CENTRE FOR INTEGRITY IN THE DEFENCE SECTOR

Analysis of the Institutional Independence of the Anti-Corruption of Montenegro and the Regime for Whistleblowers' Protection

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INTRODUCTORY REMARKS

This analysis is aimed at supporting the efforts made by the new Montenegrin Government aimed at strengthening the towards advancing the existing anti-corruption law. In doing so, it will assess the compliance of the selected issues of the applicable Montenegrin Law on Corruption Prevention with relevant international standards and where applicable, identify areas where measures need to be taken to improve compliance and/or provide recommendations to that effect.

Special attention shall be given to the issue of whistleblower's protection. The protection of whistleblowers was introduced to the legal systems of Western Balkan countries under strong external conditionality demands, but had limited effects in practice. The Montenegrin legal system, unlike those of the neighbouring countries, does not include a separate law governing the protection of whistleblowers. Instead, this issue is regulated within the law governing the prevention of corruption, while the Anti-Corruption Agency is entrusted with dealing with whistleblowers. Consequently, as a part of the examination of the institutional independence and capacities, particular attention was given to the issue of protection of whistleblowers, both in regulatory and institutional terms.

The analysis is developed with a view to relevant international standards governing corruption prevention and whistleblowers' protection and relevant European Union (EU) legislation, the Montenegrin anti-corruption legal framework, publicly available reports on the work of ACA and interviews with ACA staff.

The analysis is therefore structured in two parts, where the first part pertains to the institutional independence of the Montenegrin Anti-Corruption Agency (ACA), whilst the second part analyses the legal regime governing the protection of whistleblowers.

I ACA INSTITUTIONAL INDEPENDENCE

It is worth mentioning that the existence of specialised institutions with the mandate to deal with corruption prevention is an important international standard. The key sources of law and international standards in this field – the UN Convention Against Corruption[1] and Criminal Law Convention on Corruption[2] and the Twenty guiding principles for fight against corruption[3] - envisage the existence of bodies charged with corruption prevention and

[1] United Nations Convention Against Corruption, adopted by the UN General Assembly: 31 October 2003, by resolution 58/4, entered into force on 14 December 2005, in accordance with article 68(1)
[2] Criminal Law Convention on Corruption, European Treaty Series-No. 173, Član 20
[3] Resolution (97) 24 on the Twenty guiding principles for the fight against corruption, adopted by the Committee of Ministers on 6 November 1997

suppression which have the necessary independence but remain open with regard to the optimal institutional model to be applied when establishing such institutions. The OECD pointed out in its 2008[4] and 2013[5] analyses the existence of three distinct comparative models[6] while indicating that it is up to the states to adopt the model best suited to the local needs. It needs to be emphasised, however, that the existence of a specialised, permanent institution – whether an agency, a unit or a commission – evidently increases its visibility and should in principle entail a higher level of independence. The scholarly literature underscores[7] that in transitional and developing countries, specialised anticorruption bodies are established due to high levels of corruption within the existing public bodies. Montenegro is not an exception in that respect.

1. Existence of adequate legal grounds governing ACA

The relevant international standards mandate that adequate legal grounds needs to be in place as a basis for the establishment and mandate of the anti-corruption body. Additionally, they envisage that the relevant legislation needs to regulate the issue of the status of the institution, appointment and dismissal of its director, its internal structure, functions and competences, budgetary issues, human resources (selection and recruitment of staff), relations with other institutions, reporting, power to adopt secondary legislation etc. In principle, the mentioned set of issues in regulated in the Montenegrin Law on Corruption Prevention, but specific solutions regarding some of the key issues will be analysed in more detail in the text.

First of all, the Law on Corruption Prevention does constitute adequate legal grounds for the establishment and operation of the ACA. It also envisages the adoption of a body of relevant secondary legal acts and soft-law instruments (e.g. the Code of Ethics for ACA employees). The power of ACA to adopt secondary legislation pertaining to its work is in line with relevant international standards, mandating that internal procedures, including the Rules of Procedure and Code of Conduct be regulated by the internal acts of the anti-corruption body.
However, it has already been pointed out in the OSCE/ODIHR opinion on the draft of the Law on Corruption Prevention, **this important standard was to an extent compromised by the provisions of the Law envisaging that certain issues from the ACA competence will be regulated in more detail by the line ministry**. These include the secondary legislation governing the registers of donations and sponsorships, or the register of property and income. It is not clear why the Law established such functional dependence of the ACA from the line

[4] Specialised Anti-Corruption Institutions, Review of Models
[5] Specialised Anti-Corruption Institutions, Review of Models: Second Edition
[6] Multi-purpose model, law enforcement model i preventive bodies
[7] M. Matić Bošković, „Specijalizovana antikorupcijska tela“, Pravni mehanizmi sprečavanja korupcije u zemljama jugoistočne Evrope s posebnim osvrtom na sektor odbrane (ur. A. Rabrenović), Institut za uporedno pravo, p. 69

ministry; even in cases when a new body is being established, it must be assumed that it will have the capacities necessary to perform all the functions entrusted to it by the law, including the adoption of secondary legislation from its competence. During the meetings with NGOs[8] it was pointed out that the said provisions aimed to ensure that ACA has the necessary bylaws according to which it was to operate. However, this solution is only somewhat convincing – the same goal could have been achieved if the transitional and final provisions had envisaged the adoption of the initial set of necessary bylaws, while reserving the competence for their subsequent amendment to the ACA. The mentioned provisions of the Law, therefore, need to be amended and ACA should be granted the powers to adopt relevant secondary legislation on issues within its competence.

