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CONFERENCE OF THE PARTIES

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS no°198)

First Assessment Report of the Conference of the Parties to CETS no°198 on Montenegro[1]

[1] Adopted by the 6th meeting of the C198-COP, Strasbourg, 29 September – 1 October 2014

Montenegro is a State Party to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS no°198) since 1 February 2009. This assessment of the implementation of the Convention in Montenegro followed the decision of the 5th meeting of the Conference of the Parties (C198-COP) in 2013. This Assessment Report was adopted at its 6th meeting (Strasbourg, 29 September – 1 October 2014).

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A. **BACKGROUND INFORMATION AND GENERAL INFORMATION ON THE IMPLEMENTATION OF THE CONVENTION**

1. The Council of Europe **Convention on Laundering, Search, Seizure, Confiscation of the Proceeds from Crime and Financing of Terrorism**, which is the treaty number 198 in the Council of Europe Treaty Series (it is therefore referred to as CETS 198 or "the Convention") establishes under Article 48 a monitoring mechanism which is responsible for following the implementation of the Convention, the Conference of the Parties (COP).

2. The Convention came into force on 1 May 2008, when 6 instruments of ratification were deposited with the Secretary General of the Council of Europe, all of which were Member States of the Council of Europe.

3. The monitoring procedure under this Convention deals with areas covered by CETS 198 that are not covered by other relevant international standards on which mutual evaluations are carried out by MONEYVAL and the Financial Action Task Force (FATF). At its second meeting in April 2010, the COP adopted an evaluation questionnaire based on areas where the Convention "adds value" to the current international AML/CFT standards and agreed that the Conference would normally assess the countries in the order that they ratified the Convention[2]. At the fifth meeting, it was confirmed that Montenegro, Moldova and Malta would be the next countries to be assessed under this mechanism.

4. The monitoring questionnaire was sent to the Montenegrin authorities in October 2013, who sent their replies in January 2014. The responses to the questionnaire were coordinated by the Supreme State Prosecutor's Office of Montenegro - Department for Suppression of Organized Crime, Corruption, Terrorism and War Crime

5. In October 2013, a training seminar for potential reviewers took place and three reviewers were subsequently identified to assess the implementation of the Convention by Montenegro.

6. A draft report was prepared by the reviewers, namely, Mr Vitaliy Beregivskiy (Ukraine) on the issues of the functioning of FIU, Ms Katja Rejec Longar (Slovenia) on new legal aspects under the CETS 198 and Ms Olga Ionaş (Moldova) on international co-operation. This monitoring report by the COP is based primarily on a desk review of the replies by Montenegro to the monitoring questionnaire. Public information available in MONEYVAL adopted evaluation or progress reports have been considered and taken into account. This report is not intended to duplicate but complement the work of other assessment bodies.

7. Montenegro signed the Convention on 16 May 2005 and ratified it on 20 October 2008. It entered into force in respect of Montenegro on 1 February 2009. Montenegro has deposited one declaration (see annex IV)[3] in connection with the ratification.

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[2] If there is a number of countries that ratified on the same day, they would be assessed in alphabetical order.

[3] A list of declarations and reservations to CETS 198 is kept up to date on the website of the Treaty Office of the Council of Europe at http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=198&CM=8&DF=27/03/2012&CL=ENG&VL=1

8. The draft report was discussed at a pre-meeting on 17 April, and subsequently discussed in view of its adopted by the COP at its 6th meeting in 2014.

9. Montenegro has been the subject of four evaluations by MONEYVAL. The fourth round assessment will be discussed and adopted by MONEYVAL in December 2014. The adopted third evaluation report and related progress reports are available on MONEYVAL's website (www.coe.int/MONEYVAL). The third and fourth progress reports were adopted, respectively, on 7 December 2012 and 12 December 2013. These last reports contain information on recent developments which have occurred in Montenegro after the third evaluation report, including:

   - The adoption of the Law on Capital Market aimed at ensuring, inter alia, that Montenegro criminalises money laundering in respect of all the FATF's designated categories of offences.

   - The adoption of further amendments to the Criminal Code on 21st August 2013, many of which are aimed at addressing deficiencies related to the money laundering and financing of terrorism offences.

   - The adoption of the Action Plan for the Fight against Corruption and Organised Crime for the period 2013-2014 (dated 16th May 2013).

   - Awareness-raising activities and supervisory actions to enhance the anti-money laundering/counter-terrorist financing (AML/CFT) regime of Montenegro.

B. **MEASURES TO BE TAKEN AT NATIONAL LEVEL**

I. General provisions

1. Criminalisation of money laundering – Article 9 paragraphs 3, 4, 5, 6

The areas where it is considered that the Convention adds value on money laundering criminalisation are as follows:

- The predicate offences to money laundering have to, as a minimum, include the categories of offence in the Appendix to the Convention (which puts the FATF requirements on this issue into an international legal treaty [article 9(4)]).
- As to proof of predicate offence, paragraphs 5 and 6 establish new legally binding standards to better facilitate the prevention of money laundering: clarification that a prior or simultaneous conviction for the predicate offence is not required [article 9(5)], and to clarify that a prosecutor does not have to establish a particularised predicate offence on a particular date [article 9(6)].
- To allow for lesser mental elements for money laundering of suspicion (and negligence, the latter of which was to be found also in ETS141) [article 9(3)].

10. The relevant Convention provisions are set out in Annex I.

Description and analysis

General

11. Under Article 268 of the Montenegrin Criminal Code (CC) the offence of money laundering is defined as follows:

> *(1) Anyone who converts or transfers money or other property knowing that they are derived from criminal activity for the purpose of concealing or disguising the origin of the money or other property or who acquires, possesses or uses money or other property knowing at the time of receipt that they are derived from criminal activity, or who conceals or misrepresents the facts on the nature, origin, place of deposit, movement, disposal or ownership of money or of other property knowing they are derived from criminal activity shall be punished by a prison term from six months to five years.*
>
> *(2) The punishment under para. 1 above shall apply to the principal of the offence under para. 1 above if he was at the same time the principal or the accomplice in the commission of the criminal offence by which the money or property referred to in para. 1 above was acquired.*
>
> *(3) Where the amount of money or value of the property referred to in paras 1 and 2 above exceed forty thousand euros, the perpetrator shall be punished by a prison term from one to ten years.*
>
> *(4) Where the offences under paras 1 and 2 above were committed by several persons who associated for the purpose of committing such offences, they shall be punished by prison term from three to twelve years.*
> *(5) Anyone who commits the offence under paras 1 and 2 above and could have known or should have known that the money or property was derived from criminal activity shall be punished by a prison term up to three years.*

(6) The money and property referred to in paras 1, 2 and 3 above shall be confiscated.

12. The rapporteurs note that the money laundering offence has been amended following Montenegro's evaluation by MONEYVAL in the third round, in order to align it with the physical and material elements required under the Vienna and Palermo Conventions.

***Article 9 paragraph 3* - Mens rea**

13. Montenegro has decided to implement Article 9(3) of the Convention which enables Parties to introduce a lesser mental element for the offence of ML (as defined under paragraph 1 of the same article) of either suspicion, negligence or both.

14. Art. 268 paragraph 5 of the CC extends the mental element of the ML offence to a perpetrator, who committed the offences criminalised in paragraphs 1 and 2 of the money laundering offence who "could have known or should have known that the money or property was derived from criminal activity".

Article 9 paragraph 4 - Predicate offences

15. Montenegro has not made any declarations under Article 9 paragraph 4 and, as indicated by the Montenegrin authorities, it applies an "all crime approach", where all criminal offences, which generate proceeds, can be predicate offences for money laundering.

16. This notwithstanding, MONEYVAL's 3rd round evaluation report on Montenegro had highlighted that insider trading and market manipulation were not covered as predicate offences, as the Montenegrin CC did not contain such offences. Further to amendments of the CC, insider trading is now covered by Art. 281 of the CC (Misuse of Insider Information) and market manipulation by Art. 281a of the CC (Manipulation in the stock market and market in other financial instruments), this shortcoming has therefore been remedied.

Article 9 paragraph 5

17. A prior or simultaneous conviction for the predicate offence is not a requirement for a conviction for money laundering offence under the law of Montenegro. Some concerns persist however, from the perspective of effective implementation of the Money laundering offence and the practice of the judiciary, as described below.

Article 9 paragraph 6

18. As concerns Article 9(6) of CETS 198, the Montenegrin authorities have indicated that the ML offence in the CC has been amended for this purpose, changing the provision "money or other property…derived from a criminal act" to "criminal activity", as the previous wording led to the impression that a concrete predicate offence had to be identified. Regarding the technical aspect of the wording of the ML offence, it is therefore not necessary to establish the precise predicate offence. The authorities have provided excerpts of a judgment which confirms this approach.

Effective implementation

19. Montenegrin legislation, as described above, appears to address adequately the requirements of the Convention.

20. On the other hand, effective implementation of the legal framework still remains somewhat questionable. Statistical data shows that in the period 2008 – 2013 eight money laundering cases against 17 natural persons were initiated. In the same time-frame only two final convictions in the last instance were secured against six persons. In 2012, for instance, no money laundering investigations were initiated, whereas a slight improvement can be noted in 2013, where three new cases against four natural persons were initiated. In general, the number of ML investigations, prosecutions and convictions still remains highly disproportionate to the total level of reported proceeds generating offences.

21. There has been no practice to date in relation to cases of ML involving persons who "could have known or should have known that the money or property was derived from criminal activity".

22. According to the information provided by the Montenegrin authorities, three investigations were opened in 2013 for ML in respect of which no prior conviction for the underlying predicate offence had been secured. Furthermore, the authorities have provided a judgment pronounced in 2012, which convicts two persons for the ML offence without a prior conviction for a predicate offence and without a reference to concrete circumstances of the illegal activity from which the illicit proceeds in question derived. The judgment explicitly states that the perpetrator of the ML offence does not have to know the precise circumstances of the criminal offence, as long as he knows that the money originates from criminal activity in general. This judgment is however only a first instance judgment against which an appeal was lodged, it is therefore not clear at the moment whether the decision will be retained.

23. From the above described judgment, it is clear that there is a tendency to prosecute ML on the basis of objective circumstances and, if the judgment above is confirmed by the Court of Appeal, this would be a very welcome established jurisprudence. Nonetheless, for the moment all the other cases examples of ML convictions provided by the Montenegrin authorities appear to involve either a simultaneous conviction for the predicate offence (for at least one of the defendants) or a previous conviction for the predicate offence of a third party. This was also confirmed by the evaluation team who has carried out the MONEYVAL 4th round follow-up visit. This thereby raises concerns from the perspective of effective application of legislation and shows difficulties to establish a sufficient level of proof for cases of stand-alone money laundering.

Recommendations and comments

24. As indicated above, Montenegro has taken measures implementing the provisions of the Convention set out in article 9 paragraphs 3, 4, 5 and 6. However, a number of concerns remain, notably as regards the practitioners' understanding of these requirements and the manner in which these are applied.

In light of these observations, the authorities are recommended to develop jurisprudence in this matter.

The jurisprudence should ensure that:

- a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction of ML;
- the underlying predicate offence can be proved by inferences drawn from objective facts and circumstances.

