

Horizontal Facility for Western Balkans and Turkey



Action against Economic Crime in Montenegro (AEC-MNE)

Technical paper:

Guidelines on Ethics and Conflict of Interest for Judges in Montenegro

Prepared by:
Flemming Christian Denker
Council of Europe Expert

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For further information please contact:

Project Officer
Unit I- Economic Crime Cooperation Division- DG I
Horizontal Facility Action against Economic Crime in Montenegro
Council of Europe Programme Office in Podgorica

Tel: +382 67 211 126
e-mail: Ana.SELIC@coe.int
www.coe.int/corruption
www.coe.int/

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This technical paper is prepared within the Horizontal Facility's Programme for the Western Balkans and Turkey.

The views and opinions presented herein are those of the experts and should not be taken as to reflect the official position of the European Union and/or the Council of Europe

Abbreviations:

AEC- MNE	Action against Economic Crime in Montenegro
APC	Agency for Prevention of Corruption
GET	Greco Evaluation Team
GRECO	Group of States against Corruption
LPC	Law on Prevention of Corruption
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development

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1 EXECUTIVE SUMMARY

The Action against Economic Crime in Montenegro (AEC-MNE) aims, amongst others, to enhance the awareness and capacity of judges, to comply with and implement/enforce legal provisions on ethics and prevention of corruption.

The present guidelines on ethics and conflict of interest for judges are developed in order

- to specify the standards of integrity and conduct to be observed by judges, to help them to meet those standards; and
- to address the shortcomings identified in the 4th Evaluation Round Report on Montenegro adopted by GRECO ([MNE/GRECO/2015](#)).

Specifically, these Guidelines contain:

- A summary of the most important obligations to which judges are subject under the existing Code of Ethics and other laws and regulations on conduct.
- Examples on different situations, where the judge has to make a choice.

The following were considered in the preparation of this technical paper: Law on Prevention of Corruption, Law on Judicial Council and Judges, Rulebook on the manner of handling gifts of public officials, Rulebook on the manner of keeping the register of sponsorships and donations and content of the report on received sponsorships and donations, Codes of Judicial, Ethics and other relevant legislation was used.

An assessment mission, to establish the baselines of the situation in Montenegro took place on 30 – 31 January 2017 in Podgorica and included meetings with representatives of Agency for Prevention of Corruption, Centre for Trainings in Judiciary and State Prosecution, Judicial Council's Commission for implementation of the Judicial Code of Ethics, the Association of Judges, Human Rights Action and Centre for Democracy and Human Rights.

These guidelines are targeting the following recommendations from the GRECO report from June 2015:

- mechanisms to provide guidance and counselling on ethics and the prevention of conflicts of interest for judges should be strengthened and further developed
- the disciplinary framework for judges should further be developed with a view to strengthening its objectivity, proportionality and effectiveness; and (ii) publishing information on complaints received, disciplinary action taken and sanctions applied against judges, including possible dissemination of the relevant case law, while respecting the anonymity of the persons concerned.

The Code of Judicial Ethics has been in place since 2014 where it replaced the former Code from 2008.

The present guidelines support the existing rules and describe and analyse the types of conflicts of interest and different situations where there may be a conflict of interests, among other things gifts, hospitality, relations between management and the subordinate, use of

public resources for private purposes and the key values a judge has to respect – for example the law, impartiality, reputation, integrity, confidentiality and the court.

Furthermore, there is a presentation of the relevant articles of the Law on Prevention on Corruption, Criminal Code, Code of Judicial Ethics and Procedural Law. At last there is a short review of the disciplinary system.

Practical examples support the area of the guidelines. The examples are analysed and solutions are given in an annex of the paper.

The guidelines are developed in order enhance the awareness about legal provisions on ethics and prevention of conflicts of interests and to facilitate the further work concerning guidance and counselling on these rules for judges. It is recommended that these guidelines are effectively implemented in the future work concerning the necessary training for all judges.

It is further recommended to continue the transparency and to secure that every year a report should be published on complaints received, the opinions of the Commission to these complaints, disciplinary actions taken and sanctions applied against judges, including possible dissemination of the relevant case-law, while respecting the anonymity of the persons concerned.

2 GUIDELINES ON ETHICAL PRINCIPLES, RULES OF CONDUCT AND CONFLICTS OF INTEREST

2.1 Scope of the guidelines

The Guidelines will encompass areas of conflict of interests, gifts, diligence of judges and key obligations under Judicial Code of Ethics: respect for the law, impartiality, reputation, integrity, confidentiality and the court (the work as a judge).

2.2 Definitions – what is conflict of interest

The OECD Publication “Managing Conflict of Interest in the Public Sector” from 2005 defines Conflicts of interest in the following way: A conflict of interest involves a conflict between the public duty and the private interest of a public official, in which the official’s private-capacity interest could improperly influence the performance of their official duties and responsibilities.

The essence of the problem is that a public official, who is going to make a decision, is improperly influenced or there is a risk, that he will be improperly influenced.

In the explanatory memorandum to the COE Model code of conduct for public officials, (an appendix to the Council of Europe Recommendation R(2000)10¹, it is stated that the public official should not allow his or her private interest to conflict with his or her public position. It is his or her responsibility to avoid such conflicts of interest, whether real, potential or apparent. According to this document, conflict of interest arises from a situation (article 13.1) in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties. The public official’s private interest (article 13.2) includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organizations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto.

He or she must not allow his or her private interests to affect, or appear to affect, his or her public position nor take undue advantage of that position. The term “private interest” is explained in Article 13. It is for states to define the expression “undue advantage”. However, it should be understood in a broad sense, as including not only advantages offered or given to the public official but also the avoidance of any disadvantages or burdens imposed upon him or her. Undue advantages are usually of an economic nature but may also be of a non-material nature.