2. Institutional position of ACA

In principle, the institutional positioning of the ACA in the Montenegrin Law on Corruption Prevention is in line with relevant international standards, with the above-mentioned caveat relating to the competence of the line ministry in adopting secondary legislation.
Another potentially problematic provision is found in Article 79 of the Law. This article envisages the competence of the **ACA to provide opinions in order to promote corruption prevention, reduce corruption risks and strengthen ethics and integrity in public authorities. However, this provision is somewhat thwarted by the additional stipulation that the ACA shall not act on the request of a public authority, natural or legal person for such an opinion in cases when another competent authority is acting on the same request. It remains unclear how the ACA is informed on such cases, other than when it is the ACA itself that forwards the case file to another competent institution. The norm remains imprecise and seems to place the ACA in an inferior position compared to an unidentified number and type of state bodies, which significantly hampers its independence proclaimed in the law**.

As requested in international standards, the Law on Corruption Prevention clearly sets out the mandate of the ACA. It is particularly interesting in the context of the present review to single out the competence of the **ACA to issue misdemeanour warrants and initiate administrative proceedings. This power of the ACA seems to be frequently and somewhat automatically utilised.**

In order to perform its functions, including the above-mentioned issuing of warrants, ACA has to be able to collect the information necessary for conducting the procedure and making the decision from other state bodies, local self-government bodies, publicly or privately owned companies, institutions, other legal or natural persons. This power is granted to the

[8] Interview of November 5, 2021

ACA in the Law (Articles 31-43). This enables ACA to fully exercise its functions. However, the ACA **does not necessarily use these powers proactively and sometimes meets some form of passive resistence or lack of interest in providing precise and usable information on the part of the public and private bodies from which information is requested**. During the meetings with the NGOs it was pointed out that sometimes the bodies to which the request was made forward a huge amount of unprocessed information to the ACA (think of discovery issues in US courtroom dramas) which then takes a lot of effort to process and extract the requested information from.

One of the last standards to be addressed in the present analysis concerning institutional status is the one related to a dedicated budget for the work of the ACA. The Montenegrin law does envisage that the funds for the work of the ACA are provided from the state budget and that the ACA decides on how to spend the budget independently. The Law on Corruption Prevention prescribes that the draft budget of the ACA is drawn up by its Council, and then forwards it to the relevant parliamentary body. The parliamentary committee then establishes the draft budget and sends it to the Government. The Law does not prescribe whether and if so, to what extent, is the Parliamentary body bound by the ACA proposal. It also remains silent on whether in practice some additional consultations take place between the Parliamentary body and the ACA prior to the draft budget being sent to the Government. **The negotiation potential of the ACA in the budgeting process is therefore unclear,** as is the extent to which the ACA can implement a clear development-oriented and proactive corruption prevention policy under the present budgeting scheme. The Law on Corruption Prevention does explicitly prescribe that the funds approved for the work of the ACA on an annual level cannot be lower than 0.2% of the current budget of Montenegro. The bulk of the ACA budget is assigned for the payment of gross salaries and contributions, followed by funds allotted for software maintenance, and then by other services (including business trips, communication and media representation services). According to its 2020 report (which is the last full annual report available on ACA website), ACA has reported the execution of budget percentage of 82,55%, with a relatively low percentage of execution for development and maintenance of software, of just below 66%.[9]
During the interviews, the representatives of the ACA have indicated that the guaranteed minimal budget is one of the key aspects of ACA's institutional independence and that the budget, in its current amount, only accommodates for the regular operation of the institution but does not allow for development. They also communicated their impression of having a very limited negotiation potential with regard to the budget. This was additionally illustraed by the fact that, in the end of 2021. the Government of Montenegro had filed a Bill on Amendments to the Law on Corruption Prevention, aiming to delete the provision on the minimal budget for the ACA.[10] The Bill was soon withdrawn. ACA representatives have

[9] https://www.antikorupcija.me/media/documents/IZVJEŠTAJ_O_IZVRŠENJU__BUDŽETA_2020.pdf
[10] Proposal of 15.11.2021. No.. 04-1598, available at /https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/346/2705-15253-23-2-21-5-1.pdf

indicated that the withdrawal was informed by an intervention on the part of the European Commission. Apparently, the provisions related to ACA budget were among the measures included in the Action Plan for Chapter 23 within the framework of EU accession negotiations.[11]