Once this recommendation is implemented, the Montenegrin authorities shall focus their efforts on developing prosecutorial guidance and tailor made trainings for the judiciary in this matter.

25. Also, it is recommended to the authorities to have a system in place enabling them to have a comprehensive picture of the relevant statistical data and case law regarding money laundering offences, so as to draw relevant conclusions on any further policy measures that need taking in order to improve the effectiveness of its anti-money laundering prosecution policy.

2. Corporate liability – Article 10 paragraphs 1 and 2

The areas where it is considered that the Convention adds value are as follows:

- Some form of liability by legal persons has become a mandatory legal requirement (criminal, administrative or civil liability possible) where a natural person commits a criminal offence of money laundering committed for the benefit of the legal person, acting individually who has a leading position within the legal person (to limit the potential scope of the liability). The leading position can be assumed to exist in the three situations described in the provisions (see Annex II).

- According to Article 10 paragraph 1:

  "*Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:*
  a. a power of representation of the legal person; or
  b. an authority to take decisions on behalf of the legal person; or
  c. an authority to exercise control within the legal person,
  as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences."

- The Convention expressly covers lack of supervision (article 10 paragraph 2 makes it a separate, additional requirement).

Description and analysis

26. Montenegro has taken measures to ensure that legal persons can be held liable for money laundering offences. Corporate criminal liability is provided for under Article 3 of the Law on Criminal Liability of Legal Entities for Criminal Acts as follows:

> *"Legal entities may be held liable for criminal offences referred to in the special section of the Criminal Code and for other criminal offences provided for under a separate law, if the conditions of liability of a legal entity prescribed by this Law have been fulfilled."*

27. Article 3 refers to the special section of the CC, which includes the offence of ML, therefore corporate entities can be held liable for ML. A corporate entity is liable if the following cumulative conditions provided under Article 5 of the same law are met, notably:

    - a criminal offence has been committed by a responsible person
    - the responsible person acted within his/her authorities on behalf of the legal entity with the intention to obtain a benefit for the legal entity.

28. The Law defines a responsible person as: a natural person entrusted with certain duties in a legal entity; a person authorised to act on behalf of the legal entity and a person who can be reasonably assumed to be authorised to act on behalf of the legal entity; and a natural person acting on behalf of the legal entity as a shareholder. These provisions taken together are largely in line with the requirements provided for under Article 10(1) of CETS N 198, as the corporate liability of a legal person would be triggered if an ML offence were to be committed for its benefit by a natural person who has - a leading position based on a power of representation, the authority to take decisions on behalf and authority to exercise control within - the legal person.

Article 10(2)

29. The Law on Criminal Liability of Legal Entities for Criminal Acts does not cover explicitly situations where lack of supervision or control by the natural person, who has a leading position in the legal person, has made possible the commission of a criminal offence (including ML) for the benefit of that legal person..

30. Pursuant to the second paragraph of article 5 of the law, “the responsibility of the legal entity exists even when the performance of the responsible person was contrary with the business policy and orders of the legal entity”. The Montenegro authorities consider that this would cover instances of negligent behaviour of the legal person in cases where the natural responsible person has acted against its authority. However, the Conference of the Parties held some reservations whether this provision covered the requirements of Art. 10(2) to a full extent. In addition, there have been no illustrative cases to see how this would be applied in practice.

Effective implementation

31. No case examples have been provided by the authorities to show the effective implementation of provisions on corporate liability in cases of ML. The statistics available indicate that between 2008 and 2013 there have been no investigations, prosecutions or convictions against legal persons for ML, thereby raising concerns of effectiveness in this respect.

Recommendations and comments

32. Montenegro has taken legislative measures to ensure that legal persons can be held liable for money laundering offences established in accordance with this Convention. Nevertheless, the authorities are encouraged to cover adequately and entirely in the legislation the requirement under Art. 10(2).

    Given that these legislative measures have never been tested in practice, developing jurisprudence in this area is highly desirable.

33. The Montenegrin authorities should review the situation as to why the criminal liability provisions have never been applied in practice and take any relevant steps, such as training or awareness-raising activities, to familiarise the police, prosecutors and the judiciary on the application of the provisions of the Law on Criminal Liability of Legal Entities for Criminal Acts in relation to ML and other relevant predicate offences to ML.

3. Previous decisions – Article 11

Article 11 is a new standard dealing with international recidivism. It recognises that money laundering and financing of terrorism are often carried out transnationally by criminal organisations whose members may have been tried and convicted in more than one country. Article 11 provides for a mandatory requirement for the State to take certain measures but does not place any positive obligation on courts or prosecution services to take steps to find out about the existence of final convictions pronounced in another State-Party; its wording is as follows:

"Each Party shall adopt such legislative and other measures as may be necessary to provide for the possibility of taking into account, when determining the penalty, final decisions against a natural or legal person taken in another Party in relation to offences established in accordance with this Convention."

Description and analysis

34. Although the Montenegrin CC does not explicitly address international recidivism, it requires in Article 42 that courts take into consideration any mitigating and aggravating circumstances when determining the sentence, including the offender's behaviour and whether s/he has reoffended. This, according to the rapporteurs leaves the courts with enough judicial discretion to take into account when determining the penalty final decisions against a natural or legal person taken in another Party in relation to offences established in accordance with CETS No 198.

35. Furthermore, under Articles 17 and 18 of the Law on Criminal Liability for Criminal Acts of Legal Entities, when determining the penalty courts must take into account whether the legal person was previously convicted for a criminal offence and can impose a heavier sanction on the legal person in case of re-offending.

36. For the purposes of the application of the above mentioned articles of the CC and the Law on Criminal Liability for Criminal Acts of Legal Entities, the CPC prescribes in Art. 289(1) that "Before the investigation is concluded, the State Prosecutor shall obtain … information on the accused person's previous convictions". Under paragraph 2 of the same article, in the cases where a cumulative sentence shall be applied, the State Prosecutor would request certified copies of the previous final judgments. The authorities have reported that previous convictions are therefore brought to the court as a rule and are in practice always taken into consideration.

Recommendations and Comments

37. The Montenegrin authorities are in position to take into account final decisions taken in another Party in relation to offences established in accordance with CETS N° 198.

38. The authorities have reported that previous convictions are listed in the introductory part of the judgement and are taken into consideration, when a decision on the sentence is being taken. This statement has been supported by several judgement provided to the COP by the authorities. Furthermore, an example has been provided of

a judgment, which included several previous criminal convictions with regard to the defendant, which were pronounced by courts in Serbia. In the final part of the judgment, the court has explicitly referred to these previous convictions as to an aggravating circumstance. It has been therefore confirmed that also foreign judgements are taken into consideration by Montenegrin courts.

4. Confiscation - Article 3 paragraph 1, 2, 3, 4 of the CETS 198

Prior to Article 3, which deals with confiscation, Article 1 details the relevant terms used in the Convention such as:

- "Proceeds" which refers to "any economic advantage, derived from or obtained, directly or indirectly, from criminal offences. It may consist of any property as defined" as follows (a)

- "Property" which "includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property" (b)

The confiscation and provisional measures set out in the Convention which are considered to add value to the international standards are in the following areas:

- Article 3, paragraph 1 introduces a new notion to avoid any legal gaps between the definitions of proceeds and instrumentalities as, according to it, *"Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds* ***and laundered property****."*

- Confiscation has to be available for ML **and to the categories of offences in the Appendix** (and no reservation is possible) (Article 3 paragraph 2).

- Mandatory confiscation for some major proceeds-generating offences is contemplated under this Convention (Article 3 paragraph 3 [Annex III]). Though not a mandatory provision, the drafters sent a signal that, given the essential discretionary character of criminal confiscation in some countries, it may be advisable for confiscation to be mandatory in particularly serious offences, and for offences where there is no victim claiming to be compensated.

- Reverse burdens are possible (after conviction for the criminal offence) to establish the lawful or other origin of alleged proceeds liable to confiscation – Article 3 paragraph 4 [subject to a declaration procedure in whole or in part].

Description and analysis

General

39. The Montenegrin confiscation regime is mainly regulated under the CC and the CCP which provide for ordinary and extended confiscation. The relevant provisions are the following:

Confiscation of Objects

Article 75

(1) The objects which were used or intended for use in the commission of a criminal offence or which resulted from the commission of a criminal offence may be confiscated provided that they are owned by the perpetrator.

(2) The objects referred to in para. 1 above may be confiscated even if they are not owned by the perpetrator if so required for reasons of security of people or property, or for moral reasons, but also where there is still a risk that they may be used for the commission of a criminal offence notwithstanding however the rights of third persons to claim damages from the perpetrator.

(3) Mandatory confiscation and the requirements to be met for confiscation of objects may be laid down by law.
(4) (…)

Confiscation of pecuniary gain

Article 112

(1) No person may retain pecuniary gain[4] originating from an unlawful act which is established by law as a criminal offence.

(2) The pecuniary gain referred to in para. 1 above shall be liable to confiscation under the conditions laid down by the present Code and a court decision.

Requirements for Confiscation of Pecuniary Gain

Article 113

(3) Money, property of value and any other pecuniary gain originating from a criminal offence shall be confiscated from the perpetrator, and where such confiscation is not possible, the perpetrator shall pay the equivalent amount in money.

(4) Also liable to confiscation from the perpetrator shall be pecuniary gain for which there is reasonable suspicion to believe that it originates from criminal activity unless the perpetrator makes it probable to believe that its origin is legitimate (extended confiscation).(…)

[4] pecuniary gain as used here refers to a gain of monetary value, i.e. anything the value of which can be expressed in money and which serves as impetus for the commission (translator's note)

(5) Also liable to confiscation shall be pecuniary gain originating from a criminal offence where it has been transferred to other persons free of charge or where such persons knew, could have known, or were obliged to know that the pecuniary gain originated from a criminal offence.

40. Furthermore, under Article 268(6) of the CC which criminalises ML, express reference is made to confiscation of proceeds.

41. Proceeds of crime are defined under Article 142(12) of the CC as follows:

42. (12) Pecuniary gain originating from a criminal offence is understood to mean pecuniary gain obtained directly from a criminal offence which consists in an increase or prevention of a decrease of the gain resulting from the commission of the crime, the property for which pecuniary gain obtained directly from a criminal offence is replaced or into which it is converted, as well as any other benefit obtained from the pecuniary gain directly obtained from the criminal offence irrespective of whether it is located in or *outside of the territory of Montenegro.*

Article 3(1)

43. The definition of property has not been clearly indicated in the Montenegrin legislation. Criminal legislation[5] does not explicitly define property neither there is a jurisprudence supporting an interpretation of a term 'property'.

44. The definition of proceeds (referred to as pecuniary gain under the Montenegrin CC) appears to be broad enough to encompass both direct and indirect proceeds of crime. However, concerns have been raised about the terminology used in the provisions on confiscation, in particular the words "property" and "proceeds of crime" and whether these adequately cover the requirements of the Art. 3(1).

45. Under Articles 112, 113 and 268(6) of the CC, confiscation of proceeds, including from non-bona fide third parties (113(5) of the CC) is clearly provided for. As concerns confiscation from Bona fide third Parties, Article 114 provides that the injured party may request and secure compensation from property which is proceeds of crime and in respect of which a criminal court has issued a confiscation order.

