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Programme against Corruption and Organised Crime in South-eastern Europe (PACO)
Implementation of Anti-corruption Plans in South-east Europe (Impact)

**REPORT: ASSESSMENT AND RECOMMENDATIONS REGARDING THE STRENGTHENING
OF THE PROSECUTORIAL SERVICES IN MONTENEGRO**

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Podgorica, 4-6 July 2005

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Implementation of National Anti-corruption Plans in SEE (PACO Impact)

A Council of Europe Project funded by the Swedish International Development and Cooperation Agency (Sida)

1 INTRODUCTION

The PACO Impact project is a regional project aimed at the “implementation of the national anti-corruption plans in South-eastern Europe”. It was launched in March 2004. This project provides technical assistance directly to seven project areas in south-eastern Europe, that is, Albania, Bosnia and Herzegovina, Croatia, “the Former Yugoslav Republic of Macedonia”, Kosovo (S&M), Montenegro (S&M), Serbia (S&M).

In the framework of PACO Impact Project workplan for Montenegro, more specifically a **Pilot Project** to “Provide assistance and support to the strengthening operational capacities and increasing effectiveness of the Special Prosecutor’s Office”. The goal of this pilot activity is the capacity building and the support of an efficient functioning of the new structure (Special Prosecutor’s Office) aimed at efficient criminal proceedings related to economic crime and corruption offences.

Within Montenegro Pilot Project framework, PACO Impact will support the Special Prosecutor’s Office on the following steps:

- legal expertise and review of the existing legislation and system (recommending necessary new provisions and/or legal acts) with regard to drafting a new law on “Organised Crime for Montenegro” and relevant provisions related to the work of Supreme Public Prosecutor’s Office and Special Prosecutor’s Office;
- advice on the on-going drafting of the Internal Rules of Procedures;
- purchase of office equipment in order to assist the furnishing of the newly established Department; and
- technical assistance to the activities that will be organized through the implementing phases such as: training of staff, publications, follow-up legal expertise, etc.

The first activity scheduled to be held was the expert assessment mission by launching also this new Pilot Project and also ensuring its successful start-up and commitment of the involved actors in such process.

2 LIST OF MEETINGS

4 July (Monday)	Arrival of CoE Experts in Podgorica
18:00 Briefing Meeting at the Council of Europe Office in Podgorica. E. Nochlin, B. Penko, L. Lalicic, A. Abdiu	
5 July (Tuesday)	First Day
10:00-11:00	Meeting with the Supreme Public Prosecutor of Montenegro, Ms. Vesna Medenica Venue: Supreme Public Prosecutor’s Office
11:00- 12:00	Meeting with the Special Prosecutor for Organised Crime, Ms. Stojanka Radovic Venue: Special Prosecutor’s Office
12:00- 13:00	Meeting with Higher Prosecutor in Podgorica, Mr. Novak Raznatovic, Venue: Higher Prosecutor’s Office
13:30-14:30	Lunch break

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15:00- 16:00	Meeting with the Head of the Office for Preventing Money Laundering, Mr. Predrag Mitrovic, Venue: Office for Preventing Money Laundering
6 July (Wednesday)	Second Day
10:00-11:00	Meeting with the Acting Head of the Office for Anti-corruption Initiative, Ms. Ana Nikolic Venue: Office for Anti-corruption Initiative
11:00-12:00	Meeting with the Deputy Minister of Justice, Ms. Branka Lakocevic Venue: Ministry of Justice
12:30-14:00	Lunch break
14:00- 15:00	Meeting with the representative of the Ministry of Interior Mr. Sreto Radonjic, Chief of the Criminal Police; and Mr. Petko Spasojevic, Chief of the Department for Combating Economic Crime Venue: Ministry of Interior

3 THE PURPOSE

There were two main issues which were addressed during this expert mission:

Start-up of the Pilot Activity--Recommendations on the implementing process: Discussions and then evaluations were conducted with the involved actors on operational and implementation aspects regarding the capacity building and the efficient functioning of the Office of the State Prosecutor and the newly established office of the Special Prosecutor, as well as the further actions/steps that should be undertaken.

