

RISK ANALYSIS OF CORRUPTION WITHIN JUDICIARY



“Corruption among judges and prosecutors is not necessarily as widespread as public perceptions might suggest.”

Strengthening the Capacities of Law Enforcement and Judiciary in the
Fight against Corruption in Serbia (PACS)

Funded
by the European Union
and the Council of Europe



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ASSESSMENT OF RISKS OF POOR CONDUCT AND CORRUPTION IN THE SERBIAN JUDICIARY AND PROSECUTION

JOINT EUROPEAN UNION – COUNCIL OF EUROPE PROJECT

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INTRODUCTION AND EXECUTIVE SUMMARY

This study makes a general assessment of the capacity of the judiciary and prosecution in Serbia to promote and sustain integrity and good conduct, and identifies factors that may lead to or increase the risk of poor conduct in either institution. The primary focus of the assessment is not corruption but a broader set of problems, one of which may be corruption. For the purpose of the study poor conduct is defined as any conduct that undermines the proper performance by either institution of its function. It includes (a) corruption, (b) misconduct or poor conduct which does not involve corruption, as well as (c) conduct that results from unauthorised external pressures or perceptions of such pressures. Section 1 elaborates the scope and methodology of the study in more detail.

Three key points should be noted with regard to the scope and coverage of the risk assessment:

- The assessment focuses primarily on the criminal courts and prosecution offices, with much less information gathered specifically on the civil, commercial, administrative or misdemeanour courts. However, many of the issues covered are likely to apply equally or similarly to these other branches of the judiciary and prosecution. The criminal courts and prosecutors' offices do not necessarily present the only target for persons seeking to corrupt the judicial system, and poor judicial or prosecutorial conduct can have very serious consequences in the civil or commercial field as well as the criminal.
- The assessment should be read in conjunction with the PACS report 'Risk Analysis on Obstacles to Efficient Criminal Investigations and Proceedings' (EC-CU-PACS SERBIA-TP9-2014). Corruption and other poor conduct in the judiciary and prosecution should be seen in the

context of the entire law enforcement cycle: the prosecution and police are closely linked in investigating crime, and problems of misconduct in the police in general are equally important as those at the level of the prosecution and courts.

- Insofar as the assessment is concerned with corruption, the objective of the assessment is not to assess the effectiveness of the judiciary and prosecution in dealing with cases of corruption which are referred to them in connection with their respective professional responsibilities, but to assess their effectiveness in preventing and tackling such conduct within their own ranks.

The key findings of the risk assessment are the following:

- According to surveys, public perceptions of misconduct in the judiciary - specifically misconduct linked to corruption - are very high. However, such surveys should not be regarded as an accurate measure of actual levels of corruption. Surveys of citizens' actual experience of corruption in the judiciary yielded varying results, making them unsuitable for deriving clear conclusions. Many of those interviewed during the assessment argued that **corruption among judges and prosecutors is not necessarily as widespread as public perceptions might suggest.**
- Many of the formal frameworks for underpinning good conduct in Serbia (for example ethics codes) are adequate, although awareness of them is in some cases limited. However, the **institutional framework for governance of the judiciary and prosecution is one in which the appointment and promotion of both professions is politicised and where appointments are subject to periodic renewal, resulting in a serious threat to the necessary independence and impartiality of both branches.** These factors create a risk of undesirable influence on the conduct of prosecutors and judges, whether directly or in the

form of pre-emptive caution in dealing with cases that affect the interests of politicians or those whose interests they wish to protect.

- Following the unlawful *de facto* dismissal of judges and prosecutors in 2009 the High Judicial Council (HJC) and State Prosecutorial Council (SPC) were elected in 2011 without the participation of a substantial body of judges and prosecutors. **As a result, the HJC and SPC are perceived by many to lack legitimacy or credibility, making them weak and ineffective and unlikely to perform key functions properly.** Specifically, bodies held in such low regard are unlikely to be effective champions of high judicial standards or perform other vital regulatory function with the necessary credibility, including the key functions of performance evaluation and disciplinary proceedings. There was a strong impression that this situation underpins a general feeling of *malaise* in the two professions.
- The creation of the **Judicial Academy** as the only channel for people to become judges or prosecutors represents a laudable attempt to limit the influence of cronyism and clientelism in appointments. However, the lack of a transitional solution to allow the possibility of those who have worked for long periods of time as judicial or prosecutorial assistants becoming judges or prosecutors without having to complete the entire Academy curriculum risks demoralising key personnel and causing valuable talent to leave the judicial and prosecution systems.
- The judiciary and particularly the prosecution suffer from an acute **lack of resources**, technical and organisational support, or in the best case unevenly allocated resources, a problem that places obstacles in the way of the proper performance by judges and prosecutors of their functions.
- The coming into effect of the new **Criminal Procedure Code (CPC)** for all prosecution offices on 1 October 2013 introduced

radical changes in prosecutorial powers and the organisation of the courts which **create risks of misconduct**. Many interlocutors agreed that the changes were introduced without adequate preparation and training or the necessary allocation of resources.

The consolidated **recommendations** of the assessment are the following:

1. In line with Objective 1.1.1.3 of the National Judicial Reform Strategy (NJRS), constitutional amendments should exclude the National Assembly from any role in the election of judges (including court presidents), prosecutors and (subject to the more detailed comments concerning European standards which follow) the High Judicial Council and State Prosecutorial Council. As the HJC and the SPC have a role in the selection and career of judges and prosecutors the method for electing them should be in accordance with European standards and recommendations as well as the opinions of the relevant authoritative European bodies.¹ These instruments make clear that: a majority or a substantial component of judicial councils should be elected by the judges and prosecutors themselves; they should include representatives of civil society and the legal profession, who may be chosen by lawyers and civil society themselves; in no circumstances should

¹ These are in particular: the European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23); Recommendation (2010)12 of the Committee of Ministers of the Council of Europe on Judges: Independence, Efficiency and Responsibilities; with Opinion No. 1 (2001) of the Consultative Council of European Judges (CCEJ) on standards concerning the independence of the judiciary and the irremovability of judges; Opinion No.10 (2007) of the CCJE on the Council of the Judiciary at the Service of Society; and the recommendations of the Venice Commission, in particular its "Report on Judicial Appointments CDL-AD(2007)028 of 16-17 March 2007, Report on the Independence of the Judicial System Part I: The Independence of Judges" CDL-AD(2010)004 of 12-13 March 2010; and "Report on European Standards as regards the Independence of the Judicial System: Part II- The Prosecution Service" CDL-AD(2010)040.

councils include practising politicians; where parliament has a role it should be confined to the election of members who are not judges, and by qualified majority to avoid politicisation; councils should be free to choose their own chairs. Prosecutors and judges should then be elected in turn by the reformed Councils.

2. In line with strategic guideline 1.4.1 of the NJRS, and particularly measure 1.4.1.3, clear rules and procedures should be established for the appointment of court presidents and public prosecutors in order to end the possibility of these positions being occupied on an acting basis for lengthy periods of time. Specifically, a time limit should be introduced on the length of time a particular position of court president or public prosecutor may be held on an acting basis which should not exceed the period necessary for making the appointment.
3. As an interim measure additional to those contained in the NJRS, in order for the legitimacy of and trust in the High Judicial Council and State Prosecutorial Council to be restored, the current councils should step down in order to facilitate elections in which all currently sitting judges and prosecutors may participate.
4. The HJC and SPC should work to establish themselves as genuine mechanisms for identifying and addressing problems of the branches they govern, mediating communication between judges/prosecutors and other institutions with whom they interact, including appropriate contacts with the executive and the legislature as well as the public and the media, and ensuring accountability to the public insofar as this is compatible with the need to protect the independence and autonomy of judges and prosecutors. Actions to achieve this would include: the provision of a web page (web site/IT platform?) with full access to HJC/SPC decisions and activities along with publication of citizen's complaints (or at least statistical data thereon), research and analysis; organised and announced visits of the HJC/SPC to courts/prosecution offices; clear mechanisms by which judges/prosecutors may contact their relevant council both formally and informally; activities of engagement such as the organisation of an annual conference concentrating on a particular important issue or issues; the formulation and publication of guidelines and codes of conduct; participation in public education and the establishment of spokespersons and staff for communication with the media, either in general or, where appropriate, in relation to specific cases.
5. When legal or constitutional amendments are passed to establish the Judicial Academy as the sole route to holding the office of judge or prosecutor, these should include transitional provisions such as a provision under which judicial and prosecutorial assistants who satisfy certain criteria (for example length of employment, age etc.) may be candidates for judge or prosecutor if they take the final Judicial Academy examination, without having to complete the entire course.
6. The judiciary and prosecution should have separate budgets, administered under the control of the reformed HJC and SPC respectively. While respecting the right of the government to make final budget decisions, the budget for the judiciary and prosecution should be determined following detailed proposals (covering both current and capital expenditure) submitted by the HJC and SPC. Where the Government does not accept or alters these proposals, all decisions should be accompanied by a clear and public written explanation.
7. In order to enable the HJC and SPC to carry out budgetary and other administrative tasks each council should employ a senior administrator (in effect a chief executive officer) answering to the council and appropriate staff with skills including accountancy and information technology.

8. It is strongly recommended that the commitments in the NJRS to clarify the resource needs of courts and prosecution offices are backed up by more specific commitments to meet these needs, in particular through adequate budget allocations to ensure that prosecutors especially have adequate space and equipment to perform properly the investigative role given to them by the new Criminal Procedure Code. Greater efforts need to be made to deal with the mismatch between needs and resources which exists at present, with courts in Belgrade and the larger cities overworked and understaffed while some courts in the provinces have a low workload. Measures such as the use of financial or other incentives to persuade judges to move voluntarily to areas where the need is greater should be considered.
9. The authorities should consider changes to the legislative process (i.e. the process by which legislation is initiated and drafted) to require proper regulatory impact assessment prior to proposed legal changes, including assessment of the real need for legislation (as opposed to better enforcement of existing laws), and analysis both of the impact of legal changes on other legal provisions and of enforcement needs.
10. The concept of "binding precedent" is not part of Serbian law and many Serbian lawyers would be strongly opposed to its introduction. While it therefore may be impossible to establish a mechanism that ensures binding interpretations of case law, a mechanism should be introduced by which the Supreme Court of Cassation can issue opinions on disputed points of law which, even if not formally binding, would carry great authority as the opinion of the highest court in Serbia. In particular, it would be advisable to provide further appeal of ordinary decisions to the Supreme Court, at least in cases where the jurisprudence of the Courts of Appeal is inconsistent. In order to prevent the Supreme Court from being overwhelmed, the Supreme Court itself could be given the power to decide whether to hear an appeal, applying a test such as whether the case involved an important or previously undecided point of law. Another possible mechanism to assist in ensuring a more uniform application of law might be to provide for a system of preliminary rulings on points of law referred by lower courts, similar to the system of preliminary rulings in the Court of Justice of the European Union.
11. Objective 2.8 of the NJRS, and in particular the establishment of a central database of court decisions should be formulated/elaborated as a more urgent objective, rather than being generally stated as "long-term". In addition, the Supreme Court of Cassation should establish a system of legal reporting that provides a digest of significant cases on a regular basis.
12. The Regulation on Administration in the Public Prosecution should be amended to clarify exhaustively under what circumstances public prosecutors may deviate from the standard procedure for allocating cases within their prosecution office - thereby removing the catch-all category of "other reasons".
13. Necessary legal amendments should be passed, and sufficient budgetary resources provided, so that prosecution offices and courts introduce recording by electronic means of the collection of evidence from witnesses or suspects and of court proceedings as standard procedure.
14. Amendments to the Criminal Procedure Code should include provisions to ensure that special investigative techniques may be used for a sufficient range of corruption-related offences, including in particular those involving misconduct by judges or prosecutors.
15. Interim measures should be taken to allow the transfer of some administrative