Article 114

(1) Where the injured party has been awarded his claim for damages in criminal proceedings, the court shall order the confiscation of pecuniary gain only insofar as such pecuniary gain exceeds the adjudicated claim of the injured party.

46. The confiscation of instrumentalities is provided for under Article 75 of the CC (see above), which distinguishes between instrumentalities owned and those not owned by the offender. In the first case, instrumentalities may be confiscated subject to judicial discretion. In the second case, they may be confiscated if certain conditions are met, notably "if so required for reasons of security of people or property, or for moral reasons, or where there is a risk that they may be used for the commission of a

[5] 6th COP meeting decided to revise the report after its adoption on several points. In view of that it needs to be mentioned that the issue of property was regulated in 2015 with adoption of the Law on Seizure and Confiscation of Material Benefit Deriving from Crime. Its Article 3(2) states that '*property implies property rights of all types, irrespective of whether they relate to assets of tangible or intangible nature, movables or immovables, securities and other documents which serve to prove property rights'.*

criminal offence notwithstanding however the rights of third persons to claim damages from the perpetrator". As has already been noted in MONEYVAL 3rd round evaluation report on Montenegro, this distinction could imply a certain inability of the courts to confiscate instrumentalities not owned by the offender. The report concluded however that, given the fact that in case of conviction, instrumentalities are recognised as illegal, any further use of them would be contrary to morality and would present the danger of using them for criminal offence, so in practice, confiscation of such instrumentalities would be ordered. Notwithstanding this observation, the rapporteurs have not been provided any statistics or case examples demonstrating that instrumentalities owned by a third person are indeed, in practice, confiscated.

47. Property the value of which corresponds to proceeds is also satisfactorily regulated under Article 113(1) of the CC, when confiscation of proceeds is not possible.

48. In addition to the confiscation of proceeds, instrumentalities and property the value of which corresponds to proceeds the confiscation of laundered property is expressly provided for under Article 3(1) CETS 198. This has been done in order to ensure that in cases where ML is prosecuted on a stand-alone basis the entire property which is the object of ML may be confiscated. The latter property/sum may in fact partly differ from the proceeds of the underlying predicate crime. The rapporteurs consider that the provisions of the CC which regulate confiscation, including those in the special section under the ML offence, would cover "laundered property".

Confiscation to apply to the offences in the appendix and mandatory confiscation for particular offences – Articles 3(2) and 3(3)

49. Confiscation applies to all categories of offences provided for in the Appendix to CETS 198. More specifically, under Articles 112 and 141 of the CC, confiscation provisions apply to all categories of offences included in the special part of the CC. According to the information provided by the Montenegrin authorities, such confiscation is mandatory. The rapporteurs noted that Article 268(6) which criminalises ML, provides expressly once again for mandatory confiscation. Furthermore, the rapporteurs recall that the confiscation of instrumentalities is discretionary, and, if they are not owned by the offender, is subject to additional conditions.

Burden of Proof – Article 3(4)

50. Montenegro has not entered a declaration in respect of Article 3(4) under Article 53(4)(a)(b) or (c) of CETS 198.

51. The requirement of the reversed burden of proof is embedded in Montenegrin legislation under Article 113 (2) of the CC, which provides the following:

(2) liable to confiscation from the perpetrator shall be pecuniary gain for which there is reasonable suspicion to believe that it originates from criminal activity unless the perpetrator makes it probable to believe that its origin is legitimate (extended confiscation).

(3) The confiscation of pecuniary gain referred to in para. 2 above may apply if the perpetrator has been convicted ***under a final judgment*** *of any of the following:*
1) any of the criminal offences committed through a criminal organization (Art.401a);
2) any of the following criminal offences:
- crime against humanity and other values protected under international law and committed out of greed;
- money laundering;

- unauthorized production, possession and distribution of narcotics;
- criminal offences against payment operations and economic activity and criminal offences against official duty, which were committed out of greed, and which carry eight year prison term or a more severe punishment.

(4) Pecuniary gain shall be liable to confiscation if it was obtained in the period before and/or after the commission of any of the criminal offences under para. 3 hereof until the finality of judgment, and if the court establishes that the time when the pecuniary gain was obtained and other circumstances of the case in question justify the confiscation of the pecuniary gain.

52. Extended confiscation may therefore be ordered at the discretion of the judge if the defendant has been convicted for committing one of the offences listed above. In such cases the offender must demonstrate the origin of alleged proceeds or other property liable to confiscation (reversed burden of proof). The extended confiscation decision is applicable only after a final conviction has been achieved. Pursuant to Art. 486, in cases where extended confiscation is applicable, the State Prosecutor submits the request for confiscation to the court at the latest within one year after the final judgment. Regarding Art. 3(4) of the Convention in correlation with Art. 4, Montenegrin CPC provides in Art. 90, for the cases for which extended confiscation would be applicable, the possibility for the State Prosecutor to propose to the court to order the property to be provisionally seized. The procedural aspects of this seizure are regulated under Art. 90 and following.

Effective implementation

53. With the exception of a few technical aspects, the confiscation regime is broadly in line with the provisions of the Article 3 of the Convention. Despite the foregoing, the rapporteurs note that its overall effectiveness is questionable. According to available data, between 2008 and 2013 the estimated total economic loss from crime in Montenegro was 96 494 784.33€. The statistics provided in relation to ML offences though fragmented and incomplete, show that in 2011 €46.3 million worth of property was seized in three cases related to ML, whereas in 2013 only €376.386 were confiscated according to the ordinary, conviction-based confiscation procedure. These statistics, though incomplete, seem to indicate that Montenegrin authorities are efficient in applying temporary measures but less so in securing the confiscation of assets. The problem may be due to the excessive length of proceedings and to the fact that not many convictions are secured.

54. The rapporteurs have not been provided any statistics or case examples demonstrating that instrumentalities owned by a third person are indeed, in practice, confiscated.

Recommendations and comments

55. In light of the observations and deficiencies noted in the above paragraphs, the authorities are recommended to:

- align the terminology of the provisions on confiscation to ensure that terms used entirely cover the requirements of the Art. 3(1)..

- take measures, either by issuing clear prosecutorial guidance and/or carrying out training for judges, to ensure that the provisions on confiscation are properly and effectively applied and clarifying that instrumentalities owned by a third person should be confiscated.

- improve the quality and scope of information and statistics available on property frozen, seized and confiscated, in order to assess the effectiveness of confiscation measures in respect of ML, TF and other predicate offences.

5. Management of frozen and seized property – Article 6

The Convention introduces a new standard which relates to the requirement of proper management of the frozen and seized property enshrined in Article 6 which reads as follows:

"Each Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention."

Description and analysis

56. Montenegro has enacted a law on Management of Temporary and Permanently Seized Property which regulates the management of seized and confiscated assets in criminal or misdemeanour proceedings.

57. The Property Administration is the central authority which is responsible for managing seized, frozen and confiscated assets; it is entrusted in particular with the following tasks:

1) to estimate the value of seized property in compliance with the law
1a) to lease temporary seized property
1b) to allow using temporary seized property without compensation
2) to store, keep, return and sell seized property
3) to deposit financial assets acquired from selling seized property
4) to keep record of seized property
5) to perform other duties according to the law.

58. Under Article 10 of the law, the Property Administration must ensure that seized assets are managed effectively with minimal costs.

59. Seized movable and immovable assets can be sold subject to court's approval if:

- the costs of safeguarding, managing and maintenance significantly exceed the value of that property;
- the property is in danger of deterioration.

60. Under Article 21 of the law, the sale of movable assets is carried out by means of a public tender; should this procedure not heed any results twice consecutively, the Property Administration may proceed by means of direct bargaining. Whereas seized movable assets cannot be sold below their market value when offered by public tender, this requirement is not applicable when direct bargaining takes place. The rapporteur notes that in such case there is the risk that criminals may be able to retrieve the illicit assets at a price below market value since there had been no specific provisions in the legislation to prevent such possibility.

61. The sums obtained by selling permanently seized property are transferred to Montenegro's budget and are used to finance projects, including capacity building for

the judiciary, prosecution authorities and other authorities competent for internal affairs.

Effective implementation

62. The Montenegrin authorities have provided comprehensive statistical and other data on asset management which prove that the Property Administration has successfully managed seized property, including real estate, hotels, movable property and funds. The Property Administrations seems to have sufficient resources for it to work efficiently.

63. The designation of a central authority with broad discretionary powers provides a good basis for an effective system of asset management.

Recommendations and comments

64. Montenegro seems to have proper normative and practical measures in place which ensure the efficient management of seized or frozen movable and immovable assets. Nonetheless, the authorities are encouraged to re-think the procedure of selling seized movable/immovable assets through direct bargaining at below market value of the asset, in order to avoid that criminals retrieve the illicit assets. The authorities are also invited to adopt specific regulations which would prevent criminals to retrieve the illicit assets within 'direct bargaining procedures' noted under paragraph 58 of this report.

65. The Montenegrin authorities are encouraged to maintain detailed statistics on asset management.

6. Investigative powers and techniques required at the national level – Article 7 paragraphs 1, 2a, 2b, 2c, 2d

The areas where the Convention is considered to add value are as follows:

- The provisions of article 7 introduce powers to make available or seize bank, financial or commercial records for assistance in actions for freezing, seizure or confiscation. In particular: Article 7 paragraph 1 provides that "Each Party shall adopt *such legislative and other measures as may be necessary to empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized in order to carry out the actions referred to in articles 3, 4 and 5. A Party shall not decline to act under the provisions of this article on grounds of bank secrecy*."

- Article 7 paragraph (2a) provides for power to determine who are account holders: "*To determine whether a natural or legal person is a holder or beneficial owner of one or more accounts, of whatever nature, in any bank located in its territory and, if so obtain all of the details of the identified accounts*;"

- Article 7 paragraph (2b) provides for the power to obtain "historic" banking information *"To obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts, including the particulars of any sending or recipient account*;"

- Article 7 paragraph (2c) [subject to declaration under article 53] provides for the power to conduct "prospective" monitoring of accounts as it provides for "*To monitor, during a specified period, the banking operations that are being carried out through one or more*

identified accounts;"

- Article 7 paragraph (2d) provides for the power to ensure non-disclosure
"To ensure that banks do not disclose to the bank customer concerned or to other third persons that information has been sought or obtained in accordance with sub-paragraphs a, b, or c, or that an investigation is being carried out."

- States should also consider extending these powers to non-banking financial institutions (article 7 paragraph (2d))

Description and analysis

66. Upon signature or ratification, Montenegro has not made any declaration in respect of article 17 and the manner in which it intends to apply this article.

Paragraph 1

67. CETS 198 requires State Parties to adopt measures to empower courts or other competent bodies to order that bank, financial or commercial records be made available or be seized in order to carry out confiscation, investigative or provisional measures.

68. The authorities have indicated that Articles 75 to 84 of the CCP on search of dwellings, other premises, movable objects and persons, as well as on provisional seizure of objects and property gain, would apply. Moreover, under Article 89 of the CPC (on Obtaining Information from the Competent Public Authority for the Temporary Suspension of Monetary Transactions), the authorities have explained that the prosecutor can obtain data for the purpose, if need-be, of suspending financial transactions. Notably:

*(1) State Prosecutors may request that the competent public authority performs **control** over the financial operations of certain persons and to **submit them documentation and information** which can be used as evidence of a criminal offence or of the proceeds of crime, as well as information about suspicious monetary transactions.*

(2) State Prosecutors may request that the competent authority or organization temporarily suspends the payment, or the issuing of suspicious money, securities and objects, at the longest for six months.