¹ [Recommendation No. R \(2000\) 10](#) of the Committee of Ministers to Member states on codes of conduct for public officials

2.3 Types of Conflict of Interest

There are three main types of conflicts of interest²:

- Actual: a conflict exists between the official duties or responsibilities and the private interests of the judge (the brother of the judge is accused of a crime). The judge cannot act as the judge in a trial against his brother.
- Perceived: it appears that the private interests could improperly interfere with or influence in the performance of the official duties or responsibilities, whether or not this is a fact (for example the judge's neighbor has been assaulted). Normally the judge cannot act as the judge in the trial.
- Potential: Where the judge's private interests could interfere with or influence on the official duties or responsibilities in the future (for example friendship with a person who gets married to a woman who has been punished several times for burglary).

2.4 Examples of Conflict of Interest

- Receipt of gifts and benefits (hospitality)
- Secondary employment
- Relationship between superior and staff
- Recruitment and Promotions
- Endorsements and Sponsorships
- Procurement
- Investigation

Some of the examples are dealt with below

2.4.1 Receipt of gifts

The public official should not seek or accept any gift or benefit for himself or anyone else that could influence, or appear to influence, the carrying out of his or her duties.³

Example: 70-year-old judge charged and convicted for receiving gifts⁴

The judge, Gerald P. Garson of State Supreme Court, was caught on videotape discussing gifts and cases in his robing room with a lawyer. Justice Garson is accused of coaching the lawyers who plied him with gifts on how to argue their cases.

The prosecution alleged that Garson had an agreement with divorce lawyer Siminovsky whereby the lawyer gave Garson **cash, drinks, dinners, and cigars** in exchange for courtroom assignments and favored treatment. The prosecution alleged that before Siminovsky began cooperating with prosecutors, he had already entertained Garson more than 40 times, spending \$3,149.

² New South Wales Police Force, Procedures for Managing Conflicts of Interest, February 2016

³ Explanatory memorandum to the COE Model code of conduct for public officials – article 18

⁴ Reported by [New York Times](#), last accessed on: 14/04/2017, also see: NY Daily, Wikipedia

On June 5, 2007, Justice Berry imposed three consecutive sentences on Garson, which resulted in an aggregate sentence of between 3 and 10 years in prison.

In the Explanatory Report⁵ to the Criminal Law Convention on Corruption, paragraph 37, gifts or undue advantage is described: The undue advantages given are usually of an economic nature but may also be of a nonmaterial nature. What is important is that the offender (or any other person, for instance a relative) is placed in a better position than he was before the commission of the offence and that he is not entitled to the benefit. Such advantages may consist in, for instance, money, paid holidays, loans, food and drink, a case handled within a swifter time, better career prospects, etc.

What constitutes "undue" advantage?

"Undue" for the purposes of the Criminal Law Convention should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafters of the Convention, the adjective "undue" aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts. (Appropriate gift shall mean a gift to the value of € 50 see below 4.4. *Gifts*).

2.4.2 Hospitality

Normally conventional hospitality is respected, that means for instance, modest invitations to food and drinks, calendars, low price pens, advertising materials, small stationary, etc. can be accepted by judges while attending events such as workshops, trainings, conferences etc.

However, low value may not always be a proper criterion. The prosecutor should be alert to the possibility of even a generally permitted advantage giving rise to a conflict of interest in particular circumstances. Thus, gifts or invitations offered repeatedly, even if of low value, could affect the public official's impartiality in the exercise of his or her functions. Also, timing of the hospitality plays a crucial role for determining is it simply act of kindness or attempted bribery. Accepting even small courtesies by suspects, or related persons/businesses, in the period of trial might compromise the judge's work.

2.4.3 Relations between the management and the subordinate

Family relations or friendships between the head of the office and subordinates in the office can create a conflict of interests when for example exercising disciplinary powers or by giving reference when the relative or acquaintance applies for a position. Also, other relations can be regarded as conflicts of interest. It is not possible to mention all situations – but if the private interest is so strong that there is a risk that the decision is going to be improperly influenced (for example members of the same football club where they have very close family feelings for each other) it is a situation of conflict of interest – which should be avoided.

⁵ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cce44>

Constable barred from working in wife's courtroom⁶

District judge in Bethlehem, Patricia Romig-Passaro was barred from using constable Jon Whittington in her courtroom in 2015, after officials found out that Romig-Passaro and Whittington were married. "The clear message is that nepotism in any form will not be tolerated, whether it involves the hiring of an office secretary, a clerk, a janitor to clean the office, a contractor to reupholster the waiting room furniture, or the appointment of or assignment to a constable to serve arrest warrants or other process," wrote chief deputy counsel in the Pennsylvania Judicial Conduct Board's newsletter.

The judge went on leave about three weeks after Whittington was barred from her working in her courtroom, and resigned immediately after.

2.4.4 Recruitment and promotions

Also in cases of recruitment to a job in the office or promotion family relations (see above) can create conflicts of interests which should be avoided.

2.4.5 Sponsorships and special arrangements with private sector

If the public official for example has a voluntary job in a local football club where he is a coach for young football players he would not be able to take part in decisions concerning for example tax violations committed by the Club or in lawsuits against the sponsor of the football club.

Kids for cash scandal⁷

In 2009, judge Mark Ciavarella was convicted to 28 years prison sentence, pursuant to a plea agreement, to federal charges of honest services fraud, wire fraud and tax evasion in connection with receiving \$1 million in bribery from the co-owner and builder respectively, of two private, for-profit juvenile facilities. In exchange for these kickbacks, Ciavarella sentenced children to extended stays in juvenile detention for offenses as minimal as mocking a principal on Myspace, trespassing in a vacant building, and shoplifting DVDs from Walmart. More specifically, the crimes charged were: conspiracy to deprive the public of the "intangible right of honest services", or corruption, and conspiracy to defraud the United States by failing to report income to the Internal Revenue Service.