and technical tasks to technical/support staff and judicial associates,

16. Measures should be taken to ensure that technical/support staff and judicial associates are employed on a basis that is commensurate with their responsibilities.
17. Amendments to the Law on Expert Witnesses - and if necessary an implementing regulation - should ensure that criteria for appointment and for payment of fees are clear, that appointments are openly publicised, and that standards of conduct of expert witnesses are clearly regulated.
18. Following the coming into effect of the new Criminal Procedure Code, in order to balance the rights of the defence and prosecution and lessen the risk of arbitrary or abusive decisions by prosecutors, mechanisms to keep prosecutorial discretion in check should be established. These should include i) a mechanism by which judges may require a prosecutor to reconsider decisions such as not to open a procedure or drop charges, in a process explicitly involving the superior prosecution office; ii) sufficiently detailed rules of evidence; iii) internal Guidelines on conduct and advisory channels (see Recommendation 32).
19. Article 77 of the Criminal Procedure Code should be amended to ensure the right to a free defence counsel for any person charged with an offence for which he or she is liable to be imprisoned and who has not the means to pay for a lawyer.
20. Regarding plea-bargaining, a mechanism needs to be found to ensure that sentencing principles are clearly established. In order to encourage early pleas of guilty, courts should be required, in the case of such a plea, to impose a lesser sentence than they would following a fully-fought trial, perhaps of the order of one-quarter or one-third discount. However, the court should not accept a plea of guilty unless satisfied that the accused understands his or her rights and options and has received legal advice, and that the evidence supporting the plea are retained. The appeal court could be given a remit to set out general principles relating to sentencing with an obligation on trial judges to give due weight to those principles. Alternatively, a sentencing advisory body could be established to perform this task.
21. Written guidelines should be issued for prosecutors on the application of the opportunity principle. These guidelines should set out clearly the scope of the prosecutor's discretion, the principles to be applied in its exercise, and the extent to which decisions to apply the opportunity principle should be notified to or approved by a more senior prosecutor².
22. Much more training should be provided to prosecutors and judges on their role and duties under the new CPC, in order to ensure that prosecutors and judges are equipped to perform their function in a manner that is appropriate for an adversarial system that a recently introduced 'graft' onto a different legal tradition. In particular, training for prosecutors should underline that they have now an obligation to safeguard the rights of defendants in adversarial proceedings which are no longer subject to the same judicial oversight as before.
23. The requirements of the CPC in terms of resources should be a key input into determining resource requirements for the judiciary and prosecution (see Recommendation 8).
24. Criteria for the evaluation of judges and prosecutors' performance should be established in a consensus-based manner, i.e. through extensive consultation with those to be evaluated as well as other legal professionals.

² According to the information subsequently provided by the prosecutors from Novi Sad, the Guidelines were already in place thus this recommendation is to be considered as implemented.

They should not include indicators that depend on other factors than judges' or prosecutor's performance, unless these factors can easily be taken into account and controlled for in the process of evaluation.

25. Reflecting the recommendations in Section 1, it is essential that the full independence of the HJC and SPC are established if they are to perform the role of appeal body in performance evaluations.
26. Responses to poor evaluation scores should be made on a case-by-case basis, and should not automatically lead to dismissal. The consequences of mediocre or poor performances should be widened to allow or to require for example compulsory training as a first response to address skills or knowledge gaps. A number of the quantitative evaluation criteria should be reconsidered, in particular the counting of cases dealt with without any consideration of the complexity of cases, the measurement of rates of successful appeals and "success-rates" for prosecutors. If such measurements are to be made the results should be regarded as indicative only and not determinative of a problem in the absence of more detailed analysis.
27. Procedures for issuing evaluations of prosecutors and judges should include mechanisms by which those evaluated have a chance to provide feedback on their evaluation during the process, as well as an appeal mechanism built into the disciplinary mechanism with a further right of appeal to a court of law covering at minimum procedural or legal grounds.
28. The duty to formulate Integrity Plans should not be imposed on all individual institutions of a sector, but only on those with an important coordinating role. For the judiciary this should be the HJC or HJC together with the Supreme Court of Cassation; for the Prosecution it should be the SPC together with the Repub-

lic Prosecutor's Office, given the important role played by the latter already in overseeing anti-corruption mechanisms within the prosecution.

29. The template for Integrity Plans should be altered to make it less prescriptive, and in particular to provide specific institutions with guidelines and a framework for how to think about specific problems within their own institutions, rather than pre-determining the issues to be solved and even measures to do so. In addition, the guidelines should be amended so that Integrity Plans are not narrowly focused on 'preventing and fighting corruption', but more broadly oriented towards underpinning integrity and good conduct - only one component of which is anti-corruption policy in a narrow sense.
30. Institutions should be obliged to update Integrity Plans either at more regular intervals³, or in response to circumstances as they arise - for example the coming into effect of the new Criminal Procedure Code.
31. Judges' and prosecutors' rules and standards of conduct, such as those in the codes of ethics should be disseminated more actively by the HJC and SPC, and the curricula of the Judicial Academy should be revised to include ethics and standards of conduct as a permanent component of ongoing training of judges and prosecutors.
32. Internal guidelines and mechanisms for advisory services (providing advice to prosecutors and judges on appropriate conduct on request) within Prosecution Offices and courts should be introduced. Training should also cover these guidelines through real-life scenarios, such as ethical dilemmas and attempts at improper influence. Training should also in-

3 Although Article 19 of the Guidelines for Integrity Plan Development states that the head of institution may request the preparation of integrity plan earlier/ between these intervals and when he/she estimates that the integrity of institution is compromised, this remains to be an optional/discretionary right only.

volve attorneys and lawyers, in order to encourage common values in the new criminal procedure system.

33. In accordance with Objective 3.1.2.4 of the Anti-corruption Action Plan, the necessary legal amendments and institutional steps should be implemented in order to ensure the Anti-Corruption Agency (ACA) has access to other public databases of property, assets and income of public officials.

1. METHODOLOGY

1.1 Terms of Reference

The Risk Analysis has commenced in May 2013 when the Risk Analysis Methodology Guide⁴ was prepared. This document provides general outline concerning the identification, analysis and assessment of key risks associated with the existence of corruption. Further to that, the Terms of Reference - specifying the steps to be taken and their timeframe - defined three different phases through which the assessment was carried out:

- *Phase 1* - reviewing and collecting relevant and selected literature, legal framework, related surveys and previous researches;
- *Phase 2* – two on-site visits to relevant institutions and interviews with the stakeholders (*during this phase the experts team held meetings/interviews with the representatives of the High Judicial Council, State Prosecutorial Council, judges of the Supreme Court of Cassation, judges and prosecutors of the appellate and higher courts and prosecutors' offices in Belgrade, Nis, Novi Sad and Kragujevac; representatives of the Bar Chamber; Anti-Corruption Agency; Anti-corruption Council; Judicial Academy; NGOs; and in-*

ternational organisations).

- *Phase 3* was dedicated to final assessment of the analysis, preparation of the report and its distribution to respective counterparts.

1.2 Objective

The objective of this study is to identify factors within the judiciary and prosecution system in Serbia which may compromise their capacity to perform their public service function in an impartial, accountable and efficient manner. Such factors are those that increase the likelihood that judges and prosecutors (and also other officials/staff if relevant) will engage in two types of poor conduct:

- i) **Acting in ways that serve their own interests rather than the interests of the public. This can involve:**
 - Corruption of various kinds, in particular:
 - Requesting or accepting bribes in return for making or refraining from decisions or proceeding in certain ways in the course of performing official duties, such as prioritising certain matters;
 - Cronyism - advancing the interests of associated persons such as friends, neighbours, business associates or political allies, either in the course of judicial decision-making or in human resource management;
 - Nepotism - advancing the interests of family members, either in the course of judicial decision-making or in human resource management;
 - Making decisions in the expectation of making a personal gain or obtaining an advantage, or of benefiting another individual or group, even where no direct bribe is involved;
 - Acting in a case despite the existence of a conflict of interest;

4 <http://www.coe.int>

- Other forms of poor conduct or behaviour which are not necessarily linked with corruption, such as:
 - Treating citizens/clients unequally or unfairly
 - Allowing bias or prejudice to affect decisions
 - Failure to follow procedures/observe legal requirements
 - Excessive formalism/proceduralism
 - Insubordination, obstructionism
 - Incompetence
 - Rudeness or bad manners

ii) **Acting in ways (such as making or refraining from certain decisions, or conducting investigations in a certain manner) that respond to external pressures or perceived pressures on the institution not to perform its role in the interests of the public. Such pressures include:**

- Political pressure
- Extortion - securing favourable treatment from judges or prosecutors via threats

The various types of poor conduct may overlap. For example, a common strategy employed by organised crime is to engage in 'throtters' - offering officials of law enforcement or the judiciary benefits if they act in a certain way, combined with the threat of punishment if they do not.

The study assumes that in order to fulfil their public service function effectively, the judiciary and prosecution need to have in place a range of institutional mechanisms designed to prevent poor conduct occurring (preventive mechanisms), and addressing such conduct where it occurs (mitigative mechanisms):

- Preventive mechanisms include a system of governance that ensures the independence and professionalism of judges and prosecutors, fair and merit-based recruit-

ment/appointment, the provision of sufficient resources, working procedures designed to minimise the risk of misconduct, dissemination and implementation of measures and procedures to underpin ethical conduct and protect judges/prosecutors from improper advances, etc.

- Mitigative mechanisms include functioning complaints mechanisms, effective disciplinary proceedings, proportionate sanctions in cases of misconduct etc.

The absence of mechanisms such as those summarised above may be expected to constitute institutional risks, even if the absence of a mechanism does not necessarily result in misconduct. In addition to factors that might directly encourage or facilitate poor conduct of the type described above, this paper also notes factors that might indirectly make poor conduct more likely - for example steps or policies that contribute to general destabilisation, demoralisation, incompetence or other undesirable phenomena.

2. THE JUDICIARY AND PROSECUTION IN SERBIA: STATE OF PLAY

2.1 Structure and main features

Since the ousting of President Slobodan Milošević in 2000, the legal and institutional framework for the judiciary and prosecution in Serbia has undergone major changes. The 2006 Serbian Constitution and subsequent laws established a new network of courts and prosecutor's offices, a new framework of governance and appointment for the judiciary and prosecution, together with changes in basic procedural laws.

The Serbian judiciary is divided in a vertical sense into basic courts, high courts, courts of appeal, and the Supreme Court of Cassation. In a horizontal sense it is divided into ordinary courts, criminal courts, administrative courts

and commercial courts. There are four appellate courts for proceedings, with the exception of commercial courts for which there is one appeal court. In addition, a separate system of misdemeanour courts and High Misdemeanour Court adjudicates on a wide range of lesser offences. The system of prosecution offices largely mirrors the structure of the criminal court system, with a prosecution office corresponding to each criminal court. Each court consists of the President of the court plus other judges, and each public prosecution office consists of the public prosecutor heading the office, plus deputy public prosecutors.

There were about 2,100 judges in 2013, a fall from 2400 in 2006. Following the amalgamation of basic courts into court units under the 2008 law, amendments in 2013 led to the reform of the network again from January 2014, reintroducing many lower courts. The number of court units fell from 103 to 14 while the number of basic courts doubled to 66 basic courts, with 58 basic prosecutor's offices (with a few POs covering two courts). Significantly, the number of judges' positions was increased at the same time to 3089.