3. Appointment and dismissal of the ACA director

Given that the director of the specialised anti-corruption body is the pillar of the national integrity system. It is therefore critical that the rules on the appointment and dismissal of the direct is transparent and facilitates the appointment of a person of integrity.
It should be pointed out that the Montenegrin ACA has two bodies. The Agency Council and the director. There are clear appointment procedures and mandates set forth in the law for both the Agency Council and its director. It is important to point out that the Agency Council does not have second-instance powers with regard to the decisions of the ACA director. Hence, **the competence of the Agency Council to give initiatives to the ACA director on how to improve the work of ACA is relativized, given that the Council, given its competences, cannot have insight into the actual work of the ACA, except for the information provided in its annual work report. The oversight powers of the Council thus have limited effect**. This observation was confirmed during the interviews with the NGO members, including those who had previously been members of the ACA Council.[12]

Without examining in detail the procedure for the appointment of the ACA council, at this point we will address the possibility of dismissal of the Agency Council members. This is because the Law on Corruption Prevention sets very restrictive requirements in that respect and renders the procedure very difficult. Namely, in addition to the grounds for termination of office that are clear and self-explanatory – personal request, permanent loss of working capacity, subsequent establishment of fact that the member does not meet the conditions prescribed by law – the only other ground for termination of office is the violation of provisions of the Law on Corruption Prevention and of the Rulebook on the work of the Agency Council. **The bar for the improper exercise of the function of the ACA Council member seems to be set very high** – it is, for instance, not clear whether unconscientious exercise of function without formal violations of the Law on Corruption Prevention could result in termination of office. In procedural terms, the dismissal is in the purview of the National Assembly, at the initiative of at least three out of five ACA Council members (a majority aimed to protect ACA Council members from unjust dismissal). There are no rules on whether the National Assembly is bound by this initiative and no timelines are prescribed for the procedure. It seems clear that dismissal is very difficult to effect.

[11] Action plan for Chapter 23, measure 2.1.1.4., /https://www.eu.me/download/1662/23-pravosudje-i-temeljna-prava/20364/akcioni-plan-za-poglavlje-23-pravosudje-i-temeljna-prava-2.pdf
[12] Interview of 13.10.2021.

The requirements for the appointment of the ACA director closely mirror those for the appointment of ACA Council members, with one additional limitation aimed at depoliticization. A person who has a public functionary or was appointed by the Government or the National Assembly cannot be appointed as the ACA director.

The procedure for dismissal of ACA director also closely mirrors that for the dismissal of the ACA Council member. It is initiated by at least three ACA Council members, on the same grounds prescribed for dismissal of the ACA Council members. The dismissal is decided on by the ACA Council by a qualified majority of at least four votes in favour of dismissal (out of five). Such a majority, on the one hand, protect the ACA director from arbitrary dismissal. On the other hand, as the case is with the dismissal of ACA Council members, the norms of the Law on Corruption Prevention render the dismissal difficult to effect in practice. This has been pointed out during the interviews[13] when one of the interviewees indicated that **the desire to ensure that a proactive director cannot be easily dismissed by the will of the political majority has resulted in a completely opposite situation, where it is very difficult to dismiss a submissive and servile director, as the political majority can protect him or her**.

In conclusion, when it comes to the adherence to the relevant standards, the provisions of the Law on Corruption Prevention relating to the appointment and dismissal of the key ACA bodies are mostly aligned with the said standards. However, it seems that the standard mandating that the management organs of the anti-corruption bodies need to be protected from arbitrary dismissal is operationalised in a very strict manner, rendering the dismissal virtually impossible. There is therefore a clear need for striking a balance between the said standard and the necessary degree of accountability of the ACA Council members, and, most of all, ACA director, for the entire work of the ACA.

4. Requirements related to ACA staff

The employees of the body dealing with corruption prevention are one the key elements of a properly established system in institutional terms. Relevant international standards indicate that the procedures for recruitment and employment must be based on objective, transparent criteria, and on merit. At the same, the employees need to have an adequate level of job safety, and their salaries must reflect the nature and specificities of their jobs. Furthermore, the staff needs to have adequate capacities, or, more specifically, special knowledge and skills necessary for the performance of the ACA functions.

[13] Interview of 5.11.2021.

The current ACA Rulebook on international organisation and staffing (hereinafter: the Rulebook) was adopted in February 2021.[14] It envisages that ACA should have a total of 75 employees. According to the most recent available Report on the work of ACA[15] its staff amounts to 55 employees.

The provision of the Rulebook needs to be viewed in the context of limitations set forth in the Law on Civil Servants[16], or rather, more precisely, the limitations stemming from a formalistic interpretation of the given law, which seems to dominate in the practice of state authorities in Montenegro. Namely, this Law prescribes in its Articles 20-29 the requirements for employment of civil servants related to years of work experience for specific categories of civil service jobs. The 2021 revision of this law has considerably reduced the required years of professional experience as a precondition for employment in the civil service. For instance, heads of the public administration bodies are required to have either 3 years of experience in managerial jobs or five years of experience on other jobs. In other words, the requirements even for the highest managerial posts are set rather law.