2.4.6 Use of public resources for private purposes

Acting in the public interest means carrying out official duties and responsibilities for the benefit of the public and making decisions that are not affected by self-interest, personal values, private opinions, or the likelihood of personal gain⁸. If the public official therefore uses a car belonging to his office to private purposes it is a violation of his professional duties as well as in the situation where he permanently uses the mobile phone or laptop – also belonging to the office – to private purposes.

⁶ Reported by [Ballotpedia](#), last accessed on 17/4/2017

⁷ Reported by [The Guardian](#), last accessed on 17/4/2017

⁸ Procedures for Managing Conflicts of Interest – New South Wales, page 8

Judge accused of abusing parking privileges⁹

In 2013, Supreme Court judge Eileen Bransten was caught by journalists abusing her parking placard, by parking for hours at “No Standing” and “No Parking” zones in her upper West Side neighbourhood - and her neighbors confirmed that it is her common pattern of behavior. Journalists demanded from the Supreme Court to revoke her privileges.

2.5 Responsibilities

The judge as a public official has to respect key values in relation to the position and act in professional manner. It is therefore necessary that among other things the prosecutor acts in a manner that shows respect for: the law; Impartiality; Reputation; Integrity; Confidentiality; Court; and, other persons.

2.5.1 Identification of the conflict of interest and reporting

The public official always has to be aware of the possible situation of conflicts of interests. In assessing whether there should be conflicts of interests the public official has to include the aspects for example of financial and economic interests, family relations and further relationship with others which may appear to seem problematic. In these situations, he immediately has to report the conflict in the way it is described in the law and internal rules. (About the procedure concerning reporting etc. see article 8 in Law on Prevention on Corruption – which is explained later 4.1 - Conflict of interest.)

2.5.2 Avoiding the conflict of interest where possible

If a conflict of interest appears for a judge the Procedural Law¹⁰ in article 39 prescribes that a judge who learns that one of the reasons for his/her recusal referred to in Article 38 appears, s/he shall immediately report thereon to the President of the Court who shall allocate the case to another judge. (for example, close family relations or relationship to the parties or anyway circumstances raising suspicion to the impartiality of the judge) Also, conflicts of interest mentioned in the ethical code may cause a ground for recusal.

A “conflict of interest” involves a conflict between officials’ personal interests (what they *could gain*, not necessarily financially) and their duty as a public official and is to be avoided as far as is reasonably possible. In general, the *appearance* of a conflict of interest is also to be avoided, to minimise the risk to the organisation’s reputation (and officials’ personal reputation) for integrity. As perceived conflicts of interest could be similarly harmful to the trust in public decision making, managers should also consider perception when they decide on specific cases.

Conflict-of-interest situations cannot be avoided by simply prohibiting all private-capacity interests on the part of public officials: instead, public officials must take personal responsi-

⁹ Reported by [NY Daily news](#), last accessed on 15/04/2017

¹⁰ THE CRIMINAL PROCEDURE CODE, (Official Gazette of Montenegro, no. 57/09, August 18, 2009)

bility for identifying and resolving problem situations, and public institutions must provide realistic policy frameworks, set enforceable compliance standards, and establish effective management systems. They must also provide training, and ensure that officials actually comply with the letter and the spirit of such standards.¹¹

¹¹ MANAGING CONFLICT OF INTEREST IN THE PUBLIC SECTOR – ISBN 92-64-01822-0 – © OECD 2005

3 CODE OF JUDICIAL ETHICS

Judges must take an oath on appointment. In July 2008, the Conference of Judges adopted the Code of Judicial Ethics; it was reviewed in 2014. The Code of Judicial Ethics contains key provisions aimed at enshrining the independence and impartiality of the judicial function, e.g. gifts ban, confidentiality obligation, incompatibilities, financial interests, etc. The Code constitutes a guiding instrument for the Judicial Council as the latter takes decisions on conflict of interest and incompatibilities issues. Integrity plans have now been developed and adopted in all courts.

3.1 Respect for the law

Judges shall conduct proceedings in accordance with the law, on the basis of his/her own assessment of facts and preform judicial duties without favour, bias or prejudice on the grounds of race, colour, religion, national origin, age, marital status, sexual orientation, social and economic status, political belief and any other differences.

Example 1 - The change in law: The judge is of the opinion that a change in law is too strict (he thinks the length of the new punishment is inhuman) so he does not want to follow the new law. Instead he argues in the sentence that there was not sufficient evidence – so the indicted person is found: Not guilty. Is that performance in accordance with the rules he has to apply, including the Ethical Judicial Code?

Example 2 – The car use: A young judge has a car, which was involved in a traffic accident. While his car was repaired, he made use of the car belonging to the court in order to be able to go to work and home from work. Is that act in accordance with the rules he has to apply, including the Ethical Code?

3.2 Respect for impartiality

A judge shall abstain from any action that may raise suspicion of his/her apolitical attitude and shall avoid situations in professional and personal relations with members of legal profession and other persons which might reasonably give rise to suspicion of his/her impartiality.

Example 3 – The dinner invitation: In a pending case one of the parties is represented by an attorney, who is an old friend from law school. The attorney is so happy to see his old friend again – now he has become a judge – and invites him to dinner. Can he accept the invitation?