In addition to the standard court/prosecution network, in 2002 a special Organised Crime Prosecution Office (OCPO) was created (along with War Crimes Prosecution Office). The OCPO is responsible for the prosecution of organised crime and serious crimes including abuse of power, bribery and trading in influence involving all elected officials and officials appointed or designated by the National Assembly (Parliament), Government, High Judicial Council and State Prosecutorial Council; this therefore includes all members of the HJC and SPC and all judges and prosecutors. The OCPO corresponds to a special department of the Higher Court in Belgrade. The Office is better resourced than other prosecution offices, with higher salaries, sufficient prosecutors and support staff, space, and audio-visual equipment for recording all proceedings.

2.2 Current reform strategies

With regard to the judicial system, two main strategic policy documents are of relevance: the National Judicial Reform Strategy for 2013-2018, and the National Anti-corruption Strategy for 2013-2018. Each of these strategies is accompanied by a detailed Action Plan.

2.2.1 Judicial Reform Strategy

In July 2013 the National Assembly adopted a comprehensive Judicial Reform Strategy for 2013-2018 (hereinafter 'Judicial Reform Strategy'). The Strategy is based on five principles - independence, impartiality and quality of justice, competence, accountability, efficiency - and six priorities:

- Reintegration in the judicial system of the judges and public prosecutors reinstated based on Constitutional Court decisions, and revision of the judicial network
- Resolving the case backlog - at 3 million cases as of December 2013 according to the Ministry of Justice
- Ensuring trial within a reasonable time
- Upgrading the status of the High Judicial Council and State Prosecutorial Council and normative regulation of their responsibilities
- Establishing uniform case law
- Establishing a unified e-justice system

2.2.2 Anti-corruption Strategy

The National Anti-corruption Strategy for 2013-2018 contains a section on the judiciary (including prosecution). With regard to policies to prevent and tackle poor conduct within the judiciary, the following objectives are relevant:

- Ensure full independence or autonomy and transparency of the judiciary in terms of budgetary powers (3.4.1)
- Ensure that the process of selection, promotion and accountability of holders of judiciary functions is based

on clear, objective, transparent and pre-determined criteria (3.4.2)

- Improve mechanisms for prevention of conflict of interest in judiciary professions (3.4.7)
- Provide adequate resources in the Public Prosecutor's Office and courts for dealing with cases of corruption (capacity building) (3.4.8)
- In addition, the section describing the situation in the judiciary also mentions the problem of the absence of legal regulation of the work of court experts.

These strategies and their action plans will be referred to where relevant in the rest of this assessment. In addition to these policies, other reform measures that have been introduced or are in the process of being introduced are the following:

- A new Criminal Procedure Code, which came into effect for the War Crimes and Organised Crime Prosecution Offices in January 2012, and then for all other prosecution offices on 1 October 2013
- New systems for the evaluation of performance of prosecutors and judges
- New mechanisms and procedures for disciplinary proceedings against prosecutors and judges

2.2.3 Role of the Anti-corruption Agency

In addition to mechanisms for promoting good conduct and preventing misconduct within the judiciary and prosecution, an overall framework for the prevention and tackling corruption is established by the Law on the Anti-corruption Agency for public officials, the definition of which includes all judges and prosecutors. The Law establishes the ACA, which is responsible for performing four main functions relevant for preventing and detecting corruption among prosecutors and judges:

- Issuing guidelines for the development of integrity plans in the public and private

sector, and supervising their implementation

- Establishing rules on conflict of interest and dealing with notifications by public officials of conflicts
- Receiving and keeping a register of the declarations of assets and income of public officials
- Acting on complaints submitted by legal entities and natural persons

These mechanisms are covered under specific sections of this report.

3. CONDUCT OF JUDGES AND PROSECUTORS

This section briefly summarises the evidence on issues of poor conduct in the judiciary and prosecution. It should be noted that measuring or assessing actual conduct was not the main objective of this study. The information presented here is regarded by the experts as imprecise and indicative, and should be treated with caution.

3.1 Official evidence

There is very limited official evidence of misconduct in the judiciary and prosecution, in the sense of evidence from disciplinary or criminal proceedings. According to information provided by the Organised Crime Prosecution Office, as of November 2013 it had prosecuted 7 judges since its establishment, with three final convictions involving prison sentences of 3-6 years plus confiscation of proceeds. In addition, the Office has become significantly more active since 2012, initiating proceedings against a number of high-level officials or former officials including 3 former ministers, the current director of the national highway construction company, former directors of the State Agency for Privatisation and Health

Institute, former deputy Secretary General of the Government, and 11 former employees/directors of the national railway.

Disciplinary mechanisms and procedures for addressing misconduct have only recently been established fully (see sections 4.8-4.9), and it is too early to use data based on their functioning. However, the possibility of disciplinary sanctions for prosecutors already existed. According to the Republic Prosecutor's Office, during the five years to 2013 "less than 2-3 prosecutors" were dismissed per year on average as a result of incompetence or poor conduct in decision-making, with none being dismissed in some years.

3.2 Survey evidence

Concerning problems of actual poor conduct in the judiciary and prosecution, surveys indicate that i) perceptions of poor conduct are very high, but ii) actual experience of such conduct, while a significant concern, is much more limited.

Concerning perceptions, most of the available data focuses on corruption. In a UNODC survey⁵ conducted in 2010, around 52% of respondents believed that bribery is common in courts, while 48% believed the same for the Republic Prosecutor's Office. According to a survey conducted by UNDP and CESID (from December 2012⁶), 64% and 63% of respondents regarded the courts and prosecution as corrupt respectively; these figures were exceeded only by political parties (72%) and healthcare (69%), and perceptions have been relatively stable since 2009.

A universal complaint from judges and prosecutors during the on-site visits concerned the alleged inaccuracy of surveys of perceptions of corruption in the judiciary and prosecution. The experts share these concerns: surveys of perceptions of corruption in general must be treated with great caution for reasons that have been widely documented, and some of these reasons

may be particularly relevant in the case of the judiciary and prosecution – for example, the fact that only a limited proportion of the population actually comes into contact with courts or prosecutors, the influence that actual case outcomes may have on corruption perceptions (irrespective of whether corruption was involved or not), etc.

For this reason, surveys of actual experience may be regarded as of considerably more value. The main examples of such surveys conducted in Serbia are the following:

- According to the UNDP survey mentioned above, around 8% of the population paid a bribe during the previous 12 months; another 2.5% were asked for a bribe but refused, while 3% have a family member who paid a bribe. Of those that paid a bribe, around 2-3% paid a bribe to a judge or prosecutor, compared to 55% for doctors, 39% for police officers and 4% for customs officers. Around 10% of citizens who had refused to pay a bribe did so in relation to a judge or prosecutor.
- According to the 2013 Transparency International Global Corruption Barometer, of the 24% of respondents who had come into contact with the judiciary in the past 12 months, 18% declared they had paid a bribe, a substantial increase from 13% in 2010 and 8% in 2009. These figures were higher than in neighbouring countries, with the percentage stating they bribed 16% in "the former Yugoslav Republic of Macedonia" and Bosnia and Herzegovina and 3% in Croatia. The percentages for the police were 16%, compared to 18% in 2007, 9% in 2009 and 15% in 2010 (in the latter case equivalent to around 4% of the population).

The results of these surveys diverge to the extent that it is impossible to state with any confidence a conclusion concerning the extent of actual misconduct in the judiciary or prosecution.

5 <https://www.unodc.org>

6 <http://www.rs.undp.org>

3.3 Interview evidence

Concerning the responses of interlocutors interviewed during the on-site visits who were not judges or prosecutors, a fair summary of the opinions expressed would be the following:

- Classic corruption in the sense of bribery is probably not a widespread problem in the courts or prosecution. For example, incompetence - whether personal or institutional due to reasons such as a lack of capacity, resources or specialisation - is likely to be a more widespread problem.
- However, the conduct of both judges and prosecutors is politically influenced due to their lack of independence. Specifically, it was widely suggested that following the election process for judges and prosecutors in 2010, they are likely to refrain from engaging too actively in high-profile cases that affect or may affect the interests of politicians having in mind what was happening in relation to the re-election process. The re-election process caused uncertainty among judges in the permanence of their functions and had strong impact on the overall stability of the judicial power. Furthermore, both local experts and relevant international organisations' reports indicate that the appointment and promotion of judges and prosecutors are still vulnerable to improper political influence.

It is interesting to note that the perception of actual or potential political pressure/influence was equally strong concerning both judges and prosecutors. Despite the fact that the independence of judges appears to be somewhat better secured institutionally than autonomy of prosecutors, concerns at such influence were raised more often and more strongly by judges than prosecutors (see Section 4.1).

It is also very important to note that certain areas of the judiciary are likely to be more vulnerable than others to different forms of misconduct. While it is beyond the capaci-

ty of this assessment to make clear judgments of the distribution of corruption or other poor conduct among different types of courts, it might be expected that investigations of serious economic crime cases might expose prosecutors and judges to greater corruption pressures (including political pressure) than other criminal cases. The Organised Crime Prosecution Office has come in for some criticism for not initiating earlier a number of the cases mentioned in Section 3.1: the failure to act under the previous government combined with sudden activity following a change of government could give the impression that prosecutors' decisions are susceptible to political influence. In the courts, the misdemeanour courts, which deal with a wide range of relatively minor offences (including for example traffic offences) and impose and collect the vast majority of fines might be relatively vulnerable to small-scale bribery in such cases.

4. ISSUES AND RISK FACTORS

This section describes the main issues covered by this study to assess the integrity and resistance to poor conduct of the judiciary and prosecution, and identifies specific factors which may result in or increase the likelihood of poor conduct.

4.1 *Appointments and Governance*

4.1.1 Election of Judges and High Judicial Council members

Under the Law on Judges, the National Assembly elects judges to their initial period of tenure, from candidates proposed by the High Judicial Council (HJC), the highest governing body for the judiciary. After a three-year probationary period the HJC appoints them permanently: the HJC must make the appointment if the judge has been rated as "performs judicial duty with

exceptional success”, and may not appoint him/her if his/her performance has been rated as „not satisfactory“; apart from this, no criteria for permanent appointment are defined. The National Assembly also elects the president of each court for a four-year renewal term, on the proposal of one or more candidates by the HJC. When the term of the president of a court ceases, the immediately superior court appoints a judge from the same court as acting president until a new president is appointed.

Following permanent appointment, judges may be dismissed if convicted for an offence that carries a prison sentence of at least six months, a “punishable act that demonstrates that he/she is unfit for the judicial function”, incompetence - meaning a performance evaluation assessment of “dissatisfactory”, or in case of a serious disciplinary offence.

The HJC is composed of 11 members:

- Three *ex officio* - the Minister of Justice, chair of the parliamentary committee responsible for the judiciary, and Chair of the Supreme Court of Cassation;
- Six elected judges
- Two elected “credible and prominent lawyers with minimum 15 years of professional experience, one of whom is an attorney and the other a Faculty of Law professor”.

The mandate of elected members is 5 years, and they may not be re-elected consecutively. Of the elected judges, one shall represent each of the following: Supreme Court of Cassation, Commercial Appellate Court, and Administrative Court; appellate courts; higher and commercial courts; basic courts; misdemeanour courts and Higher Misdemeanour Court; and courts from the territory of Autonomous Provinces.

For judges:

- Candidates are proposed by sessions of the relevant courts (i.e. basic courts may propose a candidate from the basic courts

in the territory where s/he performs his/her function), and elected by all judges from the list of proposed candidates, in an election organised by an Electoral Commission formed by the HJC. All judges may vote for a candidate from the type and/or instance of the court where s/he holds office.

- On the basis of the election result, the HJC then proposes to the National Assembly the candidate for each position who won the largest number of votes, or several candidates for positions where more than one proposed candidate received the same number of votes. The National Assembly then elects the candidate for each position nominated by the HJC, or chooses from the candidates for each position where more than one was nominated.