Assessment and identification of needs and technical support: During the meetings the implementing partners were able to share opinions with the experts and address their needs. The expert mission will help to better pinpoint the areas where focus, technical and financial assistance is needed.

During the mission, the interested partners were encouraged to share their opinions with the experts and express their needs. The expert mission managed to assist the partners in identifying areas where focus, technical support and financial assistance can improve conditions.

Accordingly, the experts' team provided comments, analysis, and recommendations for future actions as follows:

- Issues concerning the prosecution of Organised Crime;
- Issues concerning the prosecution of Corruption and Money Laundering crimes;
- Issues concerning the Department of the Special Prosecutor; and
- Issues concerning the Internal Rules of Procedures.

Thus, the conclusions expressed in this report are designed to invite the Montenegrin authorities to ascertain the most urgent needs and issues at stake and implement the proposed activities suggested herein.

4 ORGANISED CRIME

4.1 Issues of Concern

4.1.1 Definition According to the Law (Art 507)

The expert's team closely examined Article 507 of the Criminal Procedure Code, the Special Regulations on Proceedings for Criminal Offences Committed in an Organised Manner, in association with issues related to its practical application. Article 507 provides eight conditions, of which at least three must exist, in order for an offence to be prosecuted as "organised crime." It appears that this article could be clearer and better organised. With respect to clarity and applicability, the team found that the conditions could be considered vague, which may lead to several problems. These problems include, but are not limited to, the possibility of misapplication by police officers (who are not specialised) and by prosecutors who do not routinely handle such cases.

4.1.2 The Issue of forfeiture, seizure Confiscation of Crime Proceeds

Despite its solid legal basis in the Penal Code and procedural framework provided in the Criminal Procedure Code, it is obvious that preliminary measures as well as final confiscation of crime proceeds only remain a dead letter on paper and sorely unutilised. The proper implementation of this law could have quite positive effects, resulting in severe damage to organised criminal enterprises, while at the same time providing a substantial financial base for law enforcement's independent, sustainable efforts to fight crime (eg: assisting law enforcement in the purchase of technologically-advanced equipment). The team identified several instances where the freezing of assets and their subsequent confiscation (which is permitted subject to a court order) should have been applied, but were not. In addition, the team was informed that the full implementation of this article has been impeded due to confusion over the current terminology as used and the meaning of the terms "freezing" and "confiscation." It appears that proper training is a necessity, and the law itself might need to be re-examined as well by the appropriate authorities and in due course.

4.1.3 The Use of Special Investigative Means (Art. 237; 238)

The team examined the issue of the practical application of the specific articles relating to the use of Special Investigative Means (SIMs) and the provisions themselves. It further conducted meetings with members of different institutions which have the authority to use SIMs, from the prosecutor's office and the Ministry of the Interior. The team learned of several problems with the SIMs provisions that may severely curtail its use. Apparently, the measures may only be ordered for criminal offences with elements of organised crime, and those for which a prison sentence of 10 years or more may be imposed. On one hand, there are offences which could not be covered, such as basic forms of corruption-related offences. For instance, it is never permissible, under the provisions of SIMs, as it stands, to make a simulated giving of a bribe to an ordinary police officer who is suspected of corrupted activity since the penalty for such conduct is not 10 years and the act is not one of organised crime.

The team was alerted to another problem relevant to the provisions as they are written. In order to apply for any Special Investigative Measure, no matter how minimally intrusive it may be, the

investigating judge must be presented with relatively high level of evidence to issue an order. However, oftentimes, as in the hypothetical example above of bribery, such evidence may not be obtained without the initial use of SIMs. In this respect, the law, by grouping all nine measures together, not taking into account their level of intrusiveness to privacy rights and their specific nature, seems overly restrictive in relation to the application for some less-intrusive measures. In this regard, the law is not conducive to the ordinary law-enforcement concept of building a case with the gradual collecting of evidence.