(3) State Prosecutors shall specify in the motion referred to in paragraphs 1 and 2 of this Article in more detail the contents of measure of action they are requesting.

(4) At the proposal of State Prosecutors, the court may issue a ruling ordering a temporary suspension of a certain monetary transaction when reasonable doubt exists that it constitutes a criminal offence or that it is intended for the commission or concealment of a criminal offence or proceeds of crime.

(5) By way of the ruling referred to in paragraph 4 of this Article, the court shall order that funds in check or cash form be provisionally seized and deposited into a special account where they will be kept until the completion of the proceedings with final force and effect or until conditions for their return are met.
(6) (…)

69. Competent public authorities in the meaning of paragraph 1 above would also include the Central Bank and other relevant supervisory authority.

70. In addition to the foregoing, the authorities have also cited Article 271(3) of the CCP which provides that:

> *If, based on the contents of the criminal charge, the State Prosecutor is unable to establish whether the allegations in the charge are probable, or if the facts from the charge are insufficient to issue either an order of investigation or decision on the dismissal of charge, and particularly if the offender is unknown, the State Prosecutor shall, either personally or through other authorities, gather necessary information. For that purpose the State Prosecutor may summon the informant, the person subject to criminal charge, and other persons whom s/he assesses able to provide information relevant to deciding on the charge. If the State Prosecutor is unable to do it by himself/herself, s/he shall request the police authorities to obtain necessary information and take other measures in order to discover the criminal offence and its perpetrator (…).*

71. In order to assess the effective application of these provisions for the purposes of Article 7(1) of the Warsaw Convention, statistics and practical examples on orders issued by courts or other competent bodies that bank, financial or commercial records be made available or be seized in order to carry out confiscation or investigative or provisional measures would be required.

72. Pursuant to Article 85 of the Law on Banks, Members of the Board of Directors, shareholders, all bank employees and other persons that have obtained confidential information are bound by the obligation of banking secrecy. Nonetheless, such information must be disclosed to the Central Bank, the competent judicial authority; or, pursuant to the Law on the Prevention of Money Laundering and Terrorist Financing (LPMLTF) to the competent authority for the prevention of money laundering and terrorism financing.

Paragraph 2 a) – determination of whether persons are holder or beneficial owner of accounts and obtaining details of identified accounts

73. The Montenegrin legal system does not provide for a centralised register of bank accounts held or controlled by natural persons, nor have the authorities referred to domestic procedures to rapidly identify and trace bank accounts of a natural/legal person or the beneficial owner.

74. The prosecutor is empowered, according to CCP provisions, to require any competent authority and financial and non-financial institutions for inquiries related to legal and natural persons. In respect of information as to whether persons hold bank accounts, they would address the Central Bank. For other non-banking institutions, those can either be addressed directly, or through the FIU or Police, who are responsible for gathering the required information.

Paragraph 2 b), 2c)

75. Under Article 7(2b) and 2c) of CETS 198, State Parties are required to: adopt legislative and other measures to obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more specified accounts including the particulars of any sending or recipient account; and monitor during a specified period the banking operations that are being carried out through one or more identified accounts.

76. Article 273(1) of the CCP empowers the prosecutor, directly or through the police, to seek additional information to assess whether charges should be pursued. This provision is valid before an investigation is initiated, as its purpose is to establish sufficient grounds for such an initiation The State Prosecutors have confirmed that they use regularly the above mentioned provisions for the activities under both Art. 7(2b) and (2c) with regard to different types of offences.

77. Pursuant to Art. 89 CPC, the State Prosecutor may request "the competent public authority" to perform control over the financial operations and to submit documentation and information which can be used as evidence of a criminal offence or of the proceeds of crime, as well as information about suspicious monetary transactions. The State Prosecutors have reported that the activities are mainly undertaken in cooperation with the APMLTF. Additionally, a case example has been presented for the purposes of this assessment, where the data obtained through the APMLTF has been used as evidence in court, as well as staff from the APMLTF has been heard as witness during the proceeding.

78. The rapporteurs note that in their response to the questionnaire, the authorities have confirmed that the actions provided for under Article 7(2b) and 2c) of CETS 198 can indeed be ordered. They have referred in this context to the LMPLTF. Given the co-operation between the State Prosecutors and the APMLTF for this purpose, it is considered that whilst the CPC gives the Prosecutors the competency to request information from other state bodies, as well as the right to use such information in court proceedings; the LPMLTF gives the APMLTF the authority to further obtain such information from obliged entities. Notably, as concerns Article 7(2b), Article 58 of the LPMLTF provides that:

Data provision upon request

The competent administration body, after estimating that there are reasonable grounds for suspicion of money laundering or terrorist financing, can request from a reporting entity to provide, in particular, the following data:

1. *from the records on clients and transactions, kept on the basis of Article 78 of this Law;*
2. *on the state of funds and other property of a certain customer at a reporting entity;*
3. *on funds and asset turnover of a certain customer at a reporting entity;*
4. *on business relationships established with a reporting entity, and;*
5. *other data obtained by a reporting entity on the basis of this law, documentation and information related to performing activities in accordance with this law as well as other data in order to monitor fulfilment of the obligations set out in this law*

In the request from paragraph 1 of this Article the competent administration body shall state the legal basis, the data that are to be provided, legal basis, the purpose of data gathering and the deadline for their provision.

79. The FIU can also require the provision of the data mentioned above on persons for whom it is possible to conclude that they have cooperated or participated in transactions or in businesses of persons for whom there is a suspicion of money laundering or terrorist financing.

80. Furthermore, the AML/CFT law (article 64) enables the APMLTF to collect data about a transaction or a person upon written and motivated request of the Court, State Prosecutor, Police Directorate, National Security Agency, Tax Administration, Custom Directorate, Directorate for Anti-Corruption and other competent state authorities.

81. The domestic provision which implements Article 7(2c) of the Convention is Article 63 of the AML/CFT Law , which provides that:

Request for ongoing monitoring of customer's financial operations

(1)The competent administration body shall request, in written form, from the reporting entity ongoing monitoring of customer's financial business, in relation to which there are reasonable grounds for suspicion of money laundering or terrorism financing, or other persons, for which may be concluded that he/she cooperated or participate in transactions or operations activity to which are grounds for reasonable suspicion of money laundering or terrorism financing are related, and shall determine deadline within which is obliged to inform and to provide required data.

(6) Reporting entity shall provide or inform the competent administration body on data from the paragraph 1 of this Article, before carrying out the transaction or concluding the business and in report shall state deadline estimation, within which the transaction or business should be done.

(…)

(7) On-going monitoring of transactions from paragraph 1 of this Article shall not be longer than 3 months.

(8) Deadline from the paragraph 4 of this article, if there is a suspicion of money laundering and terrorism financing it shall be prolonged not later than 3 months starting from the day of submitting the request from paragraph 1 of this Article.

82. The FIU is the only competent authority which can request monitoring of financial operations.

83. The cooperation between the State Prosecutor and the APMLTF for the purposes of criminal investigations is further enhanced by Art. 57, which states that the APMLTF *"is obliged upon the request of the court or state prosecutor to provide available data, information and documentation from the register of transaction and persons that are necessary for the needs of case prosecution, except for the information obtained on the basis of international cooperation and for which there is no approval of the competent authority of the foreign state".* The authorities have indicated that the prosecution requests the FIU to launch a monitoring procedure of a customer's financial operations with the banks when there is a suspicion that a person has committed a criminal offence related to money laundering or terrorist financing.

Paragraph 2 d)

84. As concerns the measures in place to ensure that banks do not disclose to the bank customer concerned or other third persons that information has been sought or obtained in accordance with sub paragraphs a, b or c of Article 7 (2) or that an investigation is being carried out, the prohibition to tip-off is provided under Article 88 of the LPMLTF law:

(1) Reporting entities, lawyers, notaries and their employees, members of the administrative, supervisory or other managing bodies, or other persons, to whom data from Article 79 of this Law are available or have been available, must not reveal to a customer or third person the following:

1) that data, information or documentation on the customer or the transaction from Article 41 paragraphs 2 - 5, Article 51 paragraph 1, Article 58 paragraphs 1, 2 and 3, Article 59 paragraphs 1 and 2 of this Law, have been forwarded to the Administration;
2) that the Administration on the basis of Article 61 of this Law, has temporarily suspended transaction or, instructed the reporting entity in relation to the suspension;
3) that the Administration on the basis of Article 63 of this Law demanded regular monitoring of customer's business;
4) that investigation is initiated or could be initiated against a customer or third party due to the suspicion of money laundering or terrorist financing.

(2) An attempt to retort a client from engaging into an illegal activity shall not be deemed as disclosure in the sense of paragraph 1 of this Article.

(3) Information on data from paragraph 1 of this Article, reports on suspicious transactions, as well as all other data, information and documentation collected by the Administration in accordance with this Law shall be designated the appropriate degree of confidentiality and must not be made available to third parties.

(4) The Administration is not obliged to confirm or deny the existence of a confidential data.

(5) The decision on lifting the status of confidentiality from paragraph 3 of this Article shall be made by the authorized person from the Administration in accordance with the Law on data secrecy.

(6) Prohibition of giving information from paragraph 1 of this Article shall not be applied on:
1) data, information and documentation, that are, in accordance with this Law obtained and kept by reporting entity, and that are necessary for establishing facts in criminal proceedings, and if the submitting of such data in written form is required or ordered by the competent court;
2) data from item 1 of this paragraph, if it is requested by supervision body from Article 94 of this Law for the implementation of this Law.

85. As concerns the application of provisions under Article 7 of CETS 198 to accounts held in non-bank financial institutions, Montenegro has extended the measures required under Article 7 of CETS 198 to accounts held in non-bank financial institutions as the LPMLTF law defines as obligors, among others: organizations performing payment transactions, post offices, companies for managing investment funds and branches of foreign companies for managing investment funds, institutions for issuing electronic money, companies for managing pension funds and branches of foreign companies for managing pension funds, stock brokers and branches of foreign stock brokers, insurance companies and branches of foreign insurance companies dealing with life assurance, crediting and credit agencies, etc.

However, the extent of the power to ensure non-disclosure, as required by Art. 7(2d), includes cases where the information has been requested by a state authority other than the FIU. Article 369 of the Criminal Code states that revealing classified information is a criminal offence. Thus, if the request is sent to the bank and if it is classified as secret, revealing such information to the client or a third party is a criminal offence. It is worth mentioning that all requests sent to the bank during the pre-investigation phase are classified as "secret".

Effective implementation

86. The authorities have reported that for the purposes of tracing accounts of specific holders or beneficial owner, the State Prosecutors would in practice either contact directly the individual reporting entity or would request the data from the Central Bank, which would collect the data for all banks. In addition, they have indicated that there is a functional co-operation between the State Prosecutors and the APMLTF, as has been described above.

87. Statistics and practical case examples have not been made available in relation to orders that bank, financial or commercial records be made available or be seized in order to carry out confiscation or investigative or provisional measures.