A similar/analogous process for the election of the two prominent lawyers exists - with candidates proposed by the Bar Association and joint session of deans of all Law Schools.

It is important to note that the Law established (as a transitional provision) - a slightly different election procedure for the first election of HJC members, which had to take place within 90 days of the law coming into effect in December 2008. The election procedure was the same, except that the High Judiciary Council was not bound to nominate candidates proposed by judges, but only to take into consideration such candidates. This allowed the HJC to nominate candidates at will, and did not establish any criteria by which such candidates should be selected.

4.1.2 Election of Prosecutors and State Prosecutorial Council members

The Republican Public Prosecutor and all other public prosecutors are elected by the National Assembly for six-year renewable terms. The State Prosecutorial Council (SPC) proposes candidates to the government, which may add its own candidates before the National Assembly conducts the

election. Deputy public prosecutors are elected the same way for a three-year probationary period, following which they become permanent. When the term of a public prosecutor ends, the Republican Public Prosecutor appoints an acting public prosecutor until a new prosecutor is elected, and for a maximum period of one year, although the appointment can be renewed. The acting Republican Public Prosecutor is appointed by the SPC.

The mandate of the SPC is similar to the HJC – five years with a ban on consecutive re-election as well as the composition with: three *ex officio* members - the Republican Public Prosecutor (the most senior public prosecutor), Minister of Justice and chair of the National Assembly (parliamentary) Committee responsible for the judiciary; six public prosecutors or deputy public prosecutors and two credible and prominent lawyers. The procedure for electing the SPC is analogous to the procedure for electing the HJC - with the SPC nominating candidates to the National Assembly. Again, transitional provisions applied under which the High Judicial Council (there was no equivalent of the SPC prior to the new laws) nominated candidates to the National Assembly, taking into account (but not bound by) the proposed candidates elected by prosecutors.

4.1.3 Key governance functions of the HJC and SPC

Apart from their role in proposing, electing, dismissing and transfer/assignment of judges, key functions of the HJC and SPC relevant to underpinning good conduct of judges and prosecutors are shown in Table 1.

Table 1: Selected functions of the High Judicial Council and State Prosecutorial Council

HIGH JUDICIAL COUNCIL	STATE PROSECUTORIAL COUNCIL
Decides on the transfer, assignment, and objection to the suspension of judges;	Gives proposals on the volume and structure of budgetary funds required for operations of Public Prosecutor's Office in respect of overhead expenses, and oversee the spending thereof, in accordance with law;
Rules on incompatibility of other services and jobs with judge's office;	Determines what other functions, affairs or private interests are contrary to the dignity and autonomy of the Public Prosecutor's Office;
Rules in the process of the performance evaluation of a judge and president of the court;	Passes the Code of Ethics;
Determines the composition, duration and the termination of the mandate of the members of disciplinary bodies, appoint the members of disciplinary bodies and regulate the manner of operation and decision making in disciplinary bodies;	Appoints and dismisses the Disciplinary Prosecutor and the deputies thereof, and members of the Disciplinary Commission and the deputies thereof;
Rules on legal remedies in disciplinary proceedings;	Passes decisions on legal remedies in disciplinary proceedings;
Proposes the volume and structure of budgetary funds necessary for the work of the courts for overhead expenses, and oversee disbursement of funds in accordance with law;	Passes Ordinance on Criteria for Performance Evaluation of public prosecutors and deputy public prosecutors'
Rules on the existence of conditions for compensation for damages due to unlawful and erroneous actions of a judge;	Passes a decision on legal remedy against the decision on performance evaluation of public prosecutors and deputy public prosecutors;
Odlučuje o postojanju uslova za naknadu štete zbog nezakonitog i nepravilnog rada sudije;	Donosi odluku o pravnom leku protiv odluke o vrednovanju rada javnog tužioca i zamenika javnog tužioca;

4.1.4 The election of 2009

Under the 2008 laws on Judges and on Public Prosecution and laws on the High Judicial Council and on State Prosecutorial Council, and following the appointment of the first HJC and SPC in 2009 under the transitional provisions mentioned in Section 4.1.1, an election of all judges and prosecutors

was conducted. All positions of judges and prosecutors were advertised in July 2009, and in December 2009 the HJC elected 1,528 judges from judges already sitting, and 886 judges for the first time. A total of 837 sitting judges were not elected, i.e. were effectively dismissed. At the same time, 68 public prosecutors were elected, 416 deputy public prosecutors re-elected and 88 candidates for deputy public prosecutors proposed to the National Assembly.⁷ Around 200 sitting prosecutors/deputy public prosecutors were not re-elected, according to the Association of Prosecutors. Following this, in 2011 the permanent composition of the HJC and SPC were elected without the participation of the judges and prosecutors who were not elected.

The outcome of the election procedures sparked protests by the sitting judges and prosecutors who were not elected. Reviews conducted by the SPC in 2011 and the HJC in 2012 of the election upheld objections by a minority of complainants. Many of the remaining judges and prosecutors appealed directly to the Constitutional Court, which upheld the appeals. However, the Court ruled that judges and prosecutors who were not in their positions at the time of the election of members of the new High Judicial Council and State Prosecutorial Council in 2011 did not have the right to stand as candidates in those elections since they did not hold the position of judge or prosecutor.

4.1.5 Role of the Judicial Academy

In a major reform of the system of preparation and training of judges and prosecutors, the Judicial Academy was established in 2010. The Judicial Academy provides the basic two-year schooling of judges and prosecutors, and Objective 1.4.2 of the NJRS includes the establishment of the “requirement of a degree from the Judicial Academy as an obligatory precondition for assuming the office of judge or prosecutor in the first election.” The Law on the Judicial Acad-

⁷ <http://www.pressonline.rs>

emy (adopted in 2009) requires in Article 40 that all candidates for judge or deputy prosecutor proposed by the HJC/SPC to the National Assembly must have graduated from the Academy's two-year initial training. In addition, the Academy provides on-going training, and for example played a key role in preparing judges and prosecutors to implement the new Criminal Procedure Code which came into effect for all courts from October 2013. The Academy system represents a move away from the old system, in which any lawyer who had passed the Bar Exam could be appointed as a judge or prosecutor. A typical route to becoming a judge or prosecutor was to gain experience as a judicial and prosecutorial associate. However, in February 2014 the Constitutional Court ruled paragraphs 8, 9 and 11 of article 40 as unconstitutional (see Section 4.1.6).

4.1.6 Problems/risks

iii) Appointments

The rules on appointment and composition of judges and prosecutors and their governing bodies (the HJC and SPC) are not in line with the idea of a truly self-governing judiciary. In particular:

- The National Assembly has a major role in appointment of the HJC and SPC, including election of the six members who are judges/prosecutors as well as the two lawyer members. Although the Assembly does not formally control the composition of the councils (as judge/prosecutorial candidates for nomination are elected by judges/prosecutors themselves), conversations with judges in particular indicated that they perceive the HJC as vulnerable to political influence. It seems the intention behind the system is that the judges are to nominate only one candidate for each vacancy, although the law does not say so. Even if this is the practice, the National Assembly has a veto on any candidate proposed, a provision that the Venice Commission criticised in its Opinion on the draft Law in 2008 (CDL-

AD(2008)006). Although the Assembly has never used this veto right, the potential for obstruction of a candidate is clear. This perception is clearly influenced by the events surrounding the 2009 election of prosecutors and judges, conducted under exceptional one-off provisions of the laws on the HJC and SPC. Whether it is justified or not in terms of future pressure or influence on the HJC, there is a clear risk that it may lead judges to exert 'restraint' in dealing with cases that involve MPs or their political allies.

- Ordinary judges hold a very narrow majority on the HCJ, as do prosecutors on the SPC - six of the eleven members, or seven including the Chair of the Supreme Court of Cassation (Republican Public Prosecutor in the case of the SPC). Since the quorum in both bodies is six members, this means that if two judges/prosecutors are not present then judges/prosecutors can be outvoted by the other members, and in theory these bodies can make decisions with only one ordinary judge (or prosecutor) plus the Chair of the Supreme Court of Cassation present. Furthermore, the representation of courts is biased in favour of the higher courts in which fewer judges work. There is also an argument to be made that the system is biased in favour of judges based in Belgrade (see Venice Commission Opinion CDL-AD(2008)006 paras 43-46 and 70-73.)
- The system by which the National Assembly elects public prosecutors for six-year terms raises a high risk that prosecutors' autonomy will be undermined. For example, it is difficult to imagine that a prosecutor will deal with a case involving MPs or their political allies (including members of the Government, political donors etc.) without having in mind the fact that the same body will decide on his/her re-election. This risk is exacerbated by the fact that candidates for election as a prosecutor are not limited to those proposed by the SPC - the Government may add its

own candidates at will. Although deputy prosecutors become permanent after an initial three-year probation period, the public prosecutors' function is limited. The limited 6-year appointment is incompatible with paragraph 5.d. of Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system which recommends that public prosecutors have tenure (although, unlike judges, not necessarily in a particular position or post) and an appropriate age of retirement. The Venice Commission has recommended that prosecutors other than the Prosecutor General should be appointed until retirement, noting that "Appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutor will make his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her." (CDL-AD(2010)004 paragraph 50.) Other recommendations and opinions of relevant international organisations underline these points further.⁸

- The process by which judges are elected to permanent office following their three-year probation period is linked directly to the performance evaluation of judges. The Law on Judges states that the HJC elects judges to permanent office, and Article 52 states that judges whose performance is evaluated as "performs judicial duties with exceptional success" are to be mandatorily elected to permanent office, while those assessed as "not satisfactory" may not be appointed. Whether judges with an evaluation in between these two

8 See in particular Council of Europe Committee of Ministers Recommendation Rec (2012)11 on the role of public prosecutors outside the criminal justice system, Opinion n°12 (2009) of the Consultative Council of European Judges and Opinion n°4 (2009) of the Consultative Council of European Prosecutors (CCPE) on the relation between judges and prosecutors in a democratic society.

are elected or not is not specified.⁹ The degree of integrity with which this system functions will therefore by definition depend on the functioning of the performance evaluation system for judges (See Section 4.6).

- The election by the National Assembly of presidents of courts for four-year terms also carries the risk of undermining judges' independence.
- The fact that the positions of court presidents and public prosecutors (i.e. heads of prosecution offices) may be maintained in a state of "temporariness" on an indefinite basis represents both a major corruption risk and an unacceptable interference with judicial and prosecutorial independence since it maintains senior judges and prosecutors in a state of dependence on political decisions. From 2009 until October 2013 the presidents of the most senior courts (SCC, three of the four Appeal Courts, Administrative Court, Commercial Appeal Court and Higher Misdemeanour Court) were all 'acting', and this is perceived by many judges as a tactic to maintain the senior management of such courts in a state of uncertainty - a not unreasonable assumption given the recent track-record of illegal dismissals of judges and prosecutors. A similar problem of 'acting' status has also existed for prosecutors.
- In general, due to the election process of 2009 and the controversy surrounding it, the legitimacy of both the HJC and SPC in their present composition is seriously undermined. A number of judges in particular referred to a general fear of another 're-election', and the general impression was of a profession that has been significantly demoralised by the experience. As already underlined in the previous sub-section, a key theme of this assessment is that while many formal legal

and institutional frameworks are satisfactory, the legitimacy deficit of the HJC and SPC undermine the likelihood that it can perform its governance role adequately.