Another problem voiced to the team is that relevant provisions on SIMs require that individual(s) have already committed the crime before measures may be ordered. However, this excludes applications for measures in the moment of preparation or organisation of criminal activity. This would especially impede the investigation of organised crime at its inception, and, as a collateral positive result, its prevention.

On the other hand, the team is concerned that the application of existing SIMs could potentially violate internationally recognized human rights standards. For example, at the earliest stages of the preliminary criminal proceedings, it is not always possible for police, prosecutors and investigating judges to know what offences will result from the investigation. Also, it is possible to classify an investigation as one into “organised crime” merely to obtain an order to use SIMs. The problems therefore are closely related to the issue of vagueness, as assessed by the team, with respect to the existing definition of Article 507.

4.1.4 The Issue of the Need for a “new law on organised crime”

Subsequent to the request for an opinion of whether or not Montenegrin authorities should opt for drafting a new law on organised crime, the expert’s team did not find any good reason for the drafting of additional legislation. Relevant substantive criminal offences already exist in the Criminal Code by which they may be prosecuted as “organised crime.” Moreover, the team did not identify any areas of prosecution that are lacking due to the absence of a specific “law on organised crime.” The existing law is sufficient and additional legislation is therefore unnecessary. The experts’ team acknowledges that certain countries, such as Croatia, have a specific “law on organised crime,” which establishes a specialized institution. Montenegro’s existing prosecutorial system already provides the capacity for such framework (prosecution of organised crime) and another law would merely echo that existing substantive, procedural and organic law. That is not to indicate that the existing laws are not in need of closer examination, in light of the recommendations proposed by the experts’ team herein; however, an entire law in itself did not seem necessary thus not suggested.

4.2 Recommendations

4.2.1 Special Investigative Means (SIMs)

Particular measures should be applied to corresponding substantive offences. The penalty that may be imposed should not be the decisive criteria for the application of SIMs, nor should the offence be required to come under the umbrella of organised crime to merit use of SIMs. Otherwise the principle of “certainty of criminal law” (*lex certa*) is compromised. A useful approach could be to apply different requirements to obtain different investigative measures. For example, the standard required to obtain judicial permission for the measure of “secret surveillance and

technical recording of private conversations held in private premises” should not be the same as the standard required to obtain permission for “simulated giving and taking of bribes,” or “use of undercover investigators.”

The team goes so far as to suggest that certain measures provided in Article 507 may need to be reviewed in light of those kind of measures that should not require judicial permission at all. The team is of the opinion that such measures (under Article 507) cannot be considered intrusions into privacy rights. Rather, certain measures can be effectively used in the earliest stages of the investigation, under the competent supervision of the prosecutor, in order to develop more evidence in order to present it then to a judge to request further, more intrusive measures in building a case. In this area, it is not simply an issue of training or practice, although those absolutely are recommended, rather it is a an issue or a problem with the law as it exists.

4.2.2 Specialised Training on the Confiscation of Crime Proceeds

Article 523 *e.t seq.* provides for extended possibilities for the seizure and confiscation of assets in cases of organised crime. Nevertheless, the measures have only been applied in rare cases where the prosecutors have been entirely confident that they can meet the burden of proving the illegal origin of the proceeds. Training on applying and methods of exercising such measures from the legally authorised authorities, is suggested and it would provide for the more effective, uniform and sustainable application of the already existing framework.

4.2.3 Joint training

Another conclusion made by the team is that the relevant laws discussed herein appear to contemplate cooperation in their use by the institutions of the police, the prosecutors and the investigative judges. Following proposals and ideas received from the authorities that were met, the team therefore strongly recommends that any training on improving the enforcement of these provisions be conducted simultaneously for all three institutions in conjunction and in cooperation with each other. For instance, if even one of these institutions is not prepared for the full use and implementation of these laws, the entire application of these particular and sensitive provisions is impeded.