3.3 Respect for Reputation

A judge shall observe and develop standards of conduct which contribute to safeguarding reputation of a court and to building public confidence in the judiciary both in and out of the court and shall not use his/her profession, official capacity and reputation to generate material gain for himself/herself or for another person or to serve his/her private interests, interests of his/her family members or interests of another person. Further on the judge shall ob-

serve the dress code in court. In his/her public appearances and when commenting on social phenomena in the media, written articles, public events, lectures etc. a judge shall strive for his/her appearance to be based on regulations, and for the expressed views and the overall conduct to be in accordance with provisions of this Code.

When the judge is using the social media, Facebook, Twitter etc. is it very important that the expressions are so clear and precise that there is not a risk that the public may perceive the judge's own private expressions as official statements from the judicial sector.

The judge ought to be very careful about who is going to have access to his content on social media and be aware that the photos or the content he shares may be used by others. He shall consider the content placed on or shared on social media, as published. He always has to be aware of his confidentiality. He has to consider very carefully before he publicly manifests about issues that may risk discrediting his impartiality in the performance of the work in the judiciary. He also has to be aware that public can also signify attitudes to, for example "Like" a post or engage in a discussion thread on someone's profile. He shall avoid adding pictures or information about his colleagues or others, for example from a social event at work, on the web without their consent.¹²

And at last when he is on the social media as a private person it must not be doubted that his expressions are his own and private ones. Every reference to his job as a judge should be avoided.

Example 4 – The car parking: It is very difficult to find a parking space near the court – but the judge thinks it is very important, that he is able to park near the court because he has some files to carry from his car to the court. He parks his car on a space where parking is prohibited. Is that a problem?

Example 5 – Facebook: The judge is very active on Facebook, where he is known as "The Judge". Is that that in conformity with the ethical rules?

3.4 Respect for Integrity

The area for receiving gifts is much narrower than receiving gifts in general for public officials. A judge shall abstain from receiving gifts and services free of charge from parties and other participants in the proceedings, but also from all those because of whom suspicion of his/her impartiality and objectivity might be raised. A judge shall not allow members of his/her family, court staff or anyone else that is subject to the authority of the judicial office to accept a gift, loan or favour for what the judge is anyway obliged to do or for what he/she has done in performing his/her judicial duties.

¹² <http://www.anklagemyndigheden.dk/Documents/god-adfaerd-og-etik-i-anklagemyndigheden.pdf>

Example 6 – The price reduction: The judge is a member of the Association of Judges. The Association has made an agreement with a department store according to which members of the association get 5 % reduction in prices when they shop in the store. Also, other associations have made that agreement. Is that a breach of the ethical code?

Example 7 – The exclusive restaurant: The judge goes to a very exclusive restaurant to celebrate his wife's birthday. The owner of the restaurant offers the judge 25 % reduction in the price, when he recognizes the judge. Which options does the judge have?

3.5 Respect for Confidentiality

A judge shall abstain from giving any information to the media and interested persons regarding specific cases if he/she has not been authorised to do so. Outside of court sittings and hearings, a judge shall abstain from expressing opinion about the case he/she has been assigned, as well as about the other pending cases and judicial proceedings and court decisions.

Example 8 – The press campaign: The media do not like a conviction and criticise the judge who was adjudicating the case. There are very critical articles in newspapers written by journalists. The judge is very angry and feels insulted. Is he entitled to justify his decision?

3.6 Respect for the Court (the work as a judge)

A judge shall maintain order and decorum in all the proceedings conducted before the court and shall be dignified, courteous and respectful in relation to the parties and other participants in proceedings, as well as in relation to the court staff. A judge shall perform duties in a dedicated manner and with reasonable promptness.

Example 9 – The delayed judge: The start of the court hearings in X-town is normally delayed because of the delay of the Judge – up to half an hour. The judge thinks that he does not have to be promptly – anyway it is him who has to make the decisions/verdicts. Are the repeated delays a breach of the Ethical Code?

Example 10 – The Roma: The indicted person in a case is a Roma. The judge is irritated because of the explanation and closes the interrogation saying: "You are welcome to say anything you want. But I do not believe in your explanation because all Romas are liars". Is this a violation of the Code?

4 EXEMPTION OF JUDGES

According to the Ethical Judicial code the judge shall request to be disqualified from proceedings of the case in which there are reasons that give rise to suspicion of his/her ability to make impartial decision. Suspicion of impartiality of a judge is particularly raised by family, friendship, business, social and other relations with parties and their representatives. The main article about conflicts of interests is so important that it is a specific rule in the Criminal Procedure Code from 2009 (2015):

Chapter III, Reasons for Recusal, Article 38:

Judges may not perform their judicial duties in the following cases:

- 1) if they are personally injured by the offence;
- 2) if the accused persons, their defense attorney, the prosecutor, the injured party, their legal representative or proxy is the judge's spouse, former spouse or extra-marital partner or direct blood relative to any degree whatsoever, collateral blood relative to the fourth degree, or relative by marriage to the second degree;
- 3) if s/he is a guardian, ward, adopted child, adoptive parent, foster-parent or foster-child of the accused person, his/her defense attorney, the prosecutor or the injured party;
- 4) if in the same criminal case s/he has carried out evidentiary actions or has taken part in the procedure in the capacity of a prosecutor, defense attorney, legal representative or proxy of the injured party or the prosecutor, or if s/he has been heard in the capacity of a witness or expert witness;
- 5) if s/he has taken part in rendering a decision of a lower court or a decision referred to in Article 302, paragraph 10 of the present Code in the same case or in rendering a decision of the same court being contested by an appeal; or
- 6) if circumstances exist that raise suspicion as to his/her impartiality.

The procedure concerning recusal is described in the code in articles 39 – 43. The persons who may request the recusal of a Judge are mentioned in article 40¹³ of CPC:

Example 11- The old friendship: A judge in a major criminal case has known the counsel for defence since college. They have since met once a year – also privately. Does the acquaintance excludes one of them to take part in the court hearings?