The ACA Rulebook follows the mentioned legislative amendments closely, taking over the minimal professional criteria for certain positions from the law. This seems to be a testament of an **extremely formalistic interpretation** of the provisions of the Law on Corruption Prevention, or, more specifically, its Article 96, which stipulates that the regulations governing civil servants shall apply to the rights, obligations and responsibilities of the ACA staff. An interpretation seeking to establish legislative intent, underscored during the interviews with the ACA representatives, would indicate that ACA can envisage more stringent criteria in its Rulebook when it comes to the minimum years of service, particularly given that the Law on Civil Servants does refer to the minimum requirement. This line of reasoning can also be supported by linguistic interpretation. The ACA has confirmed that such a formalistic approach is problematic from the standpoint of development of its internal institutional capacities. ACA representatives communicated the ACA's position that it would be more beneficial if the ACA itself were to prescribe the conditions for recruitment and was in charge in the employment process.

There seems to be an additional drawback in the ACA Rulebook, related to a rather widely set educational requirements. **Namely, the Rulebook commonly sets the requirement of a graduate degree in social sciences – which perhaps is not specific enough to ensure the recruitment of an employee with the necessary set of expert knowledge, skills and professional integrity critical for the successful exercise of ACA's competences**. This was

[14] https://www.antikorupcija.me/media/documents/Pravilnik_o_unutrašnjoj_organizaciji_i_sistematizaciji_radnih_mjesta_u_ASK_2021..pdf

[15] III KVARTALNI IZVJEŠTAJo sprovođenju Plana rada Agencije za 2021. 01. jul –30. septembar 2021., dostupan na https://www.antikorupcija.me/media/documents/III_kvartalni_izvještaj_u_2021.pdf

[16] RM Official Gazette No. 2/2018, 34/2019 i 8/2021

also an issue that was flagged during the interviews with representatives of the NGOs [17]who feel that ACA's failure to profile its staff more clearly is a major risk with regards to its institutional independence. Therefore, both **the norms of the Rulebook governing the required professional experience and the required educational background could well be revised**.

When it comes to the high managerial positions, the two problems indicated above seem to be potentially offset by the norms of the Rulebook mandating that their knowledge, abilities, competences and skills are to be tested in accordance with the relevant Government regulations. *In concreto*, this means that testing is organised through a written test and a structured interview before a commission formed by the HRM government body, which also includes a high ACA manager. It is worth questioning why the mentioned testing is envisaged only for high managerial posts, given that the majority of ACA staff is comprised of expert staff, to which the testing requirement does not apply. Both the ACA and the NGOs have recognised this as a problematic issue, for several reasons. Firstly, it was indicated that the employees of the government HRM body do not have the necessary expert knowledge in order to properly test the extent to which a candidate is familiar with the general legal framework for corruption prevention, which is not exhausted in the familiarity with the general legal framework for the work of government bodies and the provisions on the Law on Corruption Prevention. Second, it was indicated that only thorough testing of the knowledge of various areas of corruption prevention for all categories of ACA staff would strengthen ACA's institutional capacities.

An issue that is also relevant for the capacities of the ACA staff is that of the trainings for the ACA employees related to the exercise of this institution's functions. It is worth noting that the current ACA managerial staff includes persons that have been employed in ACA for only 18 months. **ACA itself has confirmed during the interviews that it had identified the lack of specialised, dedicated trainings, as one of the challenges with regard to its institutional capacities**. It also pointed out that specialised trainings attended by its employees over the course of the past year have contributed to certain improvements in its practice. During the interviews with ACA representatives, it was also pointed out that the newly employed ACA staff had peer support at the workplace, aimed at ensuring that ACA competences are implemented properly. Given the previous ACA practice was heavily criticized, it seems reasonable to wonder about the usefulness of such peer support if it is not systemically supported by external training. According to ACA representatives, the ACA Strategic plan for 2022-2024 does include measures directed towards strengthening the capacities of the ACA staff through training.[18] The ACA Workplan for 2022[19] includes

[1717] Interview of 5.11.2021.

[18] The Strategic Plan is not publicly available. In the course of the March 2022 interviews with ACA representatives it was pointed out that the Strategic Plan is treated as confidential or, more specifically, that it is

trainings for ACA staff on a continuous basis, particularly in the fields where drawbacks and weaknesses were identified in the said ACA Strategic plan; additionally, initial training as a part of onboarding is also planned for new employees. This is a positive step, the implementation of which should be monitored.

When it comes to the guarantees of job safety, ACA staff has the same guarantees as other civil servants, meaning that the Montenegrin legislative framework does not significantly depart from the standards. With regards to salaries, the Law on Corruption Prevention envisages that ACA staff has a monthly addition atop the base salary of 30%. This provision undoubtedly goes towards securing adequate salaries for ACA staff; however, it must be viewed in the context of similar rules envisaging monthly additions for other types of jobs e.g. handling classified data, which is also 30%. [20] It, therefore, seems that there could be room for additional improvement and incentives for the ACA staff in this respect. However, **during the interviews with the NGO representatives, a potential increase in salaries of the ACA staff and in particular of the salary of the ACA director[21] is perceived as an abuse of powers, or rather use of powers to own advantage rather than in public interest.**

5. IT capacities

The existence of adequate IT support for the implementation of ACA competences is certainly an important aspect of its institutional capacities and hence its independence.