5 CORRUPTION AND MONEY LAUNDERING

5.1 Issues of Concern

Corruption and Money Laundering are not always considered under the framework of organised crime. The team was even made aware, for example, of one case of *money laundering*, which met all of the conditions of the existing organised crime definition, but was nevertheless referred, from the Special Prosecutor to the Higher Prosecutor. Additionally, the Special Prosecutor has not so far on her own initiative prosecuted any organized crime related corruption offences. The team was also informed that there were no such cases referred from regular prosecutors’ offices either.

5.2 Recommendations

The team is aware that many corruption cases simply do not fall into the category of organised crime and thus are initiated from the Basic Prosecutors. In fact, the team learned that

approximately 75% of corruption cases are fully prosecuted by Basic Prosecutors. In that light and keeping in mind that it remains crucial to prosecute such crime in the best possible manner, the team recommends the assignment of one or more Basic Prosecutor from each Basic Prosecutor's territorial jurisdiction for receiving training on the unique responsibility of dealing with corruption-related criminal offences.

Therefore, Money Laundering and Grand Corruption related offences should more frequently be prosecuted by the competencies of the Special Prosecutor since they typically fall under the classic definition of organised crime.

6 THE DEPARTMENT OF THE SPECIAL PROSECUTOR AT THE SUPREME PUBLIC PROSECUTOR'S OFFICE

6.1 Issues of Concern

While the team fully supports the inclusion of the Department of the Special Prosecutor for Combating Organised Crime within the Supreme Prosecutor's Office, it found that the head of the department is the only member and staff to perform all of its functions. There are no deputies yet appointed, as provided by Article 67, nor are there any officers of department working directly for the Special Prosecutor. In addition, the Special Prosecutor has not requested secondments from the State Prosecutors or other law enforcement institutions as provided in Article 77. The team is concerned that the efficient prosecution of organised crime absolutely requires more prosecutors, who are specialised, and supported by competent and trustworthy administrative staff. Only with enhanced and specialised staff, will the Special Prosecutor be able to concentrate her efforts on the prosecution of serious and complex crimes, which present the most serious threat to the public order.

6.2 Recommendations

It is the recommendation that the Special Prosecutor fortify her office capacities by commencing the following steps as supported by the law:

- The appointment of two deputies;
- The hiring of competent administrative officers;
- The initiating of procedures for requesting secondment from other institutions, such as from the Ministry of Interior, Tax and Customs Offices; and
- Initiate aggressive investigation of allegations by the public of corruption, money laundering and organised crime in conjunction with the police.

In this way, the forthcoming technical support (*e.g.*, office equipment) from the Council of Europe, PACO Impact Project, will best be utilized by a full working staff and cooperating institutions. Also, it is the understanding of the team that the soon-to-be-drafted (by the Ministry of Justice) Internal Rules of Procedure will provide a clear framework of the Special Prosecutor's activity, alone and in conjunction with other institutions. Therefore it is recommended that the addition designation of staff, and the activities performed by them, be contemplated when drafting these regulations.

7 THE INTERNAL PROCEDURES/REGULATIONS

7.1 Issues of Concern

The new Law on the State Prosecutor [SPA] (including provisions providing for the Special Prosecutor), has been in effect since early 2004. The new law requires an "Internal Rules of Procedure," rules which have been in existence in past, but not yet been revised, amended/drafted and adopted in accordance with Article 102 of SPA. As it now stands, the one-year limit as set by Article 135 has long expired, and no provisions exist to regulate the Internal Rules of Procedure. Thus, the mechanics, as introduced in the State Prosecutor's Act, as well as of the Special Prosecutor's Department, are regulated only by the old bylaw (Internal Rules of Procedure for the State Prosecutor on Internal Operations and Record Keeping, Official Gazette, RoM 15/97). This is mainly a bylaw providing internal office policy, and greatly lacking in direction and substance.

It is of concern to the team that where the new law brings new institutions, operating principles and certain provisions that organise the prosecutorial services differently, the old regulations are inapplicable and of little use.