¹³ Article 40

(1) Recusation of a judge may be requested by the parties, defense attorney and injured party.

(2) The parties, defense attorney and injured party may submit a petition for the recusation of a judge until the commencement of the main hearing, and if they learn about the reason for the recusation later, they may submit the petition immediately after that realization.

(3) The petition for recusation of a higher court judge may be submitted by the parties, defense attorney and injured party immediately after learning about the recusation reason, and at the latest by the commencement of the panel session or hearing.

(4) The parties, defense attorney and injured party may request only the recusation of an individually designated judge exercising his/her judicial power in that particular case.

Example 12 – The false witness: A judge overrides the evidence in a case of drunk driving. Subsequently, the case of false testimony is referred to that judge. Is he able to deal with that case?

Example 13 – The strict Judge: An accused in a criminal case knows the judge from past and know that he is a strict judge. Is it possible for the indicted person to get rid of the judge?

Example 14 – The second thief: Two people are accused of together having committed a theft. The case is dealt with separately. Judge convicts the first one for having committed the theft *together* with the other one. Is it possible to the same judge to convict number two?

Example 15 - The share owner: A judge has shares for € 5,000 in a company that goes bankrupt. There are pressed charges against the director of the company for criminal offenses in connection with its bankruptcy. Is the Judge able to act as a judge in the case?

5 INSTITUTIONAL FRAMEWORK

Disciplinary proceedings are initiated by a Disciplinary Prosecutor, who is elected by the Judicial Council for a two-year period from among judges with at least 15 years' experience, upon the proposal of the General Session of the Supreme Court.

A disciplinary Committee is responsible for adjudicating in minor and severe disciplinary infringements.

The Judicial Council decides when the most serious disciplinary matters are concerned. Decisions on disciplinary measures can be reviewed before the Supreme Court.

The Commission for the Code of Ethics solely decides whether the Code of Ethics was violated in specific case, or not, without possibility of reprimand, or sanction. In case that breach of Code of Ethics also implies disciplinary liability of the judge, the case is being forwarded to Disciplinary Commission for further processing.

The Commission has 1-5 sessions per month.

As to advice on ethical dilemmas, individual judges may turn to the president of the court, to the Judicial Commission for the Code of Ethics and the Agency for the Prevention of Corruption.

6 APPENDIX 1: ANALYSIS AND SOLUTIONS TO THE EXAMPLES IN THE PAPER

Example 1 - The change in law: *No, it is essential to act legally. If he thinks that the result could be unfair he can always use mitigating circumstances to make a milder sentence. If he is not following the rules he may commit a violation not only of the Ethical Code but also of the articles about misuse of office, Criminal Code articles 416 or 417.*

Example 2 – The car use: *No. The use of property belonging to the state is not for private purposes. It is a violation not only of the Ethical Code but also of the articles 419 and 421 a about Fraud in the Conduct of Official Duty.*

Example 3 – The dinner invitation: *It should not be excluded that a judge can enjoy a meal together with an old friend – even if the friend is a lawyer. But if they are connected by a mutual case, every meeting outside the court or outside the office should be excluded as long as the case continues. And if they are too close friends the judge must ask to be exempted from the case.*

Example 4 – The car parking: *The judge has to behave in a manner that no one can say that he takes advantage of his position as a judge. Therefore, it hurts the reputation of the judges if he does not follow general rules. He has to pay a fine for the illegal parking as all others. It is a question if this fine should be combined with a disciplinary action. Probably the gravity and frequency could determine this question.*

Example 5 – Facebook: *When he uses Facebook – and it is as a private person - he must act as a private person and any hint or reference to his job as a judge should be avoided.*

Example 6 – The price reduction: *If it is a general arrangement – an arrangement which is also open to other categories of associations, it is not a violation of the Ethic Rules. If the manager of the department store f. example is accused for serious tax fraud the judge can no longer enjoy the price reduction but either must find another store to make his shopping or pay the full price (without reduction).*

Example 7 – The exclusive restaurant: *In that case – the reduction is very high and it is because of his job as a judge – he either has to reject the reduction or find another restaurant to celebrate his wife.*

Example 8 – The press campaign: *No, see (ethical code, article 9):*

A judge shall abstain from giving any information to the media and interested persons regarding specific cases if he/she has not been authorised to do so.

A president of a court or a judge authorised to provide information to the media shall give the most objective information, while ensuring that giving such information at the moment of communicating it is justified and permitted, given the stage of proceedings and taking into account all the circumstances of the case, and particularly the need to protect personal and family life of parties and other participants in the proceedings, in-

terests of juveniles as well as to protect personal and family life of a victim and defendant so as not to violate their rights.

Example 9 – The delayed judge: *Yes, it is a breach of the Ethical Code if the judge does not respect the work of the court – even if the judge is of the opinion that he (the judge) does not have to respect timetables. (But everyone has the right to file a complaint about the judge).*

Example 10 – The Roma: *Yes, it is a violation. The statement touches all Romas and not only the indicted person.*

Example 11- The old friendship: *It is very difficult to say either yes or no. It depends on how close the relations between the two parties are.*

Example 12 – The false witness: *No, he has a knowledge (has made a decision in) to the case that disqualify him (anyway he is not totally impartial). Furthermore, he cannot presume to have the presumption of innocence.*

Example 13 – The strict Judge: *No, it is not possible for the defendant to choose the judge. Only in situations where the defendant is able to make probable that the judge is not impartial (for example – many years ago, they were in love with the same girl, and the judge lost).*

Example 14 – The second thief: *No, he has a knowledge (has made a decision in) to the case that disqualify him (anyway he is not totally impartial). Furthermore, he cannot presume to have the presumption of innocence.*

Example 15 - The share owner: *He is not able to be totally impartial and therefore he has to exempt.*

7 APPENDIX 2 - LEGAL FRAMEWORK (COLLECTION OF ARTICLES FROM RELEVANT LAWS)

7.1 Criminal Code

The Criminal Code of Montenegro provides for sanctioning of the judge if he accepts a bribe, misuses his office, in other ways breaches the law during conducting his duties or commits fraud in the conduct of official duty. Below is an outline of the applicable articles from the CC.