When it comes to the regulatory framework, as briefly indicated before, the ACA is vested with adequate powers with regards to collecting information relevant for ACA procedures. Namely, during the procedure for establishing whether there were any breaches of the Law on Corruption Prevention, the authorised ACA employee collects the necessary data and information on the facts relevant for the procedure ex officio from public bodies, institutions, publicly-owned companies, but also other legal and natural persons. They are obliged to forward the requested information to ACA. Should they fail to do so, the ACA informs their supervisory body of this failure.

In addition, the **ACA has access to the universal data-exchange information system, which is used in Montenegro for automated exchange of data between official registers**

classified as „internal“ . The news about its adoption is available here://www.antikorupcija.me/media/documents/Plan_rada_ASK_za_2022._godinu.pdf.

[19] https://www.antikorupcija.me/media/documents/Plan_rada_ASK_za_2022._godinu.pdf

[20] Odluka o dodatku na osnovnu zaradu za obavljanje poslova na određenim radnim mjestima, Službeni list CG", br. 60/2017, 36/2018, 59/2019, 28/2021 i 26/2022

[21] Interview of 13.10.2021. During this interview the NGO representative pointed out that the ACA director had increased her own salary as soon as she was appointed to this position. We were unable to identify the document which envisages this increase.

and public administration bodies. This means that ACA has real-time access to the following registers: Central information register, central business register, central tax register, the register of employees, education register, criminal records register, pension insurance register, health insurance register, cadastre. This automated data exchange does constitute a very positive step. However, during the interviews with NGOs it was pointed out that, for instance, **the Tax Administration has not made available all the data needed for the exchange and that the automated data exchange has some deficiencies.**

ACA also has its own software it utilises in its daily work, which has been developed based on the source code obtained from the Serbian ACA. The software solutions used to support the execution of different ACA competences naturally differ, and some have more advanced functionalities than others. However, according to the information obtained from ACA staff during interviews, **some parts of the daily job are still done "by hand" as they are not supported by the existing software functionalities**. **An example illustrating this is the register of public officials, which is not developed automatically, but is updated by hand based on the data published in various central and local official gazettes**. Another example is the fact that the information included in the property declarations are not machine-readable, but instead have to be put in the system by hand based on the information provided in the .pdf documents submitted by the functionaries.
ACA is planning to improve its information system and base it on open data policy. The ACA Workplan for 2022 envisages the engagement of external consultants charged with developing the Information System Development Plan. However, in order to achieve optimal functionality, it would be prudent for ACA to improve its regulations and practices related to the keeping of certain registers in parallel. ACA would also be advised to try and establish interoperability with other existing public registers, which would enable it to have automatic access to additional relevant data.

II REGIME GOVERNING PROTECTION OF WHISTLE-BLOWERS

The establishment of adequate protection of whistle-blowers is among the key issues related to integrity in the public sector and private sector alike. Clear and precise definitions, including the definition of a whistle-blower and robust procedures for reporting wrongdoings and protecting whistleblowers are among key international standards.

This section will provide a birds-eye view on the regulatory framework and practice related to the protection of whistleblowers in Montenegro, based on desk research of the regulatory framework and interviews with ACA representatives and NGOs.

The protection of whistle-blowers is dealt with in a number of hard- and soft-law instruments adopted on international level. The key instruments in this regard are the United Nations Convention against Corruption, Council of Europe's Civil Law Convention on Corruption,

Council of Europe Recommendation on the Protection of Whistle-blowers CM/Rec (2014) 793 which relies on the 2010 PACE Resolution 1729 (2010) and Protection of "whistle-blowers". Specific recommendations regarding the relevance of whistle-blowers and their protection are provided in the Second round of GRECO evaluations. With regards to Montenegro, as early as 2005 GRECO, for instance, recommended the establishment of a framework for the protection of whistleblowers, ensuring that civil servants who report suspicions of corruption in good faith are adequately protected from adverse consequences.[22] The first time some level of protection for civil servants who report such suspicion was provided was in the provisions of the 2011 Law on Civil Servants.[23] Similar incentives for reporting wrongdoings, geared to also include the private sector, are introduced in the provision of the Labour Law.[24] This framework included a number of other provisions scattered in various laws, and hence in 2014 the Law on Corruption Prevention integrated the previously fragmented framework and rendered it more, but not fully aligned, with relevant international standards.

The fact that Montenegro does not have a separate law governing the protection of whistle-blowers, but rather regulates this issue in the Law on Corruption Prevention is not contrary to international standards *per se.* However, some of the provisions of the Law, primarily those relating to the definition of the whistle-blower, constitute a departure from the said standards.