The National Judicial Reform Strategy clearly acknowledges the problems of the current processes of appointments. Its Action Plan contains a key objective (1.1.1.3) of preparing constitutional amendments "in the direction of exclusion of the National Assembly from the process of appointment of court presidents, judges, public prosecutors/ deputy public prosecutors and members of the High Judicial Council and State Prosecutorial Council" together with "changes in the composition of the High Judicial Council and State Prosecutorial Council aimed at excluding the representatives of the legislative and executive branch from membership in these bodies". In addition, Objective 1.1.1.4 envisages transitional measures to strengthen independence prior to such constitutional amendments, and in particular legal amendments to establish that in elections of judges, deputy prosecutors, and members of the HJC and SPC, the HJC and SPC nominate only one candidate for each position to the National Assembly. In addition, court presidents would be elected for only one term, presumably on the assumption that this will avoid the risk of court presidents courting favour with politicians in order to increase their chances of being re-elected.

iv) Legitimacy and governance

As seen in Section 4.1.3, the HJC and SPC are responsible for performing basic functions to underpin integrity, good conduct and performance in the judiciary and prosecution, including: regulations to determine which external activities are incompatible or contrary to the proper performance of function; passing codes of ethics; appointment of disciplinary bodies and ruling on appeals in disciplinary cases; specification of performance evaluation rules, which according to the laws play an important role as criteria for career advancement and for disciplinary action; and proposing budgets (for current

⁹ The Venice Commission also criticised the apparent requirement (in order to be sure of election) for an 'exceptional' performance evaluation in a 2009 opinion (CDL-AD(2009)023)

spending) for the judiciary and prosecution. The HJC is also responsible for evaluating the performance of court presidents.

While it is not the role of this assessment to comment on the specific composition of institutions such as the HJC and SPC, almost all judges and prosecutors interviewed were clearly of the opinion that the councils lack legitimacy. The issue here is not the personal qualities of specific HJC or SPC members, but the legitimacy of an election in which the judges and prosecutors who were not elected but later reinstated were unable to participate.

In addition, important concerns were raised by judges concerning the performance by the HJC of its role as a mechanism for underpinning/enforcing good conduct among judges, or as a defender of the judiciary. For example, according to senior lawyers, some 144 complaints had been sent to the HJC alleging misconduct of judges, but no judge had been reprimanded. Concerning the second role, one case was mentioned in particular by senior judges, in which a judge of the Higher Court in Belgrade was allegedly threatened by a lawyer on behalf of the Chairman of one Parliamentary Committee demanding that the Chairman's client be released from detention. The Higher Court submitted a complaint to the HJC, Parliament and Ministry of Justice; according to the judges interviewed none of the institutions replied.

v) Role of the Judicial Academy

The new requirement that all first time elected judges or prosecutors must be graduates of the Judicial Academy was introduced to ensure the professional qualification of judges and prosecutors, and also to increase the integrity of appointments, with the previous system allegedly being vulnerable to judges/prosecutors promoting candidates on the basis of personal or other affiliation rather than professional ability. However, the speed of the transition to the new system and the absence of any transitional arrangements raise important concerns:

- The more than 1700 judicial and prosecutorial assistants (or associates - the two terms are used interchangeably in Serbia) are all qualified lawyers and are of fundamental importance to the functioning of the courts and prosecution offices. For example, the Criminal Procedure Code provides expressly that prosecutorial associates may perform the role of prosecutor on behalf of the Public Prosecutor in cases punishable by imprisonment of up to 5 years (8 years in the case of Higher Prosecutorial Associates). Assistants draft prosecutorial decisions and court verdicts, in addition to directly assisting the performance of all other judicial and prosecutorial functions (for example questioning witnesses). Many associates have worked in their positions for a number of years (even 10 years or more), in the expectation that such work will enable them at some point to be considered for appointment as a first-time judge or deputy prosecutor. It was noted by interlocutors that special prosecution offices and courts - including the Organised Crime Prosecution Offices - tend to be staffed by associates with longer experience.
- The change to the new system has generated bitter resentment among assistants. The new rules require any candidate for judge or prosecutor to complete the full-time two-year Academy course. Although Academy students are paid 70% of a judge or prosecutor's salary during their study period - more than the salary of an assistant - the new requirements are nevertheless prohibitive for assistants. In order to study at the Academy they are required to resign as associates. They are therefore asked to take a risk - however remote it may seem - that if things do not go according to plan they may end up with no job at all. These arrangements are particularly onerous for associates who live outside Belgrade, are older, or who have family commitments.
- These problems have created serious risks for the functioning of the judiciary

and prosecution. There is clearly a widespread feeling of betrayal among assistants, whose concerns are also supported by the judges and prosecutors whom they assist. Irrespective of the merits of the change itself, this could potentially have an important negative impact on the work ethic and therefore performance of assistants, including standards of conduct, together with the risk that assistants will leave the judiciary and prosecution to pursue careers as private lawyers.

In February 2014 the Constitutional Court ruled the new provisions as unconstitutional on the basis that i) the requirements for election to a judicial or prosecutorial function are to be provided by the laws that systemically regulate these issues – i.e. the laws on Judges and on the Public Prosecution, and not the law establishing a training institution, and ii) the provisions of the Law on the Judicial Academy limit powers of the HJC and SPC that were established by the Constitution – namely to independently nominate candidates for first election of judges and prosecutors. This indicates that any attempt to re-introduce the requirement would have to involve constitutional amendments.

4.1.7 Control of budgets

Courts can only be properly independent if they are provided with a separate budget administered by a body independent of the executive and legislature (as underlined in Opinion No. 10 of the CCJE, Strasbourg, 23 November 2007). An additional related issue raised by a number of judges is political control of the budget allocation for the judiciary and prosecution. The Ministry of Justice proposes the overall size and breakdown of the budget for the judiciary. As input to this, under the laws on Public Prosecution and on Organisation of Courts the SPC and HJC propose the size and structure of the current expenditure budget. However, they have no role in proposing or commenting on the capital expenditure budget (such as investment in court infrastructure or equipment).

Strategic Goal 2 of the NJRS is “full independence and transparency of judiciary in budget authorizations.” A series of measures in the Strategy involve closer involvement of the HJC and SPC in preparation of the budget, capacity building within the two councils, and culminating in “full transfer of budget authority” to the councils (Measure 1.2.3.1) as a medium-term measure. This would mean that the councils collect individual budget proposals from courts and prosecution offices, and “prepare the budget proposal of the judiciary” (including prosecution).

4.1.8 Recommendations for governance

Based on the issues discussed in this section, the following recommendations are forwarded:

1. In line with Objective 1.1.1.3 of the NJRS, constitutional amendments should exclude the National Assembly from any role in the election of judges (including court presidents), prosecutors and deputy public prosecutors, the High Judicial Council and State Prosecutorial Council. As the HJC and the SPC have a role in the selection and career of judges and prosecutors the method for electing them should be in accordance with European standards and recommendations as well as the opinions of the relevant authoritative European bodies.¹⁰ These in-

¹⁰ These are in particular: the European Charter on the statute for judges adopted in Strasbourg in July 1998 (DAJ/DOC(98)23); Recommendation (2010)12 of the Committee of Ministers of the Council of Europe on Judges: Independence, Efficiency and Responsibilities; with Opinion No. 1 (2001) of the Consultative Council of European Judges (CCEJ) on standards concerning the independence of the judiciary and the irremovability of judges; Opinion No.10 (2007) of the CCJE on the Council of the Judiciary at the Service of Society; and the recommendations of the Venice Commission, in particular its “Report on Judicial Appointments CDL-AD(2007)028 of 16-17 March 2007, Report on the Independence of the Judicial System Part I: The Independence of Judges” CDL-AD(2010)004 of 12-13 March 2010; and “Report on European Standards as regards the Independence of the Judicial System: Part II- The Prosecution Service” CD L-AD(2010)040.

struments make clear that: a majority or a substantial component of judicial councils should be elected by the judges themselves; they should include representatives of civil society and the legal profession, who may be chosen by lawyers and civil society themselves; in no circumstances should councils include practising politicians; where parliament has a role it should be confined to the election of members who are not judges, and by qualified majority to avoid politicisation; councils should be free to choose their own chairs. Prosecutors and judges should then be elected in turn by the reformed Councils.

2. In line with strategic guideline 1.4.1 of the NJRS, and particularly measure 1.4.1.3, clear rules and procedures should be established for the appointment of court presidents and public prosecutors in order to end the possibility of these positions being occupied on an acting basis for lengthy periods of time. Specifically, a time limit should be introduced on the length of time a particular position of court president or public prosecutor may be held on an acting basis.
3. As an interim measure additional to those contained in the NJRS, in order for the legitimacy of the High Judicial Council and State Prosecutorial Council to be restored, the current councils should step down in order to facilitate elections in which all currently sitting judges and prosecutors may participate.
4. The HJC and SPC should work to establish themselves as genuine mechanisms for identifying and addressing problems of the branches they govern, mediating communication between judges/prosecutors and the public/media, and ensuring accountability to the public. Actions to achieve this would include: the provision of a web page with full access to HJC/SPC decisions and activities along with publication of citizen's complaints (or at least statistical data thereon), research and analysis etc.; organised and announced visits of the HJC/SPC to courts/prosecution offices; clear mechanisms by which judges/prosecutors may contact their relevant council both formally and informally; activities of engagement such as the organisation of an annual conference concentrating on a particular important issue or issues; and the establishment of spokespersons and staff for communication with the media, either in general or on specific cases.
5. When legal or constitutional amendments are passed to establish the Judicial Academy as the sole route to holding the office of judge or prosecutor, these should include transitional provisions under which, for a transitional period, judicial and prosecutorial assistants who satisfy certain criteria (for example length of employment) may be candidates for judge or prosecutor if they take the Judicial Academy examination, without having to complete the entire course.
6. The judiciary and prosecution should have separate budgets, administered by the reformed HJC and SPC respectively. While respecting the right of the government to make final budget decisions, the budgets for the judiciary and prosecution should be determined following detailed proposals submitted by the HJC and SPC (covering both current and capital expenditure). Where the Government does not accept or alters these proposals, all decisions should be accompanied by a clear and public written explanation.
7. In order to enable the HJC and SPC to carry out budgetary and other administrative tasks each council should employ a senior administrator (in effect a chief executive officer) answering to the council and appropriate staff with skills including accountancy and information technology.

4.2 Resources

In addition to the issue of control over budgets - and of course possibly linked to that issue - a consistent complaint of interlocutors concerned a lack of resources, especially in the prosecution. In short, acute concerns are in place regarding human, physical and technical resources. In a typical example from one higher prosecution office, four prosecutors share one room, in which all are supposed to conduct desk work and interview witnesses. This is combined with a lack of recording equipment, which slows down the process of collecting evidence and conducting court proceedings (see Section 4.3). An example of insufficient human resources is provided by Novi Pazar, which has 6 deputy public prosecutors to match the work of 12 criminal judges.

These concerns have been exacerbated by the introduction of the new Criminal Procedure Code (covered in Section 4.5), which allocates new tasks to prosecutors, in particular by transferring responsibility for criminal investigations to them. Prosecutors claim that the new system has been introduced without providing any extra resources for the prosecution, making it difficult for prosecutors of integrity to perform their job properly. This claim is difficult to verify; the budget for basic prosecutors' offices (around half the total prosecution budget) rose by 20% in 2013, and that of the higher prosecutors' offices (around a quarter of the total) by 26%, although other prosecution offices saw only small increases and the budget of the appellate prosecutors' offices even fell slightly. Nevertheless, the interviews conducted with prosecutors suggested that resources are clearly insufficient. Ministry of Justice officials stated that a major problem for implementation of the new CPC is lack of resources, from money to space. Prosecutors indicated that the transfer of functions to them means that each case will take them twice as long to deal with, yet the number of prosecutors has not been increased to deal with this extra workload.

Regarding the courts, senior judges pointed out that the number of courts and judges were cut by around 700 after the 2009 election at a time when they were already working at full capacity. Judges at higher courts referred to working conditions as one of the key barriers to them performing their functions properly. However, the reinstatement of 7-800 judges in 2012, and in particular the decision to substantially increase the number of judges under the reorganisation effective from 1 January 2014 (see Section 2.1) may do much to address this problem. Moreover, the budget for the judiciary appears to have increased significantly above inflation in every year since 2010.