Passive Bribery - Article 423

(1) A public official who directly or indirectly solicits or receives a gift or any other undue advantage, or who accepts a promise of a gift or any undue advantage for himself or for another person for agreeing to perform an official or other act which he must not perform, or not to perform an official or other act which he must perform shall be punished by a prison term from two to twelve years.

(2) A public official who directly or indirectly solicits or receives a gift or any other undue advantage, or who accepts a promise of gift or any undue advantage for himself or another person for agreeing to perform an official or other act which he must perform, or not to perform an official or other act which he must not perform shall be punished by a prison term from two to eight years.

(3) A public official who commits the offences under paras 1 or 2 above in relation to detection of a criminal offence, initiating or conducting of criminal proceedings, pronouncing or enforcing of a criminal sanction shall be punished by a prison term from three to fifteen years.

(4) A public official who after performing an official or other act or after refraining from performing an official or other act as envisaged by paras 1, 2 and 3 above, or in conjunction with such acts, solicits or receives a gift or other undue advantage shall be punished by a prison term from three months to three years.

(5) A foreign public official who commits any of the offences under paras 1, 2, 3 and 4 above shall be punished by the punishment prescribed for that offence.

(6) Where a responsible officer or another person in an institution or other non-commercial entity commits any of the offences under paras 1, 2 and 4 above shall be punished by the punishment prescribed for that offence.

(7) The gift received or any other undue advantage gained shall be confiscated.

Misuse of Office – Article 416

(1) A public official who misuses his office or authority, oversteps the limits of his official authority or refrains from performing his official duty and thereby obtains for himself or another person undue advantage, or causes damage to another person or severely violates the rights of another person shall be punished by a prison term from six months to five years.

(2) Where the commission of the offence under para. 1 above resulted in pecuniary gain exceeding three thousand euros, the perpetrator shall be punished by a prison term from one to eight years.

(3) Where the value of pecuniary gain exceeds thirty thousand euros, the perpetrator shall be punished by a prison term from two to twelve years.

Malpractice in Office – Article 417

(1) A public official who, in breach of law or other regulations or general legal acts, refrains from conducting his supervision duty, and otherwise improperly acts while acting in his official capacity although he knew or could have known and was obliged to know that this may result in severe violation of rights of another person or damage to the property of another person, provided that such a violation or damage exceeding three thousand euros actually takes place, shall be punished by a fine or a prison term up to three years.

(2) Where the offences under para. 1 above resulted in grave violation of rights of another person or damage exceeding thirty thousand euros, the perpetrator shall be punished by a prison term from six months to five years.

(3) A responsible officer in an institution or other entity, with the exception of those engaged in a business activity, who commits the offences under paras 1 to 2 above shall be punished by the punishment prescribed for that offence.

Fraud in the Conduct of Official Duty – Article 419

(1) A public official who, while acting in his official capacity, with the intention of obtaining for himself or another person illicit pecuniary gain by submitting false statements of account or who otherwise misleads an authorized person to make an unlawful payment shall be punished by a prison term from six months to five years.

(2) Where the pecuniary gain obtained as a result of the offence under para. 1 above exceeds three thousand euros, the perpetrator shall be punished by a prison term from one to eight years.

(3) Where the offence under para. 1 above results in pecuniary gain exceeding thirty thousand euros, the perpetrator shall be punished by a prison term from two to ten years.

7.2 Law on Prevention of Corruption

Judges are public officials and as such covered by the Law on Prevention of Corruption (LPC)¹⁴. The law prescribes measures for prevention of conflict of public and private interest and sets restrictions in the exercise of public functions (gifts, sponsorships and donations), foresees submission of assets declarations by public officials, regulates protection of persons reporting threats to the public interest that indicate the existence of corruption (whistle-blowers), as well as other issues of importance (integrity plans) for the prevention and suppression of corruption.

7.2.1 Conflict of interest

Article 7

A public official shall perform his/her function in such a manner that the public interest is not subordinated to private, and without causing a conflict of interest in the exercise of public function.

The conflict of interest in the exercise of public function exists when a private interest of a public official affects or may affect the impartiality of the public official in the exercise of public function.

The Agency shall establish the existence of a conflict of interest and implement measures for prevention of conflict of interest.

Opinions about the existence of conflict of interest in the exercise of public function and restrictions in the exercise of public functions and the decisions on the violation of the provisions of this Law relating to the prevention of conflicts of interest in the exercise of public functions, restrictions in the exercise of public functions, gifts, sponsorships and 3 donations and reports on income and property by public officials, which are issued or adopted by the Agency in accordance with this Law, shall be binding for a public official.

It shall be deemed that a public official has violated the provisions of this Law if he fails to act in accordance with the opinion of the Agency referred to in paragraph 4 of this Article and with the obligations laid down in this Law or when he/she acts in a manner that violates the prohibitions and rules prescribed by this Law and other regulations regulating the conflict of interest in areas that are regulated by these regulations. Statement of Conflict of Interest

Article 8

If, in the authority in which he/she exercises a public function, public official participates in the discussion and decision-making in the matter in which he/she or a person related to the public official has a private interest, he/she shall inform other participants in the discussion and decision-making thereon by making a statement on the existence of private interest,

¹⁴ LAW ON PREVENTION OF CORRUPTION, (Official Gazette of MNE no. 53/2014),

prior to his/her participation in the discussion, and no later than before the beginning of the decision-making.