When it comes to alignment of the Anti-Corruption Law with the new EU Directive on the Protection of Persons who Reports Breaches of Union Law, it is noteworthy that the European Commission in its annual 2019 report on Montenegro indicated that the legal framework on whistle-blower protection would need to be aligned with the new EU acquis on this issue.[25]

1. Definition of whistle-blower

The Montenegrin Law defines whistle-blowers as legal or natural persons who submit a report on the violation of public interest which indicates the existence of corruption.[26] During the meetings with the ACA, it was underlined that the Montenegrin law provides a unique coverage in the regional legislation, as it refers to both natural and legal persons. **This solution is unorthodox given that the provisions of the law governing the protection of whistle-blowers are necessarily targeting methods for protecting natural persons**, but

[22] Joint first and Second evaluation rounds, Montenegro, Greco Eval I-II Rep (2005) 4 E, Paragraph 92.
[23] Article 79, Official gazette No. 39/2011, 50/2011, 66/2012, 34/2014, 53/2014 and 16/2016.
[24] https://crnvo.me/wp-content/uploads/2021/04/Zastita-Zvizdaca-Teorija-i-praksa.pdf, p. 32
[25] European Commission, Brussels, 29.5.2019 SWD(2019) 217 final, COMMISSION STAFF WORKING DOCUMENT, Montenegro 2019 Report, Accompanying the document
Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2019 Communication on EU Enlargement Policy, {COM(2019) 260 final}, p. 24.
[26] Article 4, Paragraph 2 of the Law on Prevention of Corruption, *Official Gazette*, no 53/2014, 42/2017-Decision of the Constitutional Court.

not potential adverse consequences or retaliation measures that can be faced by legal persons who report wrongdoings (e.g. severance of existing contracts on dubious grounds). However, according to the information obtained in the meetings with the ACA, out of the total of 142 reports the ACA received in 2021, 18 were filed by legal persons. The mechanism does seem to be accepted and operational in practice.

The Montenegrin legislation, on the other hand, fails to provide comprehensive protection to facilitators or third persons. The Law on Corruption Prevention does recognize persons who assists the whistle-blower or who may sustain damage due to their linkages with the whistle-blower, but does not grant protection to such persons. This is a drawback that has also been recognized by the ACA.

Having in mind the above definition, it seems that the status of the whistle-blower can be held by any person, regardless of his employment status or the manner of connection with the institution or legal entity to which the reported information relates. However, **the notion of public interest seems to be unjustifiably narrowed** since the status of a whistle-blower can be acquired only by a person who reports a threat to the public interest which indicates the existence of corruption. Such an approach mostly is not in line with international standards. More specifically, the Recommendation (2014)7 of the Committee of Ministers of the Council of Europe goes much further stating that a "whistle-blower" means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector. A similar approach is utilised in the EU directive.

During the meetings with the ACA it was pointed out that the **requirement that the suspected wrongdoing indicates the existence of corruption is the only legislative link that underpins the competence of the ACA** to provide protection to whistle-blowers and that it therefore would not be prudent to remove the said restriction from the definition of the whistle-blower. Conversely, the Serbian law[27] and the Croatian law[28] clearly frame whistle-blowing in the context of danger to public interest, but do not restrict it to cases where corruption may exist. It seems therefore that regardless of whether ACA is currently the most opportune institutional solution for providing protection to whistle-blowers, the Montenegrin regulatory solution needs to be examined.

2. Reasonable grounds for disclosure and abuse of disclosure

Another important international standards implies that, in order to protect whistle-blowers from misdemeanour, criminal or disciplinary liability, but also to reduce the possibility of abuse on the part of whistle-blowers, the law must clearly define the requirement that the disclosures be made on reasonable grounds and defines abuse of the right to whistle-blowers.

[27] Law on the Protection of Whistleblowers, RS Official Gazette 128/2014
[28] Law on the Protection of Whistleblowers, NN No. 17/2019

The Montenegrin Law on Corruption Prevention does include the reasonable grounds requirement, which is in line with the relevant international standards. However, it does not include provisions that would regulate the abuse of the right to whistleblowing. This was indicated as a deficiency that needs to be addressed during the meetings with ACA representatives.

3. Reporting channels and anonymity

International standards mandate that whistleblowers should have access to more than one channel to report and disclose information on potential wrongdoings.

The Montenegrin Law on Corruption Prevention recognises only two types of whistle-blowing: internal and external. Media or public whistleblowing is not directly envisaged in the law. Instead, it envisages that if certain conditions are met, it is the ACA that will alert the public.[29] This is a solution that needs to be re-examined as it restricts the options of the person reporting the wrongdoing in cases of possible retaliation or imminent danger to public interest and is not in line with international standards or comparative best practices. The ACA has noted this drawback of the law but framed the answer as to the potential improvements in that regard in the context of harmonisation with the relevant EU directive, which seems to be the key impulse for regulatory amendments in this filed.

The Montenegrin law does not make the external whistleblowing conditional on prior internal whistleblowing. This is in line with relevant international standards. The observance of the said standard is particularly relevant in a country where until recently public sector was perceived to be captured by the political elites and where lack of trust in the public institutions can seriously preclude whistleblowers from opting for internal reporting. On the other side, **there are no clear reporting mechanisms on instances of internal reporting**, so, except for the information received directly from the whistleblower, the ACA in fact has no formal knowledge of the total number of whistleblower's reports filed.