88. On the other hand, the Montenegrin Authorities have provided the following statistics on cases in which the FIU has ordered the monitoring of banking operations during a specified period:

Year	Number of orders for monitoring
2008	**-**
2009	**10**
2010	**21**
2011	**14**
2012	**16**
2013	**30**

89. Statistics have also been provided in relation to cases in which the Montenegrin FIU (the APMLTF) requested a reporting entity to provide data on clients and their transactions, on the state of funds and other property or on asset turnover of a certain customers:

Year	Number of opened cases
2008	**454**
2009	**269**
2010	**276**
2011	**407**
2012	**348**
2013	**418**

90. These figures are encouraging and demonstrate an increasing use of these tools in practice.

Recommendations and comments

91. Montenegro has taken domestic legislative measures to implement the requirements set out in article 7. However, Montenegro is encouraged to take additional practical measures to expedite the processes through which competent authorities, and in particular, law enforcement authorities, may determine whether a natural or legal person is a holder or beneficial owner of accounts in Montenegro.

7. International co-operation

7.1. Confiscation – Articles 23 paragraph 5, Article 25 paragraphs 2 and 3

The Convention is considered to add value in the following areas:

The Convention introduces a new obligation to confiscate that extends to "*in rem*" procedures. Hence, Article 23 paragraph 5 reads as follows:

> "*The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures* ***equivalent to confiscation leading to the deprivation of property, which are not criminal***

***sanctions**, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention*." (i.e. transformed or converted etc.)

Asset sharing (though Article 25(1) retains the basic concept that assets remain in the country where found, the new provisions in Article 25(2) and (3) require priority consideration to returning assets, where requested, and concluding agreements).

Description and analysis

92. The legal framework of the Republic of Montenegro does not provide for measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions. The authorities have informed the Conference of the Parties that co-operation with other countries within the meaning of Article 23 paragraph 5 of CETS No. 198 in the territory of Montenegro is not possible.

93. As concerns giving priority consideration to returning confiscated property to the requesting Party so that it can give compensation to the victims of the crime or return such property to their legitimate owners, the reply provided by the authorities raises doubts as to whether this is possible under domestic law. The authorities have cited Article 114 of the CC on the protection of the victim of a crime in criminal proceedings, as well as the law on Mutual Legal Assistance in Criminal Matters (MLA law) and "Conventions" as the sources which provide for the return of confiscated property.

94. However, Article 114 does not address the return of property to the requesting State. This provision simply outlines the procedure under which a victim of a crime may, in the course of a domestic criminal proceeding or in a separate civil proceeding, request and secure compensation from property which is proceeds of crime and in respect of which the criminal court has issued a confiscation order.

Effective implementation

95. The authorities have not provided any case examples or statistics in relation to Articles 25 paragraphs 2 and 3 which would demonstrate that these provisions are effectively applied.

Recommendations and comments

96. Montenegro should introduce a mechanism to enable Montenegrin authorities to cooperate with State Parties in the execution of foreign non-conviction based confiscation orders, in accordance with Article 23 paragraph 5 of the Convention.

97. Although Article 114 of the CC shows that Montenegrin law gives priority consideration to compensation of a victim of a crime, there are no clear provisions that provide for the return of confiscated property to a requesting party so that the latter can ensure the compensation of victims. The same can be said about giving special consideration to sharing confiscated property with other Parties on a regular or case-by-case basis. No specific provisions provide for this possibility, nor have the Montenegrin authorities entered into agreements with other Parties to this effect.

98. The Montenegrin authorities should therefore introduce provisions and/or enter into agreements with other State parties which will enable it to cooperate for the purposes

of sharing or repatriating criminal assets so as to give full effect to Article 25 of the Convention.

7.2. Investigative assistance – Article 17 paragraphs 1, 4, 6; Article 18 paragraphs 1 and 5; Monitoring of transactions – Article 19 paragraphs 1 and 5

The areas where the Convention is considered to add value here are the following:

- The Convention introduces the power to provide international assistance in respect of requests for information on whether subjects of criminal investigations abroad hold or control accounts in the requested State Party. Indeed, Article 17 paragraph 1 reads as follows: *"Each Party shall, under the conditions set out in this article, take the measures necessary to determine, in answer to a request sent by another Party, whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in its territory and, if so, provide the particulars of the identified accounts."* This provision may be extended to accounts held in non-bank financial institutions and such an extension may be subject to the principle of reciprocity.

- The Convention also introduces power to provide international assistance in respect of requests for historic information on banking transactions in the requested Party (which may also be extended to non-bank financial institutions and such extension may also be subject to the principle of reciprocity). Article 18 paragraph 1 provides that *"On request by another Party, the requested Party shall provide the particulars of specified bank accounts and of banking operations which have been carried out during a specified period through one or more accounts specified in the request, including the particulars of any sending or recipient account*."

- The Convention is considered to add also value as it establishes the power to provide international assistance on requests for prospective monitoring of banking transactions in the requested Party (and may be extended to non-bank financial institutions). Article 19 paragraph 1 reads as follows:
  "Each Party shall ensure that, at the request of another Party, it is able to monitor, during a specified period, the banking operations that are being carried out through one or more accounts specified in the request and communicate the results thereof to the requesting Party."

Description and analysis

Article 17 paragraphs 1, 4, 6; Article 18 paragraphs 1 and 5; Article 19 paragraphs 1 and 5

General information

99. MLA requests are regulated in Montenegro in accordance with ratified Conventions, bilateral treaties and in the absence of these, with the MLA law. Under Article 4 of this law, MLA requests are received by domestic judicial authorities from foreign judicial authorities (and vice versa) via the Ministry of Justice by means of letters rogatory. Exceptionally, when provided for under international agreements or where there is reciprocity, the letters rogatory can be sent *directly* by the foreign judicial authority (courts or the prosecutor) to the national judicial authority (and vice versa) with the obligation to deliver a copy of the letter rogatory to the Ministry.

Article 17(1), 18(1) and 19 (1)

100. According to the authorities, under the MLA law and the AML/CFT law it is possible to satisfy requests from other Parties under Article 17(1), 18(1) and 19 (1) of CETS 198. Such requests are considered in the context of mutual legal assistance requests.

101. Under Article 42 of the MLA law Montenegrin authorities may provide other forms of mutual legal assistance such as "*submitting documents, written materials and other cases related to the criminal proceedings in the requesting country; mutual exchange of information, as well as undertaking of individual procedural actions* (…) *and other procedural action"*. The authorities deem that Article 42 of the MLA law gives the competent domestic authorities the competency to undertake the full range of actions, as they would be entitled to undertake within a domestic investigation or criminal proceeding. Under Art. 42 of the MLA Law, the authorities would therefore undertake the same procedures as were described under the analysis of Art. 7 of the Convention above. The authorities consider that the above described framework is broad enough to encompass the execution of requests as per Article 17(1), 18(1) and 19(1) of CETS 198.

102. The authorities have added that in practice, although the prosecutor is the authority which is competent to receive the letter rogatory, the FIU would be entrusted with the execution of the specific request, notably liaising with the obliged entities, collecting the necessary information, analysing it and forwarding its conclusions to the Prosecutor. The information provided to the Conference of the Parties indicates that the FIU's competence to carry out the actions provided for under Articles 17, 18 and 19 of CETS 198, stems from the LPMLTF law under its Article 48 and 53.

Articles 17(4) and (6), 18(5) and 19(5)

103. As concerns the execution of the request as per Article 17(1) of CETS 198, the reply provided by the authorities does not clarify whether it is subject to the same conditions applied in respect of requests for search and seizure, nor whether specific conditions are required for the execution of requests for search and seizure. Article 42 of the MLA law seems to indicate that requests for search and seizure are not subject to any specific condition and therefore that only general rules apply, such as the requirement of dual criminality, in order to provide mutual legal assistance.

104. Regarding the extension of the applicability of Articles 17(6), 18(5) and 19(5) of CETS 198 to accounts held in non-bank financial institutions, the authorities have explained that the procedures for these provisions apply to non-bank financial institutions on the same basis as Art. 7 of the Convention. Therefore under Art. 271(3) the State Prosecutor may request information from any person, who might have such information, or under Art. 89 the State Prosecutor would usually undertake the actions in cooperation with the APMLTF, which is competent to require information or monitoring of accounts from all the entities listed in Article 4 of the LPMLTF (for further detail on this issue, please see in this respect the analysis under Art. 7 of the Convention.

Effective implementation

105. The authorities have not provided any case examples or statistics to indicate whether these provisions have been applied in practice.

Recommendations and comments

106. On the whole, the domestic legislation appears to permit the execution of requests from foreign authorities as per Articles 17(1), 18(1) and 19(1) of CETS 198. Given that the Prosecutor is the authority which is competent to ensure and order that the above-mentioned requests from foreign authorities are satisfied, the rapporteurs deem that it would be beneficial to spell out in the context of the MLA law the possibility for the Prosecutor to order, further to a request from a foreign Party, that the competent authority (the FIU):

- determine whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in Montenegro;
- obtain the particulars of specified bank accounts and of banking operations which have been carried out during a specified period;
- and monitor, during a specified period, the banking operations that are being carried out through one or more accounts.

107. For the same reasons, the rapporteurs deem that it would also be beneficial to indicate in the context of the MLA law that the above-mentioned actions apply to accounts held in non-bank financial institutions.

108. Additionally, Montenegro should clarify and establish clear procedures available to give certainty to other Parties in respect of which authorities they should address for the purpose of identifying whether a financial institution in Montenegro holds accounts of a natural or legal person under investigation and based on which procedure.

7.3. Procedural and other rules (Direct communication) – Article 34 paragraphs 2 and 6

The Convention is considered to add value in that it introduces the possibility for direct communication prior to formal requests. According to article 34 paragraph 6:

"Draft requests or communications under this chapter may be sent directly by the judicial authorities of the requesting Party to such authorities of the requested Party prior to a formal request to ensure that it can be dealt with efficiently upon receipt and contains sufficient information and supporting documentation for it to meet the requirements of the legislation of the requested Party."

Description and analysis

109. Under Article 4(3) of the MLA law, exceptionally, when provided for under international agreements or where there is reciprocity, the letters rogatory can be sent directly by the foreign judicial authority (courts or the prosecutor) to the national judicial authority (and vice versa) with the obligation to deliver a copy of the letter rogatory to the Ministry. Article 34(2) of CETS 198 is therefore implemented under Montenegrin Legislation.

110. As concerns the ability to send draft requests or communications directly by the judicial authorities of the requesting Party to such authorities of the requested Party prior to a formal request to ensure that it can be dealt with efficiently upon receipt and contains sufficient information and supporting documentation for it to meet the requirements of the legislation of the requested Party, this is not provided for under Montenegrin law. Nonetheless, the authorities have confirmed that this is common practice.

Effective implementation

111. The authorities have not provided any examples of cases in which Article 34 (2) and (6) have been applied in practice. They have referred to several cases in which such co-operation has been provided to Bosnia and Herzegovina and Croatia, based on the available bilateral agreements, the 1959 MLA convention and additional protocols.