The obligation of making a statement referred to in paragraph 1 of this Article shall not apply to MPs, councillors and public officials who are subject to the rules on exemption prescribed by a special law or other regulation.

The authority in which the public official exercises public function shall include the statement made by a public official referred to in paragraph 1 of this Article in the minutes and request the opinion of the Agency thereon.

In the case referred to in paragraph 1 of this Article, the public official shall not participate in the discussion and decision-making until the Agency issues an opinion on the existence of the conflict of interest.

If, in the case referred to in paragraph 1 of this Article, the Agency determines the existence of conflict of interest and informs the public official and authority referred to in paragraph 3 of this Article thereon, the public official shall not participate in the discussion and decision-making and the authority shall adopt the decision on his/her exemption.

The authority shall prevent the enforcement of decisions taken contrary to paragraphs 1 to 4 of this Article and put it out of force, in accordance with the Law, and shall notify the Agency thereon.

7.2.2 External Engagement

Article 9

A public official may be engaged in scientific, educational, cultural, artistic and sports **active** ties and acquire income from copyrights, patent rights and other similar rights, intellectual and industrial property, unless specified otherwise by the law.

Membership of a public official appointed or elected in the permanent or temporary working bodies established by an authority shall not be deemed a performance of two or more public functions in terms of this Law, except for those who make decisions or participate in decision-making process.

A public official shall report to the Agency accurate and complete data on income acquired through the exercise of activities or tasks referred to in paragraph 1 and 2 of this Article. In the case of membership in several working bodies referred to in paragraph 2 of this Article, a public official may acquire income only in one working body in the given month.

7.2.3 Integrity plans

Article 71

Based on estimates of the susceptibility of certain jobs and work processes to the emergence and development of corruption and other forms of biased conduct of public officials and employees of an authority, the authority shall adopt an Integrity Plan containing measures to prevent and eliminate opportunities for the emergence and development of corruption and providing confidence of citizens in their work (hereinafter: Integrity Plan).

The Integrity Plan shall be adopted in accordance with the rules for the development and implementation of the Integrity Plan adopted by the Agency.

The Integrity Plan may be adopted by another legal person as well, and the Agency may, upon the proposal of this legal person, assess the integrity and propose recommendations for its improvement.

The costs of the integrity assessment referred to in paragraph 3 of this Article shall be borne by the legal person upon whose proposal the Agency conducted the assessment.

7.2.4 Gifts

Article 16

Public officials shall not accept money, securities or precious metal in connection with the exercise of public function, regardless of their value.

Public officials shall not accept gifts in connection with the exercise of public function, except for protocol and appropriate gifts.

Protocol gift shall mean a gift from representatives of other states or international organizations, which is given when paying or receiving a visit, or on other occasions, as well as other gifts presented in similar circumstances.

Appropriate gift shall mean a gift to the value of € 50. If, within a year, a public official receives more than one appropriate gift from the same donor, the total value of such gifts shall not exceed the amount of € 50, and if a public official receives gifts from several donors in this period, the value of such gifts shall not exceed € 100.

The prohibition or restriction referred to in paragraph 1 and 2 of this Article shall also apply to married and common-law spouses and children of public officials if they live in the same household, if the receipt of money, securities, or precious metals and gifts is in connection with the public official, or the exercise of public function. Gift value shall be calculated on the basis of its market value on the date of receipt.

Article 17

A public official who is offered a gift that he is not allowed to accept shall refuse the offer, i.e. inform the donor that he/she cannot accept the gift.

A public official shall, within eight days of the offer under paragraph 1 of this Article, prepare a written report on the offer made and submit it to the authority in which he/she exercises a public function.

If a public official, in the case referred to in paragraph 1 of this Article, was not able to refuse the gift or return the gift to the donor, he/she shall hand over the gift to the authority in which he/she exercises the public function, and the gift shall become state property or property of the municipality.

Article 18

Received gifts and their value shall be entered into the record book of gifts kept by the authority in which the public official exercises public function.

If it is determined that the appropriate gift is of greater value than the value referred to in Article 16, paragraph 4 of this Law, the gift shall be handed over to the authority in which the public official exercises public function for management and shall become state property, or property of the municipality.

Protocol gifts shall, regardless of their value, become state property, or property of the municipality.

The manner of management and use of gifts referred to in paragraph 1, 2 and 3 of this Article, the manner of keeping record books of gifts, as well as other issues relating to restrictions regarding the acceptance of gifts in connection with the exercise of public functions shall be prescribed by the state administration body in charge of anti-corruption (hereinafter: the Ministry).

Article 19

The authority referred to in Article 18, paragraph 1 of this Law shall submit an excerpt from the record book of gifts it keeps to the Agency by the end of March of the current year for the previous year.

If the Agency determines that the actions were not in accordance with this Law, it shall inform the authority which submitted the excerpt from the records thereon.

The Agency shall prepare a catalogue of gifts that the public officials received in the previous year and publish it on its website.

Article 20

Based on the knowledge that a public official has received a gift contrary to the law, the Agency shall carry out the procedure in accordance with this Law.

In cases where the Agency determines that a public official has received a gift contrary to the law, a public official shall hand over the gift, or the equivalent monetary value of the gift, to

the authority where he/she performs the function, which shall thus become state property or property of the municipality.

7.2.5 Declaration of income and assets

Article 23

The public official shall, within 30 days from assuming the function, submit to the Agency a Report on Income and Assets, as well as on assets and income of married and common-law spouse and children, if they live in the same household (hereinafter: the Report), according to the state of play on the day of election, appointment, or assignment.

