the capacities of the Ombudsman's Office still remain limited despite the appointment of new staff. Its competences in the field of the rights of the children should be better clarified. The authorities ensured the rapid identification and arrest of the alleged perpetrators who attacked in September 2012 an actor and the director of a video against homophobia. Yet, processing of cases related to LGBT rights is slow and would require more thorough follow up by the authorities. LGBT persons, as well as civil society activists engaged in promoting and protecting LGBT rights, are still subject to discrimination, both by public authorities and in society.

- ***Right to education***

The right to education is protected by the Constitution and further regulated by the national legal framework. Consensus was reached over the use of the official language, and other languages in official use, in school's curricula, according to the constitutional guarantee for minorities to obtain

education in their own language. Yet, Roma students face difficulties and higher dropout rates due to language barriers.

- ***Right to property***

The right to property is generally ensured. *Ad hoc* commissions have been set up at the local level to implement the restitution of properties nationalised under the Communist regime. The restitution process is slow, with only 30% of the total claims reportedly resolved. Displaced persons with permanent residence in the country still face discrimination in their access to land.

- ***Gender equality and women's rights***

Gender equality is provided for in the Constitution, the legal framework and in the relevant international agreements ratified by Montenegro. A gender equality department exists within the Ministry of Justice and Fundamental Rights.

Promotion of gender equality and women's rights has improved at the level of the national and local public administration; capacities of the civil servants in this field have been strengthened. However, enforcement of women's rights, including domestic violence, is an issue of concern. The law on protection from the violence in the family is not fully implemented. More skilled staff could be deployed in this field, and a better inter-institutional coordination ensured. Women are profoundly underrepresented at the top political and managerial positions in the country.

- ***Rights of the child***

Children's rights are protected by the Constitution and by a number of international instruments ratified by the country. The Law on juvenile justice was adopted in December 2011; implementation of the victim-offender mediation as an alternative measure for children in conflict with the law continued to yield good results. The Judicial Council initiated the establishment of special units of judges dealing with juvenile justice at the High Courts of Podgorica and Bijelo Polje.

However, the law on social and child welfare has not been yet adopted. The Council for the rights of the child, as well as the Ombudsman, are engaged in promoting and protecting children's rights, but their capacities should be enhanced. The capacities of the social services to reach minors subject to violence should improve. More should be done to rehabilitate children in conflict with the Justice; their mandatory education in the prisons' facilities is not yet in line with the relevant international standards. Efforts to ensure better inclusion and access to mainstream education for children with disabilities are still needed. The high number of unregistered children, particularly within the Roma community, is a concern.

### **Procedural safeguards**

The right to a fair trial is protected by the Constitution, but due to the shortcomings as regards the judicial system (see above) and the excessive length of proceedings, practical implementation is not fully ensured.

As regards access to justice, following the entry into force of the Law on free legal aid in January 2012, three implementing acts have been adopted and free legal aid offices were opened in all basic courts. However, the implementation of the law is hampered by the insufficient budget allocations for these offices.

## **Respect for and protection of minorities and cultural rights**

Respect for and protection of minorities and cultural rights are protected by the Constitution. A Law on minority rights and freedoms is in place, but not implemented properly, especially when it comes to provisions related to representation of minorities in the parliament and in local institutions. Roma are particularly underrepresented. The functioning of the Minority Fund is not fully satisfactory. Interethnic relations in the country are generally good.

A strategy for the improvement of the status of Roma and Egyptians in Montenegro and a related Action plan developed under the framework of the 2005-2015 Decade for Roma Inclusion are in place. However, they should be reviewed in line with the EU Roma integration goals in 4 key areas (education, employment, health and housing) which are equally relevant to all candidate and other enlargement countries. Civil registration of the Roma, Ashkali and Egyptian population was facilitated, in particular for those who are also displaced persons. Montenegrin authorities should continue their efforts to facilitating access to personal documents and registration of these people.

Measures were undertaken to facilitate RAE education and employment. Nevertheless, drop out and unemployment rates remain high, especially for women. Discrimination against these groups is prevalent in access to employment and to social and health care. The Roma, Ashkali and Egyptian population still remains the most discriminated against group. The authorities need to enhance their political commitment to Roma inclusion, and ensure the allocation of sufficient resources under the national budgets, better coordination with all relevant donors and a systematic evaluation and monitoring.

The situation of the displaced persons living in Montenegro is improving but not yet entirely satisfactory. Additional measures and legal adjustments are needed in several sectors, to ensure full access to economic and social rights for both foreigners with permanent residence and for displaced persons. The situation in the Konik area remains a matter of concern: a plan to change the Konik area was adopted in February 2012, but the capacity within the administration to effectively implement projects on this scale is poor. A Law on social housing remains to be adopted.