Recommendations and comments

112. The Montenegrin legal framework enables domestic authorities and requesting authorities to communicate directly with their counterparts, in cases of urgency. Although in practice it would appear that direct communication between counterparts is possible prior to a formal request, the authorities should consider introducing a provision to this effect in the legislation.

113. The Montenegrin authorities should ensure that they are in a position to provide comprehensive statistical information on the practice of international co-operation and direct communication between judicial authorities of the Parties.

8. International co-operation – Financial Intelligence Units - Article 46 paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12

It is considered that the added value of the Convention in A.46 is that it sets out a *"detailed machinery for FIU to FIU cooperation, which is not subject to the same formalities as judicial legal cooperation."* The relevant provisions are set out in full.

> **Paragraph 1** *Parties shall ensure that FIUs, as defined in this Convention, shall cooperate for the purpose of combating money laundering, to assemble and analyse, or, if appropriate, investigate within the FIU relevant information on any fact which might be an indication of money laundering in accordance with their national powers.*
> **Paragraph 2** *For the purposes of paragraph 1, each Party shall ensure that FIUs exchange, spontaneously or on request and either in accordance with this Convention or in accordance with existing or future memoranda of understanding compatible with this Convention, any accessible information that may be relevant to the processing or analysis of information or, if appropriate, to investigation by the FIU regarding financial transactions related to money laundering and the natural or legal persons involved.*
> **Paragraph 3** *Each Party shall ensure that the performance of the functions of the FIUs under this article shall not be affected by their internal status, regardless of whether they are administrative, law enforcement or judicial authorities.*
> **Paragraph 4** *Each request made under this article shall be accompanied by a brief statement of the relevant facts known to the requesting FIU. The FIU shall specify in the request how the information sought will be used.*
> **Paragraph 5** *When a request is made in accordance with this article, the requested FIU shall provide all relevant information, including accessible financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between the Parties.*
> **Paragraph 6** *An FIU may refuse to divulge information which could lead to impairment of a criminal investigation being conducted in the requested Party or, in exceptional circumstances, where divulging the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Party*

concerned or would otherwise not be in accordance with fundamental principles of national law of the requested Party. Any such refusal shall be appropriately explained to the FIU requesting the information.

Paragraph 7 *Information or documents obtained under this article shall only be used for the purposes laid down in paragraph 1. Information supplied by a counterpart FIU shall not be disseminated to a third party, nor be used by the receiving FIU for purposes other than analysis, without prior consent of the supplying FIU.*

Paragraph 8 *When transmitting information or documents pursuant to this article, the transmitting FIU may impose restrictions and conditions on the use of information for purposes other than those stipulated in paragraph 7. The receiving FIU shall comply with any such restrictions and conditions.*

Paragraph 9 *Where a Party wishes to use transmitted information or documents for criminal investigations or prosecutions for the purposes laid down in paragraph 7, the transmitting FIU may not refuse its consent to such use unless it does so on the basis of restrictions under its national law or conditions referred to in paragraph 6. Any refusal to grant consent shall be appropriately explained.*

Paragraph 10 *FIUs shall undertake all necessary measures, including security measures, to ensure that information submitted under this article is not accessible by any other authorities, agencies or departments.*

Paragraph 11 *The information submitted shall be protected, in conformity with the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and taking account of Recommendation No R(87)15 of 15 September 1987 of the Committee of Ministers of the Council of Europe Regulating the Use of Personal Data in the Police Sector, by at least the same rules of confidentiality and protection of personal data as those that apply under the national legislation applicable to the requesting FIU.*

Paragraph 12 *The transmitting FIU may make reasonable enquiries as to the use made of information provided and the receiving FIU shall, whenever practicable, provide such feedback.*

Description and analysis

114. It should be noted that Montenegro has not indicated, in application of article 46 paragraphs 13 which is the FIU within the meaning of this article. For the purpose of this analysis, it was considered that the Montenegrin FIU is the Administration for the Prevention of Money Laundering and Terrorist Financing (APMLTF).

Article 46 paragraphs 1, 2 and 3

115. The Montenegrin FIU, named Administration for the Prevention of Money Laundering and Terrorist Financing (APMLTF) is the relevant authority responsible for AML/CFT matters. The FIU is a member of the Egmont Group since July 2005 and operates according to the Egmont Group Principles. The APMLTF is an independent body with full operational autonomy, whose administrative work is supervised by the Ministry of Finance.

116. Article 68 of LPMLTF regulates international cooperation with other FIUs for the purpose of combating ML and enables the Montenegrin FIU to enter into agreements with foreign counterparts on the exchange of financial and intelligence data, information and documentation.

117. Article 68 on international cooperation provides that:

"With a view to establishing and realizing international cooperation the Administration shall conclude agreements with the relevant authorities of foreign countries and international organizations, on exchanging financial-intelligence data, information and documentation that can be used only for the purposes defined by this Law."

118. It follows that, in line with the requirements stipulated in paragraph 3 of Article 46 of CETS N°198, the APMLTF can co-operate with all types of FIUs, regardless of whether they are administrative, law enforcement or judicial, the only requirement being that "*the foreign competent authority to which it shall forward the requested data, possesses a system for the protection of personal data and that used data shall be used only for required purpose, unless it is otherwise provided by the international agreement".* Furthermore, as a member of the Egmont Group the APMLTF exchanges data and information with all the other FIUs regardless of their type/nature (Egmont members) via the Egmont secure website.

119. The APMLTF has signed Memoranda of Understanding with FIUs from 30 countries:

List of MoUs signed by the FIU	**Date**
FIU Serbia	15.04.2004
FIU Albania	03.06.2004
FIU Bosnia and Herzegovina	19.04.2005
FIU – "The former Yugoslav Republic of Macedonia"	29.10.2004
FIC-UNMIK Kosovo	07.12.2004 (revised on 19.02.2009)
FIU Slovenia	28.12.2004
FIU Croatia	25.03.2005
FIU Bulgaria	11.04.2006
FIU Portugal	11.06.2007
FIU Russia	07.09.2007 (revised 15.12.2010)
FIU Poland	15.11.2007
FIU UAE	06.07.2009
FIU Ukraine	27.05.2009
Fin Cen	21.10.2008
FIU Romania	27.02.2009
FIU Bermuda	21.10.2009
FIU Moldova	12.10.2010
FIU San Marino	12.10.2010
FIU Israel	12.10.2010
FIU Aruba	14.03.2011
FIU Estonia	14.03.2011
FIU Armenia	12.07.2011
FIU British Virgin Islands	12.07.2011
FIU United Kingdom	12.07.2011
FIU Japan	31.01.2012

FIU Canada	31.01.2012
FIU Cyprus	10.07.2012
FIU Panama	04.07.2013
FIU India	04.07.2013
FIU Saudi Arabia	04.07.2013

Article 46 paragraph 4

120. The Montenegrin authorities have clarified that any request for information sent to a foreign FIU is accompanied by a brief description of the case, as well as the reason for suspicion of ML/TF. They have further explained that as a member of the Egmont Group, the APMLTF applies the Egmont principles when exchanging information with foreign FIUs, including those with which it has signed MOUs. One such principle provides that "requests shall be accompanied by a brief statement of the relevant facts known to the requesting FIU (particular attention should be paid to: the information identifying the persons or companies involved, the reported suspicious or unusual transactions or activities, the link with the country of the requested FIU, whether the request for information is based on one or more disclosures or whether it has another base, such as a request from a national police authority, a list of suspected terrorists…).

121. According to the authorities, the Montenegrin FIU specifies in the request how the information will be used as per Article 69 of the LPMLTF[6]. The rapporteurs note that under this Article "information and documentation obtained from foreign counterparts may be used only for purposes of detection and prevention of money laundering and terrorist financing and that for all other possible uses a written consent of the requested party is needed". It would appear therefore that only in cases where the information is not to be used for the purpose of detecting and preventing money laundering and terrorist financing, the FIU would specify how the information will be used and request the consent of the counterpart.

Article 46 paragraph 5

122. Article 46(5) of CETS 198 requires that FIUs provide all relevant information, including accessible financial information and requested law enforcement data, sought in the request, without the need for a formal letter of request under applicable conventions or agreements between the Parties.

123. Under Article 70 of the LPMLTF, upon request of the competent authority of a foreign state, the FIU can provide data, information and documents for the purpose of detecting and preventing money laundering and terrorist financing, about persons or

[6] Article 69 - **Request to the competent authority of a foreign state for providing data and information**

(1) The Administration may request, within its competencies, from the competent authority of a foreign state data, information, and documentation necessary for detection and prevention of money laundering or terrorist financing.
(2) The Administration may use the data, information and documentation obtained in accordance with paragraph 1 of this Article, only for the purposes provided for by this Law, and without previous approval of the competent authority of the foreign state from which the data are obtained, it must not provide or disclose them to another authority, legal or natural person, or use it for purposes that are not in accordance to the terms and limits defined by requested authority.

transactions if there are reasonable grounds for suspicion of money laundering or terrorist financing, under conditions of reciprocity.

124. Article 64 of the LPMLTF also enables the FIU to initiate, upon a written and motivated request from a competent authority of a foreign country in cases where there is a suspicion of ML or TF regarding certain transactions or persons, a procedure for collecting and analysing data, information and documentation.

125. The Montenegrin authorities have confirmed that when the FIU receives a data delivery request, it conducts searches in its own databases and requests necessary information from the obligors and the relevant state authorities (Police/ Tax/Customs/Real Estate Administration etc.). The data the FIU can collect and forward to other FIUs includes: data on bank accounts and activities onto those accounts, data on the ownership and management structure of legal persons, data from the criminal records on persons, data on entering/leaving Montenegro, data on the property (real estate, securities…) owned in Montenegro etc. such data is to be provided by reporting entities without delay, and no later than 8 days since the date of receiving the request.

126. All the requested data available to the APMLTF is made available to the requesting party with a note that it may be used only for analytical purposes by the requesting FIU. If information is requested for dissemination to foreign law enforcement authorities, the FIU can grant the approval for dissemination, for intelligence purposes only. If the data is to be used as evidence in judicial actions, or any other official proceedings, a rogatory letter is needed.

127. The statistics available to the rapporteurs indicate that on average it takes 60 days to respond to a request from foreign FIUs. The authorities have indicated that this timeframe is variable. The length of time needed varies given that the FIU's policy is to request all reporting entities to provide information, and thus the gathering of information takes more time, however this also impacts positively on the quality of information received and which can be transmitted to a foreign FIU. Intermediary replies are also being provided based on the requests of foreign FIUs.

Article 46 paragraph 6

128. Pursuant to Article 70 of the LPMLTF, the FIU of Montenegro can refuse to divulge information to a requesting FIU if:

(1) on the basis of the facts and circumstances, stated in the request, it evaluates that there are not enough reasons for suspicion of money laundering or terrorist financing, and,

(2) providing this data jeopardizes or may jeopardize the course of criminal proceeding in Montenegro or otherwise could affect interests of the proceeding.

129. If the FIU refuses to divulge the requested information, it must, under Article 70 inform the requesting party in written form about the reasons for the refusal. The rapporteurs consider that, regarding the implementation of Art. 46(6), the AML/CFT legislation provides for additional possible reasons for refusal to provide information. Nevertheless, the rapporteurs also highlighted that the information available shows that in the last six years the FIU has never refused to submit information to another requesting FIU.