The public official shall provide accurate and complete information in the Report. During the exercise of public function, the public official shall submit the Report:

- Once a year, by the end of March of the current year for the previous year;
- In the case of changes in the Report that relate to an increase in assets of more than € 5,000, within 30 days from the date of change;
- At the request of the Agency in the case of initiation of proceedings referred to in Article 31, paragraph 1 and 2 of the **LPC**, within 30 days from the receipt of the request, or initiation of proceedings ex officio.
- In the case of termination of public function, a public official shall, notify the Agency thereon and submit the Report within 30 days from termination of the function.

Public official whose office has terminated shall submit annual Report to the Agency, according to the state of play on the day of submitting the Report, for the period of two years following the termination of office.

When moving to another public function, as well as in the case of election, appointment, or assignment to another public function, the public official shall, pursuant to Article 12, paragraph 2 and 4 of this Law, notify the Agency thereon within 30 days from the date of change.

The obligation to submit Report and the procedure of verification of the data from the Report shall also apply.

7.2.6 Restrictions upon Termination of Public Office

Article 15

For a period of two years following the termination of public office, the public official shall not:

- 1) Act, before the authority in which he/she exercised a public function, as a representative or attorney of a legal person, entrepreneur or international or other organization having or establishing a contractual or business relationship with this authority;
- 2) Establish a working relationship or business cooperation with the legal person, entrepreneur or international or other organization that acquires gain based on the decisions of the authority in which a public official has exercised function;

3) Represent a natural or legal person before the authority in which he/she exercised a public function in a case in which he participated, as a public official, in the decision-making process;

4) Perform management or audit activities in the legal person in which, at least one year prior to the termination of public function, his/her duties were related to supervisory or control activities;

5) Enter into a contract or other form of business cooperation with the authority in which he/she exercised a public function;

6) Use, for the purpose of obtaining a benefit for himself/herself or another person, or to harm another person, the knowledge and information acquired in the performance of public function, unless the knowledge and information are available to the public.

7.3 Law on Judicial Council and Judges - Disciplinary Measures

The procedure for determining disciplining responsibility has been significantly upgraded following the latest amendment of the Law on the Judicial Council and Judges. A judge is held disciplinarily responsible if s/he seriously misconducts or impedes judicial office.

Article 108

A judge and a court president as a judge shall have disciplinary liability for minor, severe and the most severe disciplinary offences.

A minor disciplinary offence of a judge shall exist if he / she:

1) Fails, without justified reason, to assume cases for work in the order in which they are received, in accordance with the law and the Court Rules of Procedure;

2) Comes late or does not come to scheduled trials, hearings or sessions of the panel without justified reason;

3) Does not attend mandatory training programmes without justified reason;

4) Does not meet the obligations of a mentor during initial training and training of trainees;

5) Does not take statutory measures to respect the court and the parties to the proceedings.

Severe disciplinary offence of a judge shall exist if he / she:

1) Fails, without justified reason, to schedule trials or hearings in cases assigned to him / her for work, or delays the proceedings in another manner;

2) Delays the proceedings or does not assume the case for work without justified reason, where, due to statute of limitations, such action results in barred criminal prosecution or barred enforcement of criminal sanctions for the criminal offence for which a prison sentence of at least one year is prescribed;

3) Exceeds, without justified reason, the triple statutory deadline for making decisions in at least three cases;

4) Fails to seek a recusal in at least three cases in which he / she knew there was a reason for his / her mandatory recusal in the course of one calendar year;

5) Fails, without justified reason, to respect the programme for resolving backlog of cases or does not act upon the decision under a control request;

6) Prevents supervision in accordance with the law;

- 7) In the exercise of judicial office, or in a public place, brings himself / herself into a state or behaves in a manner that is not appropriate to the exercise of judicial office;
- 8) Treats participants in court proceedings and court staff inappropriately;
- 9) Discloses confidential information that he / she learned while acting in cases or performing a judicial office;
- 10) Uses the judicial office to achieve his / her private interests and interests of his / her family or close persons;
- 11) Accepts gifts or does not submit data on property and income in accordance with the regulations governing the prevention of conflicts of interest;
- 12) Has been absent from work for five consecutive days without excuse;
- 13) Publicly declare an opinion on the case that has not become final and enforceable;

The most severe disciplinary offence of a judge shall exist if he / she:

- 1) Has been convicted of an offence that renders him / her unworthy to perform judicial office;
- 2) Performs the judicial office incompetently or unconscientiously.

The offence referred to in paragraph 4, item 1 of this Article shall be a criminal offence that is prosecuted ex-officio and for which a prison sentence is prescribed.

Incompetent or unconscientious performance of judicial office shall exist if a judge:

- 1) Without justified reason, does not achieve at least 50% of the results in terms of quantity of work in relation to the average quantity benchmarks in certain types of cases, as determined by the Judicial Council, unless the judge provides valid reasons for not achieving results in terms of quantity of work;
- 2) Starts exercising parliamentary or other public office or professionally performing other activities;
- 3) Has been appraised with a not satisfactory grade twice in a row;
- 4) Has been imposed disciplinary sanctions for severe disciplinary offences twice.

Article 109

Disciplinary sanctions shall be a warning, a fine, ban on promotion and dismissal.

A warning and a fine in the amount of 20% of the salary of the judge, lasting up to three months, shall be imposed for minor disciplinary offences.

A fine in the amount of 20% to 40% of the salary of the judge, lasting for a period of three to six months and a ban on promotion shall be imposed for severe disciplinary offences.

If the proceedings are conducted for two or more minor disciplinary offences, the judge may be imposed the disciplinary sanctions for severe disciplinary offence.

Dismissal shall be imposed for the most serious disciplinary offences.

A ban on promotion shall imply that a judge may not be appointed to a higher court before the expiration of two years from the date of finality of the decision imposing a disciplinary sanction.