### **Measures against racism and xenophobia**

The Constitution provides for measures against racism and xenophobia. The Criminal Code renders racial discrimination and discrimination on the basis of nationality or ethnic origin a criminal offence, but does not stipulate that racist and xenophobic motives are aggravating circumstances of other crimes. Implementation generally remains weak and there is so far limited experience in prosecuting racially motivated crimes and violence. At the same time, such crimes only occur at an occasional basis and are not a broader problem. Measures encouraging tolerance should be promoted.

### **The EU Fundamental Rights Agency**

Montenegrin authorities declared that Montenegro will participate in the Agency's work upon accession, and have already expressed their willingness to join the works of the Agency with the status of observer to the management board.

### **Protection of personal data**

Alignment with the Data Protection Directive needs to be completed. A new Law on personal data protection was adopted and needs to be fully implemented. The capacities of the Agency for the protection of personal data are still limited in terms of human resources, investigation and

inspection mechanisms and should be further strengthened. The Agency has not yet established a prior checking system, as foreseen in the EU data protection rules.

## RECOMMENDATIONS

In view of the above, Montenegro should adopt one or more Action Plan(s), addressing in particular the issues listed below. If deemed useful by the Montenegrin authorities, separate Action Plans can be established, in particular, for media freedom and respect for and protection of minorities. Legislative amendments aiming at further alignment of the anti-discrimination law, the law on the Ombudsman and the law on the prohibition of discrimination of persons with disabilities also need to take into account the requirements under chapter 19 (*Social policy and employment*). Strengthen the capacity of the Ombudsman, in particular in view of his role as national mechanism for the prevention of torture.

- Introduce an effective legal remedy in line with Article 13 ECHR to redress violations of human rights under the convention.
- Fully implement the recommendations provided by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Improve prison conditions; measures to reduce the prison population, in particular alternative sanctions and conditioned sentencing could be further explored.
- Ensure protection of journalists against threats and violence, in particular through effective investigations and deterrent sanction of past attacks. Review and amend the legislative and institutional framework for the protection of media freedom.
- Ensure the independence of the audio-visual regulator and of the public broadcaster.
- Take concrete steps to ensure practical implementation of non-discrimination and gender equality, including through strengthening of the monitoring bodies and more effective reactions of the law enforcement bodies to possible violations, as well as through better awareness raising and support measures, especially on employment and public representation of women. Particular focus should be put on ending discrimination of the LGBT community.
- Take steps to ensure full transparency of trade unions' representativeness and the right to establish new unions, in line with the relevant national regulations.
- Improve the protection and enforcement of rights of the children and of persons with disabilities, including by strengthening the relevant councils, and continue deinstitutionalisation where possible.
- Ensure the effective functioning of the free legal aid system, also through the allocation of sufficient financial means.
- Take concrete measure to prevent discrimination of minorities. Ensure their continuous registration, as well as their equal access to economic and social rights and their adequate representation in public authorities. Particular focus should be given to improve the living conditions of the poorest part of the RAE population and of the displaced persons.
- Ensure adequate prosecution of hate crime.



- Ensure the alignment with the *acquis* in the area of protection of personal data and allow for assessment through the preparation of the relevant transposition tables; ensure sufficient financial and human resources to the Data Protection Agency.

### **III.d EU CITIZENS RIGHTS**

Upon accession Montenegro needs to have adopted legislation that would allow EU citizens to vote and stand as candidates in elections to the European Parliament and in municipal elections. The same applies to the right of free movement and residence, which so far is only granted under the conditions set out in the Law on foreigners. Montenegro will also have to ensure diplomatic and consular protection for EU citizens. The Montenegrin authorities indicated that they see no difficulties in adopting and implementing these parts of the *acquis*.

## **Annex – Human rights related conventions ratified by Montenegro (as stated by Montenegro)**

### Council of Europe conventions:

- European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols 1 to 8 and 11 to 14;
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its Protocols 1 and 2;
- European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes;
- European Convention on the Compensation of Victims of Violent Crimes;
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children;
- European Convention on the Exercise of Children's Rights;
- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;
- Framework Convention for the Protection of National Minorities;
- Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings;
- Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and trans-border data flows;
- Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin;
- Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems;
- Council of Europe Convention on Action against Trafficking in Human Beings;
- Council of Europe Convention on the avoidance of statelessness in relation to State succession.

### UN conventions:

- International Covenant on Civil and Political Rights and its first and second optional Protocols;
- International Covenant on Economic, Social and Cultural Rights;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention on the Elimination of All Forms of Discrimination against Women and its optional Protocol;
- Convention on the Rights of the Child and its optional Protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography;
- Convention on the Rights of Persons with Disabilities and its optional Protocol;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its optional Protocol;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity;
- International Convention on the Suppression and Punishment of the Crime of Apartheid;
- International Convention against Apartheid in Sports;
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (only signed);
- Convention for the Protection of All Persons from Enforced Disappearance.