A key point regarding resources concerns the distribution of workload among courts. One of the stated reasons for the reform of the network of courts from 1 January 2014 has been to achieve a more rational distribution of work among judges. Prior to this at least, the case load has been highly uneven. At one higher court outside Belgrade it was claimed that the number of judges is approximately half of those needed, and prior to the establishment of the new network, it was estimated that 60-70% of all cases in the country were at the Appellate Court in Belgrade. Although it might be natural for a large number of appeals to be concentrated in the capital, this nevertheless would appear to be a serious burden for the 74 judges falling under that court as of November 2013. On the other hand, judges' responses at the Special Department for Organised Crime at the Belgrade Higher Court indicated that it has 'just enough' judges.

A key burden on resources is created by the inefficient nature of judicial and prosecutorial proceedings - in particular the relaying through the prosecutor or judge of testimony (in both courts and prosecution offices from witnesses, accused and defendants) and typing by support staff (see Section 4.4.3). It would be fair to say that if working practices were streamlined (see recommendation for 4.4.3) the number of judges and/or prosecutors might be sufficient; a clear

judgment on this would have to be made when that is done.

The NJRS does not contain any commitment to increase funding of the judiciary or prosecution, although measures to transfer control over budgets include a commitment to prepare “a study of the real needs” of the judiciary/prosecution (Measure 1.2.1.1). In addition, Strategic Guideline 5.1.6 aims at developing properly formulated and prioritised infrastructural investment planning, leading to the submission of proposed investments to the HJC and SPC.

Recommendations:

8. It is strongly recommended that the commitments in the NJRS to clarify the resource needs of courts and prosecution offices are backed up by more specific commitments to meet these needs, in particular through adequate budget allocations to ensure that prosecutors especially have adequate space and equipment to perform properly the investigative role given to them by the new Criminal Procedure Code. Greater efforts need to be made to deal with the mismatch between needs and resources which exists at present, with courts in Belgrade and the larger cities overworked and understaffed while some courts in the provinces have a low workload. The use of financial incentives to persuade judges to move should be considered.

4.3 Legal certainty and uniformity

A general factor repeatedly underlined by interlocutors as undermining the effective functioning of the judiciary and prosecution was constantly changing laws, both in general terms but also specifically those laws governing the judiciary and prosecution, together with inconsistencies in the way different courts and prosecution offices decide cases, leading to legal uncertainty.

4.3.1 Changing laws

In general, a criticism raised by lawyers was a tendency to change laws without ensuring compatibility with other existing legal provisions, and that the ‘sub-legal’ framework for implementation (such as by-laws) was not always established. To the extent that such criticisms are accurate, this phenomenon represents a general corruption risk. Conflicts between legal provisions will tend to generate excessive discretion on the part of officials responsible for implementing laws, as well of judges in adjudicating disputes over their provisions. They also lead to a legal culture in which the judge could justify deciding cases either way. Also, constant changes in the law lead to uncertainty about what the law actually is, not only amongst the general public but even among lawyers. By contrast, legal certainty may be expected to discourage judicial corruption by making it much more difficult to disguise a corrupt decision.

More specifically, a tendency to amend at regular intervals basic legal provisions governing the judiciary and prosecution was singled out for particular criticism. As noted in Section 2.1, legal amendments introduced major changes in the court network (which affects the network of prosecution offices as well) in 2009, changes that were largely reversed in 2013. The effect of carrying out ‘reform of the reform’, as this is critically referred to, is to decrease the feeling of job stability among judges and prosecutors. For example, prosecutors expressed concerns that the recent reform will lead to the need for new elections of deputy public prosecutors in many places. On the other hand, the NJRS itself is an indication of intent to ensure a coordinated and in a sense definitive plan to reform the judicial system.

A further problem is that the everyday predictability of law is undermined by wide variations in the way that different courts treat similar cases. For example, commercial lawyers stated that in commercial disputes it is impossible to predict how judges

will decide with any confidence, as different courts adjudicate similar issues quite differently. There appear to be two reasons for inconsistency - the absence of mechanisms for ensuring uniformity of case law, and the lack of availability of court decisions and case law to either judges or the public.

4.3.2 Inconsistent case law

There is no mechanism in Serbia for ensuring a degree of uniformity of case law. While the Supreme Court of Cassation is the court of highest instance, and specifically the court immediately above the Commercial Appellate Court, the High Misdemeanour Court, the Administrative Court and Appellate Courts, relatively few decisions of these lower courts may be appealed to it. It decides on extraordinary legal remedies filed against decisions of courts of the Republic of Serbia (for example applications for a criminal procedure to be reopened because it is discovered that decisive evidence was forged) and in other matters set forth by law (Article 30, Law on Courts). However, even in such cases its decisions, while binding on the parties, are not binding on other courts even where the same legal issue arises again. For ordinary case decisions, the highest instance is the Courts of Appeal, of which there are four. There are, however, inconsistent decisions across these courts.

According to Article 31 of the Law, the SCC shall “determine general legal views in order to ensure uniform application of law by courts”. However, it does not appear to actually carry out this function. At the time of the expert visits, discussion was proceeding on the establishment of a mechanism to ensure uniformity of case law. There is a general intention to establish a “Certification Commission” for this purpose, although the exact location, composition and remit of the Commission had yet to be clarified. The NJRS Action Plan envisages the “establishment of a certification body (Commission) within the Supreme Court of Cassation” (measure 2.7.7.1), that will be “in charge of certification

of judgments, thereby establishing case law” (measure 2.7.1.3). However, different interlocutors had different understandings of official intentions regarding:

Composition of the Commission. One proposal envisaged the Commission will be comprised of judges together with officials from outside the judiciary such as professors of law and lawyers, although the majority of interlocutors were clear that this proposal had been abandoned and the Commission will be comprised only of judges. It should be noted that if Commission decisions were binding, the presence of non-judges would be an impermissible violation of judicial independence under European and international principles. Furthermore, the Commission itself would have to be constituted as a court of law. If this has to be done, what is the point of creating a Commission rather than getting the Supreme Court to perform this function? It still remains unclear whether the Commission will include judges from other courts than the Supreme Court of Cassation. However, if the Commission has *de facto* authority to determine the correct interpretation of laws (like a Supreme Court in common law systems), the inclusion of judges from lower courts would be illogical and controversial.

► The exact function of the Commission. On this issue there was even less clarity among interlocutors. Some stated that the Commission will stamp or otherwise designate Appeal Court decisions that are to be regarded as good case law, while Ministry of Justice officials insisted the Commission will only identify case law issues on which different Appeal Courts have shown inconsistent approaches, as an initiative for those courts to resolve such differences in their regular meetings.

The experts have key concerns over the proposal to confer the function of underpinning consistent case law on a Commission rather than a court. In most jurisdictions where such a function exists it would be carried out by the highest court

in the system. To confer the function on a commission which is not a court of law risks undermining the role of the courts and in turn damaging the independence of the judiciary. Worse, the potential will exist for the Commission to disagree with and in practice to overrun the Supreme Court of Cassation.

The second barrier to consistency is the fact that court decisions are not available systematically, either to judges or lawyers or to the general public. Currently, some court decisions are available online at the Supreme Court of Cassation website. However, there is no unified method of classifying decisions, making it time-consuming for judges to find decisions. There is no system of access to decisions for the public or for lawyers, due to issues of data protection/privacy. Objective 2.8 of the NJRS is to provide “public access to legal regulations, case law, judicial records and proceedings databases”, and specific objectives within the Action Plan pillar include the establishment of a central database of court decisions that will be available free-of-charge. The objective is defined as ‘long-term’.

Recommendations:

9. The authorities should consider as appropriate changes to the legislative process (i.e. the process by which legislation is initiated and drafted) to require proper regulatory impact assessment prior to proposed legal changes, including assessment of the real need for legislation (as opposed to better enforcement of existing laws), and analysis both of the impact of legal changes on other legal provisions and of enforcement needs.
10. The concept of “binding precedent” is not part of Serbian law and many Serbian lawyers would be strongly opposed to its introduction. While it therefore may be impossible to establish a mechanism that ensures binding interpretations of case law, a mechanism should be introduced by which the Supreme Court of

Cassation can issue opinions on disputed points of law which, even if not formally binding, would carry great authority as the opinion of the highest court in Serbia. In particular, it would be advisable to provide further appeal of ordinary decisions to the Supreme Court, at least in cases where the jurisprudence of the Courts of Appeal is inconsistent. In order to prevent the Supreme Court from being overwhelmed, the Supreme Court itself could be given the power to decide whether to hear an appeal, applying a test such as whether the case involved an important point of law. Another possible mechanism to assist in ensuring a more uniform application of law might be to provide for a system of preliminary rulings on points of law referred by lower courts, similar to the system of preliminary rulings in the Court of Justice of the European Union.

11. Objective 2.8 of the NJRS, and in particular the establishment of a central database of court decisions should be formulated/elaborated as a more urgent objective, rather than being generally stated as “long-term”. In addition, the Supreme Court of Cassation should establish a system of legal reporting should be established that provides a digest of significant cases on a regular basis.

4.4 Organisation of work

Concerning the organisation of the work of the prosecution and courts, the following general issues were covered.

4.4.1 Specialisation

With regard to the ability of prosecution offices and courts to prosecute sensitive and demanding cases related to corruption and economic crime, there is a need to have continuous specialisation of judges or prosecutors. A good example is the Organised Crime Prosecution Office (see Section 2.1), which deals with such cases involving high-level officials. However, even in this case

it is not clear to what extent the special departments for Organised Crime at the Higher and Appellate Courts in Belgrade to which the OCPO corresponds are specialised; while there is a requirement that judges in the departments have a certain number of years of experience, the TI study notes that there are no clear criteria such as training required, while the deployment of judges to special departments is decided by court presidents or the HJC with no special criteria for such decisions. In addition, the same study notes that corruption-related offences may be adjudicated by all courts of general jurisdiction (i.e. basic, higher and appellate). (TI 2012, 13).

Within the ordinary network of prosecution offices and courts, there is a specialisation of prosecutors. On the basis of the Mandatory instruction A number 194/10 from 26 March 2010, and in accordance with the new court network, anti-corruption departments have been established in all appellate and higher prosecutor's offices. Although according to the data of the Republic Prosecutor's Office prosecutors are educated for these type of cases, it still seems that there is a lack of continuous training and capacity which increases the risk that prosecutors and judges involved will not be able to deal with such cases effectively. The lack of any special status for such prosecutors and judges may also make them more vulnerable to improper influence in such cases, although special procedures govern the processing of corruption cases to ensure greater hierarchical supervision (see Section 4.4.5).

4.4.2 Allocation of cases within courts and prosecution offices

In the courts, rules for the allocation of cases are strongly formulated to ensure 'random allocation' (see particularly Articles 24-25, Law on Judges and Articles 49-56, Rules of Court Procedure). Cases are allocated to judges on the basis of the court schedule of tasks. When a case arrives, it is allocated a number and the case is then allocated ran-

domly to one of the judges specialised in the area to which the case belongs (for example organised crime). Exceptions to this are only allowed if a judge is sick or absent for a lengthy period, or has been issued a final disciplinary sanction for unjustified procrastination from a proceeding.

For prosecutors, the regulations on allocation of cases are contained in the Law on Public Prosecution, which defines the public prosecutor as responsible for the organisation of the work of the office, and in the Regulation on Administration in the Public Prosecution. Under the Regulation cases are "as a rule" allocated to prosecutors based on the order in which they arrive, with cases allocated in order of the list of prosecutors in alphabetical order. However, the public prosecutor may deviate from this method of allocation for reasons of work overload or the inability of certain prosecutors, the specialisation of a prosecutor in a particular area, "or if justified by other reasons", although records must be kept on the allocation of cases. (Regulation on Administration, Article 42).