The ACA in practice provides a sufficiently wide array of options for whistleblowers who wish to address it. There is a hotline for whistleblowers, corruption can be reported via a dedicated email, electronically or even in person. It is important to note that the internal ACA unit in charge of whistleblowers is located on a separate floor in the building where ACA premises are, so that those who wish to remain anonymous but prefer direct contact with ACA staff can safely arrange an in-person meeting.

According to ACA data, in the first nine months 2021, it had received a record number of reports from whistleblowers.[30] Namely, in the said period, ACA has received a total of 110 reports, which is a 96.4% increase compared to the entire 2016, a 59.4% increase

[29] Article 63, paragraph 2
[30] Izvjestaj o radu ACA III kvartal 2021, p. 26

compared to 2017 and a 47% increase compared to 2020, while it is on par with the number of reports ACA received in 2018 and 2019. It is interesting to note that, compared to the previous period, where reportedly the majority of the whistleblower's reports were filed anonymously[31], in the last quarterly report ACA stated that only 11 out of 35 reports were filed anonymously. The ACA interprets this tendency as a signal of an increasing trust of the general public in ACA's role with regards to whistle-blowing practices and its awareness-raising campaign.

However, during the interviews with NGOs it was pointed out that previous ACA's practices regarding whistleblowers were not consistent and that in fact they sometimes went against the whistleblowers. It was indicated that in one case someone was not even recognised as a whistleblower by the ACA even though that person got fired from a civil service job, most likely due to disclosures made. However, this happened during the previous ACA leadership.

4. ACA capacities to deal with whistleblowers

In practice, **the capacities of the ACA for dealing with whistleblowers are very limited, and currently amounts to one employee**, even though the staffing table envisages a total of 5 ACA employees to work on these tasks. Given the reported workload, it seems that these capacities will soon need to be extended in order to ensure that external whistleblowing to the ACA has the potential to remedy the reported wrongdoings in the public sector.

This observation is to an extent corroborated in the last available ACA report, which states that out of the 134 reports filed by whistleblowers that the ACA had pending before it in the third quarter of 2021, a total of 9 were finalised, 4 of which dated from previous years. Within the same period, the ACA has provided 6 relevant recommendations aimed at improving transparency and eliminating corruption risks.[32] Therefore, only a small percentage of the cases included in ACA's workload seem to be resolved in a timely manner.

5. Legal force of ACA recommendations

It is interesting to note that, during the meetings with the ACA, its representatives singled out one case where they had a somewhat "**uncooperative" whistle-blowe**r, who had used the external reporting mechanism i.e. reported to the ACA, but also in parallel filed criminal charges against the management of the public institution in question. The ACA

[31] Interview with NGO representative of November 5
[32] Izvjestaj o radu ACA III kvartal 2021, p.28.

representatives commented that they were unable to protect the whistle-blower as these actions had antagonised the public institution and that no one would be willing to reinstate him to his job. On the other hand, **NGO representatives have pointed out that in some cases, whistleblowers did sustain workplace harassment, but that ACA was impotent to address this issue**. During the meetings, ACA representatives have also indicated that it would be most beneficial if the recommendations the ACA provides in the procedure conducted upon whistleblower's report had mandatory legal force.

6. Protection of whistleblowers by ACA

An important international standard that is critical for the success of whistleblowing is the one stating that the relevant law has to provide protection for whistle-blower's from employees from retaliation or other negative consequences when reporting corruption. While the Montenegrin law includes a general proclamation that both public and private sector institutions must provide protection all forms of discrimination and restrictions and denial of whistle-blower rights. In operational terms, however, it is only the ACA that can in fact provide protection to whistle-blowers envisaged in the law.

The Law on Corruption Prevention stipulates that the ACA shall protect the whistle-blower who has reasonable grounds to suspect that the public interest is being compromised, which indicates the existence of corruption, and who reports this suspicion in good faith. This last condition, **namely the existence of good faith in reporting corruption, seems to have been introduced in order to offset the lack of provisions regulating the instances of abuse of whistle-blowing. Nevertheless, it is a requirement that is very difficult to ascertain, and, moreover, the existence of good faith in reporting would imply a considerable degree in arbitrariness in providing protection to whistle-blowers. During the meetings with ACA representatives, it was pointed out that the existence of the good faith requirement was never examined in practice, which does mitigate this unfortunate legislative formulation**. The norm needs to be amended none the less, and this requirement needs to be deleted from the law. This is particularly relevant in light of the provisions of the EU directive, stipulating that motives of the reporting person in making the report should be irrelevant as to whether they should receive protection.[33]

The protection of whisteblowers is made conditional on two sets of requirements. One concern the actual adverse consequences sustained by the whistleblower, and the other one is the timeliness of the request for the protection. When it comes to the adverse consequences, they are mostly linked to the labour-law status (e.g. termination of employment, disciplinary measures, changes to job description, denial of promotion etc.) and the termination of business cooperation. Additionally, the Law does envisage that protection can be awarded in

[33] https://whistleblower.org/blog/a-comparative-analysis-of-u-s-v-e-u-whistleblower-law/

cases where whistleblower's life, health or property are under threat. **The Law however fails to address a plethora of other possible scenarios, particularly those identified in the EU Directive, such as workplace harassment in the general sense, ostracism, negative performance assessment, harm to reputation, particularly through social media etc. There seems to be a clear need to extend the grounds for ACA protection in order to respond to reality more fittingly, rather than reserve protection for situations that can be interpreted very formalistically**.