Article 46 paragraph 7

130. Article 69 paragraph 2 of the LPMTF, in line with Article 46(7) of CETS 198, states that information obtained by the APMLTF may only be used for the purpose of detecting and preventing ML and TF and cannot be disseminated to third parties (another authority, legal or natural person); or use it for purposes that are not in accordance with the conditions and limits established by the requesting FIU without its approval. The data provided by the FIU can only be used for analytical purposes. Each reply delivered to a requesting FIU includes a note stating that the provided information must be used for intelligence purposes only and must not be divulged without the permission of the FIU providing the data.

131. According to article 57 paragraph 2 of the LPMLTF, the FIU is not allowed to disclose to the Court or state prosecutor the data and information received on the basis of international cooperation for which it has not obtained dissemination approval of the competent authority of the foreign state, that the court or prosecutor need for conducting the procedure.

Article 46 paragraph 8

132. Article 70 of the LPMLTF allows the APMLTF to impose restrictions and conditions on the use of information provided to FIUs, without going into specifics. However, the authorities state that restrictions and conditions imposed thus far were related to the prohibition of disseminating the information to a third party, and to limiting the use for purposes other than analysis without APMLTF's prior consent.

Article 46 paragraph 9

133. Under the LPMLTF the Montenegrin FIU may provide data and information to foreign counterparts only for the purpose of detecting and preventing money laundering. The authorities have explained that if information is to be used for criminal investigations or prosecutions, the Law on international legal assistance in criminal matters applies. Thus, the requesting party would need to deliver the rogatory letter to the Ministry of Justice.

Article 46 paragraph 10

134. As concerns the measures taken by the APMLTF to ensure that information submitted under Article 46 is not accessible to other authorities, agencies or departments, as a member of the Egmont Group, the APMLTF exchanges data and information with other members via the secure Egmont website which is accessible only to such members. Moreover, the information which is sent to the requesting FIU is accompanied by a note stating that it cannot be disclosed to a third party and may not be used for purposes other than analytical ones, without the APMLTF's consent. The data accessible to the APMLTF is mainly of a confidential nature and any unauthorized disclosure of such information is defined by the CC of Montenegro as a criminal offence under Article 280 of the CC. Lastly, Article 11 of the Code of Ethics, which applies to all state employees, requires all civil servants and other state employees to protect confidential data, information and facts which are accessible by them in the performance of their duties.

Article 46 paragraph 11

135. Montenegro ratified the Council of Europe Convention for the protection of individuals with regard to processing of personal data (ETS. N°108) in 2005. The authorities referred in this context to the Information Secrecy Act, which stipulates the manner of classifying, handling and protecting classified information. There are also provisions regulating the obligation of civil servants and state employees to safeguard and protect secret and personal data. Section 2 of the LPMLTF Act also includes detailed provisions on data protection (article 88 and following).

Article 46 paragraph 12

136. The replies to the questionnaire indicate that under Montenegrin law there is no explicit provision on requesting or providing feedback on the use of information which has been transmitted. In practice the APMLTF has indicated that it provides feedback on the use of information obtained from a foreign FIU, only upon request. In the period 2010-2011 the FIU had sent feedback forms to foreign FIU regarding further use of provided information, however, given the low number of feedback received in return, they have stopped with this practice.

Effective implementation

137. The statistics provided seem to indicate good cooperation between the Montenegrin FIU and its foreign counterparts for the purpose of combating ML and more particularly, with a view of assembling, analysing information or facts which might be an indication of ML. All foreign requests received by the FIU were executed between 2010 and 2013.

138. Nonetheless, in order to have a complete picture in relation to the effective implementation of Article 46 of CETS 198, statistical data should be kept and provided in relation to:

- the number of requests to and replies provided by foreign FIUs according to their type;
- the number of refusals to provide information by foreign FIUs in reply to requests of the APMLTF and the grounds thereof;
- the number of enquiries sent/received as to the use made of information provided.

International co-operation	2010	2011	2012	2013
INCOMING REQUESTS				
Foreign requests received by the FIU	49	46	26	40
Foreign requests executed by the FIU	49	46	26	40
Foreign requests refused by the FIU	0	0	0	0
Spontaneous sharing of information received by the FIU	/	1	2	1

TOTAL (incoming requests and information)	49	46	26	40
OUTGOING REQUESTS				
Requests sent by the FIU	111	611	176	216
Spontaneous sharing of information sent by the FIU	1	/	2	2
TOTAL(outgoing requests and information)	111	611	176	216

Recommendations and comments

139. First of all, Montenegro is invited to make a formal communication pursuant to article 46 paragraph 13, indicating which is the FIU within the meaning of this article.

140. It would appear that the legislation and the manner in which the Montenegrin FIU operates meets to a large extent the requirements provided under Article 46 of the Convention.

141. The authorities are also encouraged to continue enquiring into the use that has been made of information which has been provided to a requesting FIU.

142. In order to have a complete picture in relation to the effective implementation of Article 46 of CETS 198, statistical data should be kept and analysed in relation to:

- the number of requests to and replies provided by foreign FIUs according to their type;
- the number of refusals to provide information by foreign FIUs in reply to requests of the APMLTF and the grounds thereof;
- the number of enquiries sent/received as to the use made of information provided.

9. Postponement of domestic suspicious transactions – Article 14

The Convention is considered to provide added value by requiring State Parties to take measures to permit urgent action in appropriate cases to suspend or withhold consent to a transaction going ahead in order to analyse the transaction and confirm the suspicion.

Description and analysis

143. Under Article 14 of CETS 198, State Parties must adopt legislative and other measures permitting urgent actions to be taken by the FIU or, as appropriate by any other competent authorities or body when there is a suspicion that a transaction is related to money laundering, to suspend or withhold consent to a transaction going ahead in order to analyse the transaction and confirm the suspicion.

144. The Montenegrin authorities have confirmed that the APMLTF has the power to temporarily suspend a transaction for the period of 72 hours when it suspects that the transaction is related to money laundering or terrorist financing. Such actions are taken under Article 61 of the LPMLTF which provides that:

(1) The Administration may require in written order the reporting entity to temporarily suspend a transaction, but not longer than for 72 hours, if it evaluates that there is a suspicion of money laundering or terrorism financing, and is obliged, without delay, to notify competent authorities of it in order to take measures from their own competence.
(2) If the last day of a deadline referred to in paragraph 1 of this Article occurs during non-working days of the competent authorities, such deadline can be extended with an order for additional 48 hours.
(3) The reporting entity shall, without delay, take measures and actions in accordance with the order from paragraphs 1 and 2 of this Article.
(4) With exception to the paragraph 1 of this Article, in case of urgency or other circumstances of the transaction execution, an order shall be given verbally.
(5) The responsible person of a reporting entity shall make a note on receiving a verbal order from the paragraph 1 of this Article.
(6) The Administration shall, without delay, provide the previously given verbal order to the reporting entity in written form.
(7) Upon received notification of suspension of transaction, competent authorities from paragraph 1 of this Article shall act without delay in accordance with their powers and not later than 72 hours from the beginning of the temporary suspension of transaction and shall without delay notify the Administration in written form on the decision on further procedure regarding the suspended transaction.

145. According to this provision, urgent action can therefore be taken by the FIU and must be communicated to the Prosecutor within 72 hours. Under Article 89 of the CCP, the Prosecutor may decide to extend the suspension or the withholding of consent to a transaction going ahead for six months at most. The authorities have clarified that these measures are not limited to cases where a suspicious transaction report has been submitted by obliged entities.

Effective implementation

146. The statistics provided by the authorities show that the APMLTF exercises its right to suspend financial transactions. For example in 2013 it postponed financial transactions 13 times for a total value of 3 518 918.88 EUR. However, the information provided seems to indicate that out of the postponement orders, none led to further actions such as investigative and provisional measures, confiscation and indictments.

Year	Number of postponed transactions/block account	Amount
2008	11	2.400.704,oo EUR
2009	6	1.184.676,oo EUR 4.549.298,75 USD
2010	5	236.331,31 EUR

2011	3	99.000,oo EUR 1.295.000,oo $
2012	9	2.526.763,oo EUR 1.000.000,oo $ 488.200,00 CHF
2013	13	3.518.918,88EUR 399.982,65$

Recommendations and comments

147. Montenegro has taken measures to implement Article 14 of CETS 198 and the rapporteurs are pleased to note that the FIU has the power to suspend temporarily a transaction verbally –this prerogative may be very helpful when a quick reaction is required by the APMLTF in order to prevent of the movement of criminal flows.

148. In order to have a clear overall picture, the authorities are encouraged to maintain detailed statistics concerning the postponement of financial transactions and information indicating whether they resulted in investigative and provisional measures, confiscation and indictments.

10. Postponement of transactions on behalf of foreign FIUs – Article 47

Article 47 establishes a new international standard, namely:

"1 Each Party shall adopt such legislative or other measures as may be necessary to permit urgent action to be initiated by a FIU, at the request of a foreign FIU, to suspend or withhold consent to a transaction going ahead for such periods and depending on the same conditions as apply in its domestic law in respect of the postponement of transactions.

2 The action referred to in paragraph 1 shall be taken where the requested FIU is satisfied, upon justification by the requesting FIU, that:

a the transaction is related to money laundering; and

b the transaction would have been suspended, or consent to the transaction going ahead would have been withheld, if the transaction had been the subject of a domestic suspicious transaction report."

Description and analysis

149. Indeed, the legal framework in place allows the Montenegrin FIU, at the request of a foreign FIU, to suspend or withhold consent to a transaction going ahead. Article 72 of the LPMLTF, specifies that:

(1) In accordance with this Law, the Administration may, under the condition of reciprocity, by reasoned written initiative of a foreign competent authority, suspend a transaction, with written order, for the period not exceeding 72 hours.
(2) The Administration is obliged to inform competent authorities about the order from the paragraph 1 of this Article.
(3) The Administration may reject the initiative of the authority from the paragraph 1 of this Article, if based on the facts and circumstances stated in the initiative, it evaluates that given reasons are not sufficient for a suspicion of money laundering and terrorist financing, and shall inform in written form the initiating authority on the rejection and give the reasons for its rejection.

150. Although for the suspension of such transactions the law seems to require similar conditions as those which apply for the postponement of transactions domestically, it is not clear whether the FIU may also in this case suspend temporarily a transaction verbally where there is particular urgency. The grounds of refusal are in line with Article 47 of CETS 198.

Effective implementation

151. Thus far, the APMLTF has received only one request in 2010 from a foreign counterpart [Serbia] to temporary suspend a transaction (in 2010). In this connection, no additional information, including the content and circumstances of the request have been provided by the authorities, nor have they specified whether such transaction was postponed. It is therefore difficult to assess the practical implementation of Article 47 of CETS 198.

Recommendations and comments

152. Although the relevant provision under the LPMLTF broadly complies with Article 47 of CETS 198, the authorities should clarify whether the FIU may, where there is particular urgency, suspend temporarily a transaction verbally in cases where a request for postponement has been received by a foreign FIU.

153. In order to facilitate the assessment of the effective implementation of Article 47, the authorities should maintain and provide information on instances in which foreign FIUs request the postponement of a financial transaction, including: the content and circumstances of such request; whether it resulted in a postponement action; and whether it has led to investigative and provisional measures, confiscation and indictments.