Rules on the allocation of cases to judges or prosecutors must balance concerns about improper influence on the one hand, with the need to provide sufficient flexibility to ensure that cases are allocated to prosecutors or judges who are best qualified to hear them. The rules for allocation to judges appear to strike this balance well. However, in the case of prosecutors, allowing the deviation from standard rules of allocation "if justified by other reasons" establishes an exception that is clearly much too vague.

4.4.3 Collection of evidence

There are two main issues of concern related to the recording and collection of evidence. The first concerns the burden on resources in general caused by methods of recording and collecting evidence. As noted in Section 4.2, the way in which both prosecution offices and courts physically process cases is quite burdensome in terms of the time spent by prosecutors and judges

on administrative and technical tasks. For example, when collecting evidence from witnesses or suspects/defendants, the provision of verbal evidence (e.g. questioning a witness) is not recorded in full; instead, prosecutors and judges dictate a summary of the evidence as they have understood it to a recorder.

There are two main problems with the method of collecting evidence described above. First, it lengthens initial proceedings considerably and in the courts has the knock-on effect of lengthening appeal proceedings due to the absence of a complete recording of the initial proceedings which may leave the appellate court with no option but to order a complete rehearing. In particular, this exacerbates the burden imposed by the new Criminal Procedure Code on prosecutors (see Section 4.5). Second, it appears to open the possibility of evidence being manipulated or manufactured, although prosecutors stated that disputes over what is recorded as evidence are usually settled during the process of recording. Experience in other countries suggests that at a minimum it is likely to result in disputes over what was provided as evidence, the circumstances in which statements (for example confessions) were made, and so on. Conversely, the introduction of recording of all evidence by audio (or even better, video) removes both the risk of manipulation or disputes. The NJRS Action Plan envisages as Strategic Guideline 5.3.3 (i.e. objective) of relieving the burden on judges of administrative and technical tasks by re-assigning them to administrative and technical staff and judicial assistants. This objective is very much 'medium-term', with processes to establish working groups to determine the tasks to be transferred and the necessary changes in staff structure, prior to the development of proposals to change the legal framework/regulations.

The second issue relates to the powers of the police and prosecutors to use special investigative techniques (SITs, such as wire-taps) to collect evidence on offences related to corruption and abuse of office. As the

2012 study by Transparency International notes (TI 2012, 13), such methods may only be used for several criminal offences related to corruption (abuse of authority, unlawful mediation, bribe accepting and bribe giving), although the Criminal Code contains several other important offences. These other offences include abuse related to public procurement, abuse of official position by a responsible person and fraud in service, but also notably violation of the law by a judge, public prosecutor or his deputy. In relation to this, it is important to note that the Law on amendments and additions to the Criminal Procedure Code (adopted on 8 April 2013) has introduced a possibility for special investigative means to be deployed also for criminal offence abuse of office by responsible person and abuse in public procurement.

While fears about the use of SITs are natural in countries with a history of secret police methods, these restrictions are likely to seriously hamper effective investigation of criminal offences of misconduct by judges and prosecutors, as well as a wide range of cases in general.

4.4.4 Status of support staff

A concern and possible risk noted by certain interlocutors is the fact that many court and prosecution staff (for example around 900 administrative court staff, including some assistants) are employed only on temporary contracts. Despite the concerns raised in the previous sub-section, a number of important tasks and functions are carried out by such staff, such as budget administration, allocation of cases in courts, etc. A long term contract for judicial support staff is important if proper training is to be provided and the quality of work underpinned. In addition, court files are highly sensitive, and in criminal cases especially they demand secrecy and extensive restraint on the part of anyone who comes into contact with them. For these and other reasons, support staff should be properly integrated into the career system of the courts and judiciary, and specialised; in

many countries, they even have special status as civil servants.

4.4.5 Anti-corruption Departments/ monitoring of high-risk cases

In the Prosecution, a Republic Prosecutor's Office mandatory instruction issued in 2007 and updated in March 2010 mandates the following:

- The establishment of anti-corruption and anti-money laundering departments (ACDs) at each appellate and higher prosecution office. All Higher Prosecutors must assign a deputy prosecutor to monitor the status of corruption cases, and one or several deputies to monitor AML cases.
- Higher and Basic POs must keep special records (special marking of cases in the register of cases) and inform the RPO immediately on criminal complaints (reports) of corruption crimes; higher POs are to do this also for money laundering offences. For money laundering offences, a copy of the relevant financial transaction report is to be attached to the notification.
- Decisions to dismiss crime reports or cease prosecution after the completion of an investigation are to be made in panels.
- Where a prosecution is ceased by a decision of a single prosecutor, the decision must always be reviewed/controlled by a panel.
- The Instruction concludes "Prior to decision-making, active cooperation with other agencies is needed to ensure efficient proceedings.

Interlocutors from the ACD of the Republic Prosecutor's Office stated in addition that decisions in such cases the ACD at the RPO reviews draft decisions, and if it disagrees will return them to be reconsidered. According to the RPO, since 2007 around 10% of cases have been returned, most for formal deficiencies. Of the cases returned, around 2-3% of draft decisions were changed - meaning around 0.2-0.3% of all decisions have been

reversed. Although this figure seems low, the RPO argued that the effect of the mechanism is mainly preventive and its effectiveness can't be measured by such figures.

While the procedures established by the mandatory instruction appear to provide significant guarantees in the sense of hierarchical review of sensitive decisions, there are issues of concern with the mandatory instruction. For one thing, the term "corruption crime" is not defined, except to state that it includes "white-collar crimes related to corruption". It is therefore unclear whether the cases to be monitored are only explicit bribery cases, or include abuse of office, fraud, or other misconduct offences.

Moreover, it should be noted that concerns about political influence on the prosecution service are of particular relevance here. If the concerns noted in Section 4.1 over the vulnerability of prosecutors to political pressures and influence are well-founded, hierarchical control mechanisms within the prosecution may work as a 'double-edged sword', i.e. they could be used to ensure that cases affecting the interests of politicians or those they have a motive to protect are *not* processed as they should. This underlines again the importance of ensuring that the system for appointment and governance of the prosecution and judiciary ensures that judges and prosecutors are sufficiently shielded from such pressures.

The experts had the impression that, despite the existence of the mandatory instruction, the role of ACDs was not interpreted in the same way by all prosecutor's offices. While members of the ACD at the Republic Prosecutor's Office stated that the department deals primarily with corruption prevention within the institution, according to prosecutors at one other ACD the purpose of these procedures is not explicitly to detect corruption among prosecutors, but to ensure that corruption-related cases are processed properly and on a consistent basis by different prosecutors.

ACDs are also obliged to deal with complaints forwarded to them by the Anti-corruption Agency (ACA), as well as complaints about judges and prosecutors. Criminal complaints against judges are processed by the relevant Higher Prosecution Office, and the ACD reports the results to the RPO, which may check the case and issue orders to the prosecutor dealing with the case. According to the ACD of one higher prosecution office, complaints forwarded by the ACA are numerous and not screened in any way, and prosecutors implied that much time is wasted as a result of them.

4.4.6 Expert witnesses

Expert witnesses are a key component of a well-functioning courts system, providing expertise that may often be decisive in shaping court verdicts. It is vital that expert evidence is and is seen to be independent, objective and unbiased. One concern raised by judges interviewed during the on-site field visits was the inadequacy of the current regulatory framework for expert witnesses. For example, it was mentioned that expert witnesses often submit opinions of insufficient quality, whereupon a court will hire them again to complete the work, effectively paying them twice or more for the same work. Ministry of Justice interlocutors identified the appointment of expert witnesses as one of the main corruption vulnerabilities in the Serbian judicial system. Measure 3.5.2.1 of the NJRS Action plan is to draft amendments to the Law on Expert Witnesses to place more emphasis on expertise and competence in the criteria for their appointment - again, a "long-term" measure with no defined implementation date.

Recommendations:

12. The Regulation on Administration in the Public Prosecution should be amended to clarify exhaustively under what circumstances public prosecutors may deviate from the standard procedure for allocating cases within their prosecution

office - thereby removing the catch-all category of "other reasons".

13. Necessary legal amendments should be passed, and sufficient budgetary resources provided, so that prosecution offices and courts introduce recording of the collection of evidence from witnesses or suspects and of court proceedings as standard procedure.
14. Amendments to the Criminal Procedure Code should include provisions to ensure that special investigative techniques may be used for a sufficient range of serious offences, including in particular corruption-related offences, particularly those involving misconduct by judges, prosecutors or other office-holders.
15. Interim measures should be taken to allow the transfer of some administrative and technical tasks to technical/support staff and judicial associates.
16. Measures should be taken to ensure that technical/support staff, including judicial and prosecutorial assistants, are employed on a basis that is commensurate to their responsibilities.
17. Amendments to the Law on Expert Witnesses - and if necessary an implementing regulation - should ensure that criteria for appointment and for payment of fees are clear, that appointments are openly publicised, and that standards of conduct of expert witnesses are clearly regulated.

4.5 Reforms of Criminal Procedure

Criminal procedure has undergone fundamental reform in Serbia with the adoption of a new Criminal Procedure Code (CPC) in 2011. The Code came into effect for proceedings falling under the special prosecution offices for war crimes and organised crime from January 2012, and from 1 October 2013 for all other proceedings. Until the new Code came into effect, judges were responsible for investigation, with their function being to determine the facts of the case. Under the

new system, this role has been transferred to the prosecutor, who directs all aspects of the investigation and is responsible for taking equally into account evidence that is incriminating or in favour of the defendant. The role of the court is to reach a verdict based on the submissions of the prosecution and defence, rather than establishing all facts of the cases - in short, an adversarial system.

While many accept the need to reform the previous Criminal Procedure Code, the content of the new CPC was widely criticised by the legal community even prior to its adoption. Around 250 amendments to the draft Code were agreed by a working group of the Ministry of Justice but were not adopted as part of the final approved law. The main objections to the Code have been the following:

- The new CPC provides extensive new discretionary powers to the prosecution. Prosecutors can open an investigation without the knowledge of a suspect for an unlimited period of time, and may halt an investigation or not initiate proceedings, with neither the court nor superior prosecution office holding any power to reverse such a decision. Senior ministry officials suggested that even in the first month of implementation of the CPC it was a problem that judges cannot reverse a prosecutorial decision to drop a case. All interlocutors including prosecutors acknowledged that the expansion of unchecked discretionary prosecutorial powers represents a corruption risk.
- Under Article 77 of the CPC, where a defendant cannot afford the cost of a defence counsel, a counsel is appointed and the costs paid by a court for cases with minimum sentences of 3 years or more. This article appears to be out of line with Article 6 of the European Convention on Human Rights (ECHR), according to which anyone charged with a criminal offence has the right to be provided with free legal assistance where he/she cannot afford it and “the interests of justice so require”;

the interests of justice are understood in this case as being where the offence in question carries a possible prison sentence. The NJRS 2013-18 (Measure 2.5.1.5) envisages “the possibility of amending the Criminal Procedure Code - amendments to Article 77 that would provide for bigger guarantees for the exercise of the right to a fair trial, especially regarding underprivileged persons”, but there is no unequivocal commitment to ensure free defence counsel for persons charged with offences carrying a possible prison sentence. Moreover, Serbia has still not established a system of free legal aid as required by the 2006 Constitution; however, the NJRS envisages a set of steps to achieve the latter (objective 2.5.1), and a draft law was under discussion as of the end of 2013.