7.2 Recommendations

The team supports the establishment of a multidisciplinary working group under the auspices of the Ministry of Justice to address the drafting of the new Internal Rules of Procedure for the State Prosecutor which is expected to be finalised this autumn. Since this group assumingly has initiate its work as of September 2005, the team suggests primary that such regulations could be elaborated as follows:

- General Provisions
- Internal Organisation
- Processing of Allegations of Crime and Criminal Complaints
- Supervision of Superior Prosecutors on the Performance of Prosecutorial Duties
- Provisions ensuring integrity and corruption-resistance of the Prosecutors office
- Case Assignment, Transfers of Cases, Referrals of Cases
- Case Management Within the Prosecutorial System
- International Legal Assistance and Cooperation
- Handling of Seized Assets
- Protection of Sensitive Information

Attention should also be paid to provisions relating to the duties of the Special Prosecutor, as it is a new department, and due to the highly sensitive nature of the proceedings conducted by this department.

At the same time an effort should be made to allocate other existing provisions, which, by their nature, do not belong in this document, to other sub-regulations, based on the provisions on the Law on Public Prosecutors. The team believes that those should not be a part of the new by-law, but rather, contained in a separate sub-regulation and merged in a more concise manner.

8 FINAL CONCLUSIONS (IMMEDIATE FOLLOW UP)

In view of the above given recommendations, the team suggested that the following training/direct technical assistance can be initiated as follow up in order to support the given recommendations.

8.1 Review and assessment of the Internal Procedures and Regulations

It has initially been agreed that after the first draft of the Regulations is finalised, the team of experts will be ready to provide analysis and recommendations on the draft Regulations in view of their compatibility with the existing legal framework in Montenegro and European standards.

Since the Ministry of Justice established drafters' group has been expected to initiate its work in September 2005, then October - November 2005 can be the suggested months which will allow the initiation of the expert review of the draft Regulations should they be ready.

Also, expert discussions/meetings and workshop among local drafters and Council of Europe experts can be provided under the Pilot Activity should such they be requested from the Ministry of Justice authorities and the Office of Supreme Prosecutor.

Training on the application of new the Regulations once they are enforced can be organised for prosecutors and administrative staff of the prosecutorial services in Montenegro under the action plan of the PACO Impact Pilot Activity.

8.2 Multi-disciplinary training

In addition to the above listed recommendations per each area, in sum the expert team as indicated in this report strongly suggests after assessing separate training needs per each subject as listed above, the following multi-disciplinary topics/trainings should be provided for: **Prosecutors, Judges, Officers of Money Laundering Department, and Police** (including here financial, tax and customs officers).

- General information on the criminal proceedings against economic crime and corruption related offences;
- Use and Application of SIMs;
- Confiscation, Search and Seizure of Crime Proceeds;
- Rules of Procedure of Prosecutorial and Judicial services; and
- Financial Investigation Tools, Procedures and the Interaction Modalities among relevant agencies.

The above suggested training, can be supported and funded fully under the PACO Impact Pilot Activity funds, but also can be co-organised with other assistance providers in Montenegro. Identification of specific costs, beneficiary numbers, and donors is expected to be determined during October 2005 in cooperation with all relevant institutions as listed.

8.3 Office Equipment

As previously assessed and committed from PACO Impact through the Pilot Activity Action Plan, the Department of the Special Prosecutor is expected that by the end of September 2005 to be furnished with the following office equipment as initially requested.

Equipment	# of Units
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Purchase of file cabinet	2
Purchase of mobile phones	2
Purchase of printer	1
Purchase of scanner	1
Purchase of laptops	2
Purchase of shredder machine	1
Purchase of photocopying machine	1
Purchase of DVD system	1
Purchase of video recording camera	1
Purchase of digital camera	2
Purchase of video recorder	1
Purchase of TV set	1
Purchase of fax machine	1

8.4 A Strategy for the Future Allocation of Use and Funds of SIMs

In addition, also the experts team felt at the urge of to suggest that also a comprehensive assessment and report from the Department of the Special Prosecutor in conjunction with cooperating institutions (eg: Ministry of Interior) be drawn and submitted in anticipation of receipt of funding from international aids and/or State budget in order to respond to the current needs of funds and specialised training for the use and access to technical equipment of SIMs.