11. Refusal and postponement of co-operation – Article 28 paragraphs 1d, 1e, 8c.

The Convention is considered to add value here as, according to article 28 (i.e.) and article 28(1)(d), the political offence ground for refusal of judicial international cooperation can never be applied to financing of terrorism (it is the same in respect of the fiscal excuse)

Provision is made in article 28(8c) to prevent refusal of international cooperation by States (which do not recognise self laundering domestically) on the grounds that, in the internal law of the requesting Party, the subject is the author of both the predicate offence and the ML offence.

Description and analysis

154. In addition to cases where the principle of dual criminality is not respected (Article 5 of the MLA law), Mutual legal assistance is denied under the law of Montenegro:

- if the letter rogatory concerns military criminal offence (Article 46 MLA law);

155. Mutual legal assistance *may* be denied:

- if the letter rogatory of the requesting state concerns a political criminal offence (Article 47 MLA law);
- if the execution of the letter rogatory of the requesting state is likely to prejudice the sovereignty, constitutional order, security or other essential interests of Montenegro (Article 47 MLA law).

156. It follows that, in line with Article 28(1)(d) of CETS 198, the fact that the request relates to a fiscal offence where the offence also relates to financing of terrorism, is not a ground for refusal.

157. On the other hand, if the MLA request relates to a political offence, mutual legal assistance may be refused.

158. The Montenegrin authorities have not provided any information clarifying whether co-operation is granted in situations when the person under investigation or subject to a confiscation order by the authorities of the requesting Party is mentioned in the request both as the author of the underlying criminal offence and of the offence of money laundering. It is important to note however in this respect that under Montenegrin law self-laundering is criminalised expressly (Article 268, Paragraph 2 of the CC), thus that cooperation in these instances would not be contrary to the fundamental principles of the Montenegrin legal system.

Recommendations and comments

159. Although no practical examples have been cited, international legal assistance is granted in cases concerning terrorist financing which also involve fiscal offences. As concerns mutual legal assistance requests which relate to a political offence, where the offence also relates to financing of terrorism, these may be refused. While it is duly noted that under Article 9 of the Constitution of Montenegro, international treaties which have been ratified take precedence over national legislation and are directly applicable in cases of conflicting provisions, the Conference of the Parties deems that it would be beneficial to amend Article 47 of the MLA law to specify that Mutual legal assistance may be denied if the letter rogatory of the requesting state concerns a political criminal offence, with the exception of financing of terrorism.

II. Overall Conclusions on Implementation of the Convention

160. The information provided by the authorities of Montenegro in the context of the COP questionnaire is mostly satisfactory and compliance with the provisions of the Convention may be considered as adequate. Little information on evidence of effective implementation and, in particular, evidence that the new measures in the Convention which add value to the existing international standards are being used to improve the national performance on AML/CFT issues, however, has been provided. It is important that these new measures are tested in practice, and that statistical data is maintained to demonstrate that the authorities are making use of these provisions, wherever possible, to improve national AML/CFT performance.

161. With the exception of certain technical aspects outlined in the report, the provisions implementing the requirements of the Convention which add value to the current international AML/CFT standards appear to be mostly in line with this instrument.

162. The following positive aspects have been noted in relation to the legal issues of the Convention: the criminalisation of negligent behaviour in the context of ML is provided for; measures have been taken to ensure that legal persons can be held liable for money laundering offences; the authorities are in a position to take into account final decisions taken in another Party in relation to offences established in accordance with CETS N° 198; extended confiscation with reversed burden of proof has recently been introduced in the legal system; Montenegro seems to have proper normative and practical measures in place which ensure the efficient management of seized or frozen movable and immovable assets.

163. In the field of international cooperation, the Montenegrin legal framework enables domestic authorities and requesting authorities to communicate directly with their counterparts, in cases of urgency. As concerns the provisions related to the functioning of the FIU and cooperation between FIUs: the statistics provided seem to indicate good cooperation between the Montenegrin FIU and its foreign counterparts for the purpose of combating ML with a view of assembling, analysing information or facts which might be an indication of ML; all foreign requests received by the FIU were executed between 2010 and 2013 and the legal framework in place allows the Montenegrin FIU, at the request of a foreign FIU, to suspend or withhold consent to a transaction going ahead.

164. Nonetheless, the present report has identified a series of improvements which are desirable in order to ensure a higher degree of compliance with CETS no°198, in areas where this treaty adds value to the Recommendations of the Financial Action Task Force (FATF). The following recommendations were addressed to Montenegro.

165. In view of the implementation of article 9, to take further measures, possibly through prosecutorial guidance and additional trainings for the judiciary as a whole, to ensure that:

a) law enforcement authorities and judiciary have an adequate understanding of the offences established pursuant to the Convention's requirements and apply them effectively in practice
b) a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction of ML;
c) the underlying predicate offence can be proved by inferences drawn from objective facts and circumstances.

166. Also, it is recommended to the authorities to have a system in place enabling them to have a comprehensive picture of the relevant statistical data and case law regarding money laundering offences, so as to draw relevant conclusions on any further policy measures that need taking in order to improve the effectiveness of its anti-money laundering prosecution policy.

167. The Montenegrin authorities should review the situation as to why the criminal liability provisions established in line with Article 10 of the Convention have never been applied in practice and take any relevant steps, such as training or awareness-raising activities, to familiarise the police, prosecutors and the judiciary on the application of the provisions of the Law on Criminal Liability of Legal Entities for Criminal Acts in relation to ML and other relevant predicate offences to ML.

168. Montenegro should take measures, either by issuing clear prosecutorial guidance and/or carrying out training for judges, to ensure that the provisions on confiscation are properly and effectively applied and clarifying that instrumentalities owned by a third person should be confiscated.

169. Montenegro should improve the quality and scope of information and statistics available on property frozen, seized and confiscated, in order to assess the effectiveness of confiscation measures in respect of ML, TF and other predicate offences.

170. Montenegro is encouraged to re-think the procedure and possibly adopt additional regulations with regard to selling seized movable/immovable assets through direct bargaining at below market value, in order to avoid that criminals retrieve the illicit assets. Montenegro should also maintain detailed statistics on asset management.

171. As regards the implementation of Article 7: Montenegro is encouraged to take additional practical measures to expedite the processes through which competent authorities, and in particular, law enforcement authorities, may determine whether a natural or legal person is a holder or beneficial owner of accounts in Montenegro.

172. The Montenegrin legal framework enables domestic authorities and requesting authorities to communicate directly with their counterparts, in cases of urgency. Although in practice it would appear that direct communication between counterparts is possible prior to a formal request, the authorities should consider introducing a provision to this effect in the legislation. The Montenegrin authorities should ensure that they are in a position to provide comprehensive statistical information on the practice of international co-operation and direct communication between judicial authorities of the Parties

173. Montenegro should introduce a mechanism to enable Montenegrin authorities to cooperate with State Parties in the execution of foreign non-conviction based confiscation orders, in accordance with Article 23 paragraph 5 of the Convention. Furthermore, it should introduce provisions and/or enter into agreements with other State parties which will enable it to cooperate for the purposes of sharing or repatriating criminal assets so as to give full effect to Article 25 of the Convention.

174. Montenegro should also:

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- spell out in the context of the MLA law the possibility for the Prosecutor to order, further to a request from a foreign Party, that the competent authority :
  - determines whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in any bank located in Montenegro;
  - obtains the particulars of specified bank accounts and of banking operations which have been carried out during a specified period;
  - and monitor, during a specified period, the banking operations that are being carried out through one or more accounts.

- to indicate in the context of the MLA law that the above-mentioned actions apply to accounts held in non-bank financial institutions.

175. Montenegro is invited to make a formal communication pursuant to article 46 paragraph 13, indicating which is the FIU within the meaning of this article.

176. As regards Article 46 of the Convention, the authorities are encouraged to continue enquiring into the use that has been made of information which has been provided to a requesting FIU.

177. In order to have a complete picture in relation to the effective implementation of Article 46 of CETS 198, statistical data should be kept and analysed in relation to:

- the number of requests to and replies provided by foreign FIUs according to their type;
- the number of refusals to provide information by foreign FIUs in reply to requests of the APMLTF and the grounds thereof;
- the number of enquiries sent/received as to the use made of information provided.

178. In order to facilitate the assessment of the effective implementation of Article 47, the authorities should maintain and provide information on instances in which foreign FIUs request the postponement of a financial transaction, including: the content and circumstances of such request; whether it resulted in a postponement action; and whether it has led to investigative and provisional measures, confiscation and indictments.

179. Montenegro should amend Article 47 of the MLA law to specify that Mutual legal assistance may be denied if the letter rogatory of the requesting state concerns a political criminal offence, with the exception of financing of terrorism.

180. The Conference of the Parties invites Montenegro to implement the findings contained in the present evaluation report and to report back by September 2016 at the latest.

III. Annexes

ANNEX I

Article 9 of the Convention – Laundering offences

3. Each Party may adopt such legislative and other measures as may be necessary to establish as an offence under its domestic law all or some of the acts referred to in paragraph 1 of this Article, in either or both of the following cases where the offender

    a) suspected that the property was proceeds,

    b) ought to have assumed that the property was proceeds.

4. Provided that paragraph 1 of this article applies to the categories of predicate offences in the appendix to the Convention, each State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 1 of this article applies:

    a) only in so far as the predicate offence is punishable by deprivation of liberty or a detention order for a maximum of more than one year, or for those Parties that have a minimum threshold for offences in their legal system, in so far as the offence is punishable by deprivation of liberty or a detention order for a minimum of more than six months; and/or

    b) only to a list of specified predicate offences; and/or

    c) to a category of serious offences in the national law of the Party.

5. Each Party shall ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering.

6. Each Party shall ensure that a conviction for money laundering under this Article is possible where it is proved that the property, the object of paragraph 1.a or b of this article, originated from a predicate offence, without it being necessary to establish precisely which offence.

ANNEX II

Article 10 of the Convention – Corporate liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

    a) a power of representation of the legal person; or

    b) an authority to take decisions on behalf of the legal person; or

    c) an authority to exercise control within the legal person,

    as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

ANNEX III

Article 3 of the Convention – Confiscation measures

3. Parties may provide for mandatory confiscation in respect of offences which are subject to the confiscation regime. Parties may in particular include in this provision the offences of money laundering, drug trafficking, trafficking in human beings and any other serious offence.

4. Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law.

ANNEX IV

Declarations deposited by Montenegro – situation on March 2014

Declaration contained in the instrument of ratification deposited on 20 October 2008 - Or. Fr.

In accordance with Article 33, paragraph 2, of the Convention, Montenegro designates the Ministry of Justice and the Directorate Against Money Laundering and Against the Financing of Terrorism as the central authorities responsible for carrying out the functions foreseen by this Convention :
Ministry of Justice
Vuka Karadzica 3
81 000 Podgorica
Tel. +382 20 407 501
Fax +382 20 407 515

Administration for the Prevention of Money Laundering and Terrorist Financing
Novaka Miloševa bb
81 000 Podgorica
Tel. +382 20 210 025
Fax +382 20 210 086
Period covered: 1/2/2009 -
The preceding statement concerns Article(s) : 33