The timeliness of the request for the protection is another potentially problematic and overly formalistic request. **The Law states that only requests made within 6 months from the date the damage c**aused by the report had been sustained, or within 6 months from the date of learning that such a damage may be incurred. While the idea behind this requirement seems to be motivated by the need to establish a clear temporal link between the whistleblowing and the adverse consequences, this preclusive deadline seems rather restrictive, particularly in respect to the subjective condition. In fact, any whistleblower can reasonably expect some form of retaliation, which means that the subjective timeline would start on the very day the report is submitted. **The need for the existence of this criterion needs to be examined**.

The right to protection is exercised by the whistle-blower submitting a request to the Agency in writing or orally on the record. If the Agency determines that damage was caused to the whistle-blower due to the submission of the report, or that there is a possibility of damage, the opinion shall also contain a recommendation on what should be taken to eliminate the damage or prevent its occurrence, as well as the deadline for elimination of harmful consequences. The authority, company, other legal entity or entrepreneur to whose work the recommendation refers, is obliged to submit a report on the actions taken to implement the recommendation within the set deadline. If it fails to do so, the Agency shall notify the body supervising their work and submit a special report to the Assembly and inform the public.

7. Judicial protection of whistleblowers

According to Montenegrin law, indicated above, the whistle-blower also has the right to initiate court proceedings for the damage suffered. More specifically, the whistle-blower has the right to judicial protection against discrimination and harassment at work due to reporting an endangerment of the public interest, which indicates the existence of corruption in accordance with the law governing the prohibition of discrimination and the law governing the prohibition of harassment at work. The Law also envisages that in such court proceedings, the ACA is to provide expert support in demonstrating and proving the causal links between the damage sustained and the whistle-blowing. This support is provided at whistleblowers' request**. So far, there have been no cases in which whistleblowers sought protection**

before the court. The ACA recognises that it would be able to provide the necessary support in such cases. It was pointed out that the court is not bound by ACAs recommendations, but that they constitute a sound indication in support of the claims made by whistleblowers in court proceedings.

8. Exemption of whistleblowers from liability

Although at first glance the law appears to provide full protection for whistle-blowers, it lacks provisions relating to the exemption from criminal, misdemeanour or disciplinary liability of persons who report corruption in good faith. Such an approach by the legislator has a particularly discouraging effect on employees in the police and military service. Therefore, it can be said that the Law of Montenegro in that respect is not in line with international standards.

According to international standards the law should ensure waiving of criminal liability for protected disclosures (disclosure of information related to official secrets or national security). That is one way to encourage whistleblowing in both the public and private sectors.

The Law on Prevention of Corruption of Montenegro does not provide for an explicit release from liability but stipulates that the right to protection belongs to the whistle-blower against whom disciplinary proceedings have been initiated or a measure imposed for filing a report of corruption. That solution is not in line with standards.

9. Incentives for reporting

International standards also indicate that the law should include incentives to encourage reporting (i.e. reward systems, recover lost or misspent money). The Law on the Agency for the Prevention of Corruption of Montenegro prescribes a reward for whistle-blowers. The reward is made conditional on contributing to the prevention of endangering the public interest that points to corruption which resulted in generating incomes (this does not explicitly include preventing loss). The reward is determined according to the contribution of the whistle-blower in relation to the amount of acquired income or confiscated property. The law determines the minimum and maximum amount of the award. It cannot be lower than 3% or higher than 5% of the realized income or property. **The reward is not obligatory; it is optional and within the margin of appreciation of the given public institution or a company.**

According to the information obtained during the meetings with ACA, so far no one has been rewarded for whistleblowing. There was one attempt to effect the reward, but given that whistleblowing took place prior to the adoption of the Law on Corruption Prevention, it was not given.

It is interesting to note that the ACA was, during interviews, somewhat critical of some of the whistleblowing reports submitted by NGOs, indicating that these were rather

clear-cut cases where the NGO submitted the reports motivated by the prospect of the reward. It seemed that the ACA thought that NGOs were somehow abusing the right to report in order to obtain financial gain from the state budget.

10. Retaliation against whistleblowers

One of the last international standards to be examined in this overview is the one stating that law is to prescribe effective sanctions for persons who prevent the whistle-blower from filing a report or who take revenge on the whistle-blower or persons. **The Law of the Prevention of Corruption of Montenegro does not provide sanctions for persons who prevent the whistle-blower from filing a report**. This is contrary to the provisions of the EU Directive, which stipulates clearly that there is personal liability for retaliation.[34] Consequently, there is an need for the law to be amended so that this important provision is introduced.

[34] Article 23.