- The CPC does not establish any rules of evidence, an important component of a well-functioning adversarial system in which prosecutors rather than judges are in charge of investigations. This increases the likelihood that prosecutors will adopt inconsistent approaches to evidence collection in similar criminal cases, and by extension creates scope for corrupt influence on prosecutors to use or reject certain types of evidence.

It should be noted that the key objection above - on the lack of a mechanism for judicial review of prosecutorial decisions - involves complex issues in the transition from an inquisitorial system to an adversarial one. In an inquisitorial system it is logical for the judge to have a role in overruling prosecutorial decisions not to prosecute, in particular; in a fully adversarial system (such as in the UK or Ireland) few would be in favour of such a role. The question is however, what provisions are desirable in a country that is in a transition from one system to the other, and where therefore there may be a risk that prosecutorial conduct does not fulfil the standards necessary in a fully adversarial system. In this situation, an intermediary solution to maintain judges’ ability to have some

redress against prosecutorial decisions may be wise (see Recommendation 18). The importance of such a solution is increased by the concerns over prosecutorial independence. The Republic Prosecutor's Office and other prosecutors argue that risks of misconduct by prosecutors in important cases are mitigated by special procedures for investigations/prosecutions of corruption-related offences. These procedures appear to ensure a significant degree of control over decision-making in corruption-related cases (see Section 4.4.5), but as noted earlier, political influence could make such procedures a tool for ensuring political control rather than one for ensuring good conduct.

4.5.1 Plea-bargaining and the opportunity principle

One of the aims of the CPC has been to streamline criminal proceedings by expanding the use of the institutions of plea-bargaining - where the prosecution or the court reduces the sentence requested by the prosecutor or imposed by the court for a crime in return for cooperation by the accused, and the principle of opportunity, whereby prosecutors may decide not to prosecute a case if they believe it is not opportune.

Concerning the opportunity principle, under the legality principle (previously the law) the prosecutor must in principle prosecute every case in which he has evidence to show the accused committed an offence. Under the opportunity principle, even though the evidence may be there the prosecutor has a discretion not to prosecute where there is no public interest in doing so. Where the opportunity principle applies it will, however, almost always be the case in relation to serious cases that there is an overwhelming public interest in prosecution. The sort of circumstances which in practice are most likely to lead to a public interest decision not to prosecute include minor offences, especially when committed by a first offender or a juvenile; cases where multiple offences have been committed, where the prosecutor chooses a representative sample of cas-

es to bring rather than prosecuting every single charge; cases where a serious sentence is unlikely, for example because of the age or state of health of the suspect, or perhaps where the suspect is already serving a sentence for a similar or related offence; cases where there has been a long delay; the danger to a witness if a case proceeds or the likely effect on the health of a witness.

The opportunity principle applies in all common law countries and in many civil law jurisdictions, including France and the Netherlands, and there is no serious evidence that criminal proceedings are more susceptible to corruption in these countries than in countries where the legality principle applies. Nevertheless, while both plea-bargaining and the use of the opportunity principle may be important mechanisms for making criminal proceedings more efficient, the extra discretion they give prosecutors in pre-trial proceedings may appear to create risks of prosecutorial misconduct. In the case of plea-bargaining the judicial supervision over the process should minimise this risk. Concerning the opportunity principle, the experts were informed that the practice in Serbia is to refer the case to a superior before invoking the opportunity rule. This provides a safeguard against corruption. A further safeguard would be to develop written guidelines as to the factors which might or might not be considered.

Plea bargains are becoming an increasingly important phenomenon in criminal proceedings. The Organised Crime Prosecutor's Office reported a big increase in plea bargains - from 3 in 228 cases investigated in 2010 to 58 out of 150 cases from January to October 2013. The introduction of the new system of plea-bargaining has much to recommend it. A well-functioning system of plea-bargaining will encourage early pleas, thereby reducing the time taken to hear cases, saving judicial and prosecution resources which in turn reduces the backlog in courts and delivers speedier justice to all the participants in the system. Some of the more obvious problems with such systems have been

avoided in the Serbian reform. There is judicial oversight over the system in that the judge may not accept a plea without being satisfied that the prosecution case is made out. Under the Serbian system the judge retains control over the sentencing process.

However, the system is not likely to lead to early pleas unless the accused person sees some advantage in an earlier plea of guilty in the form of a lesser sentence than he would otherwise receive. The experts heard much evidence that the system is not leading to as many pleas as anticipated because prosecutors cannot clearly offer defendants a significantly lower sanction than they would receive if they plead not guilty. This is exacerbated by a lack of predictability in sentencing by courts (linked to the unpredictability of case law discussed in Section 4.3). The appeal courts appear to be reluctant to lay down sentencing guidelines or principles. The NJRS 2013-18 envisages amendments to the CPC aimed at strengthening the role of the Public Prosecutor's Office to actively make corrections of the penal policy (propose the gravity of penalties)."

4.5.2 Control over investigations: relation between the Prosecution and the Police

Concerning the supervisory role of the prosecution over investigations, another important problem that was raised during interviews was the *lack* of powers of the prosecution *vis-a-vis* the police, whom the prosecution now directly supervises and directs in criminal investigations. While prosecutors may issue orders to police, these are not enforceable because the latter are accountable to the Director of Police and Minister of Interior. This appears somewhat dysfunctional in principle in a system where the prosecutor is responsible for - and therefore expected to control - investigations.

4.5.3 Training

In addition to issues over the content of the Code itself, concerns have also been raised by both judges and prosecutors over the provision of insufficient training prior to the CPC coming into effect. The judges and prosecutors interviewed stated that 1-2 trainings were provided, and were not based on concrete case scenarios. Ministry of Justice officials conceded that there was not enough time to train prosecutors or judges properly. On the other hand, the Judicial Academy claimed that very few prosecutors turned up to the first of two main trainings, in the expectation that the date the CPC was to come into effect would be postponed.

To conclude and place the analysis of the new CPC in context, the law until amendment has created a system that introduces aspects of an adversarial system but requires some further safeguards to ensure that system works justly - with particular concerns over the equality of arms of prosecution and defence, and specific risks of abuse of the new powers. In addition, a key issue is the fact that the CPC has introduced a major transfer of powers from the judiciary and the police to the prosecution while preserving a system of governance that fails to guarantee the independence of prosecutors. Third, the new system has been introduced without paying sufficient attention to the resource needs of the prosecution.

Recommendations:

18. Following the coming into effect of the new Criminal Procedure Code, in order to balance the rights of the defence and prosecution and lessen the probability of arbitrary or abusive decisions by prosecutors, mechanisms to keep prosecutorial discretion in check should be established. These should include i) a mechanism by which judges may require a prosecutor to reconsider decisions such as not to open a procedure or drop charges, in a process explicitly involving the superior prosecution office;

- ii) sufficiently detailed rules of evidence;
- iii) internal guidelines on conduct and counselling/advice channels (see Recommendation 32).

19. Article 77 of the Criminal Procedure Code should be amended to ensure the right to a free defence counsel for any person charged with an offence for which he or she is liable to be imprisoned and who does not have the means to pay for a lawyer.
20. Regarding plea-bargaining, a mechanism needs to be found to ensure that there are sentencing principles and that courts are required, in the case of an early plea of guilty, to impose a lesser sentence than they would following a fully-fought trial, perhaps of the order of one-quarter or one-third discount. The appeal court could be given a remit to set out general principles relating to sentencing with an obligation on trial judges to give due weight to those principles. Alternatively, a sentencing advisory body could be established to perform this task.
21. Written guidelines should be issued for prosecutors on the application of the opportunity principle (see footnote number 2).
22. Much more training should be provided to prosecutors and judges on their role and duties under the new CPC, in order to ensure that prosecutors and judges are equipped to perform their function in a manner that is appropriate for an adversarial system that a recently introduced 'graft' onto a different legal tradition. In particular, training for prosecutors should underline that they have now an obligation to safeguard the rights of defendants in adversarial proceedings which are no longer subject to the same judicial oversight as before.
23. The requirements of the CPC in terms of resources should be a key input into determining resource requirements for the judiciary and prosecution (see Recommendation 6).

4.6 Mechanisms to assess performance

At the time of the field work conducted for this assessment, the framework for new systems of performance evaluation was in the process of establishment for both courts and prosecutors. The Law on Public Prosecution provides for three-yearly evaluation of prosecutors. Evaluations culminate in three possible ratings: "performs the prosecutorial function exceptionally", "satisfactory performance of prosecutorial function", and "unsatisfactory performance" (Article 101, Law on Public Prosecution). These may be used as grounds/criteria for election, mandatory training and dismissal (Article 99). The Law delegates to the SPC the task of defining more clearly the criteria for performance evaluation. As of November 2013 a draft Rulebook on Performance Evaluation Criteria for Public Prosecutors and Deputy Public Prosecutors had been completed. In the case of judges, amendments to the Law on Judges are expected to define the framework for performance evaluation, presumably in a similar fashion as the Law on Prosecutors. The HJC had drafted a Rulebook similar to the one for prosecutors had also been drafted at the time of the on-site field visits, envisaging four possible ratings for judges: "exceeds requirements of judicial office", "meets requirements of judicial office", "satisfactory" and "not satisfactory".

Both draft rulebooks establish a complex system of quantitative and qualitative criteria for deriving the evaluation scores for judges and prosecutors. Criteria vary slightly between different categories of prosecutor and judge. The following examples are sufficient to illustrate, and are taken from the criteria for judges at basic, higher and commercial courts, and deputy public prosecutors:

- For judges quantitative criteria include the number of decisions taken per month compared to the 'minimum monthly norm'. If the number of cases is to be counted then the weight and complexity of cases has to be assessed. Qualitative

variables include the number of cases of a given judge that were reversed on appeal. This is fundamentally objectionable as incompatible with the independence of the judge, 'Quality of drafting of judicial decisions and skill in conducting proceedings' comprises sub-components such as "clarity, conciseness and articulation of written reasoning of decisions"; "time for drafting of decision"; "manner of conducting proceedings - rationality, timeliness and granting priority to urgent proceedings and old cases"; and "number of open trials and hearings before second-instance court in respect [proportion] to the number of reviewed decisions."

- For prosecutors, quantitative criteria include the ratio between the number of assigned cases and the number of cases in which a deputy public prosecutor has rendered a decision in the course of the evaluation period. This takes no account of cases where the correct response is to leave a file open without taking a final decision. It is likely to lead to over-hasty and therefore bad decision-making.
- 'Qualitative' criteria include the ratio between final convictions and final acquittals for cases charged by the prosecutor (with an 80% ratio or above evaluated as satisfactory, or successful depending on which translation is used). This is a particularly inappropriate measure. Any prosecutor can get a "success" rate near to 100% just by not prosecuting the difficult cases! Furthermore, it puts pressure on a prosecutor to seek convictions even where the evidence does not warrant such a result - in a clear breach of the most fundamental ethical duty of the prosecutor. These measures will do nothing to improve prosecutors' performance - they will reward the timid prosecutor and penalise the conscientious. The time-servers and clock-watchers will have no difficulty massaging their scores to achieve top results. If these indicators are to be counted at all they should be used with great caution and on a purely indicative basis rather than being treated as determinative.

On a more positive note, professional commitment and cooperation constitute a third component of the overall score; one sub-component of this is rated positively if "at the main hearing they act responsibly in presenting cases assigned to them according to the roster; their decisions are competently substantiated, precise and coherent, well-structured, clear; they can successfully adapt to a concrete procedural situation; they typically show initiative in the proceedings."

Evaluations are conducted by the immediately superior prosecutor (in the cases of prosecutors with special jurisdiction, the Republican Public Prosecutor), or a committee from the superior court. The HJC evaluates presidents of courts. For prosecutors and deputy prosecutors, performance may be subject to an unscheduled evaluation on decision of the SPC.

The experts have significant concerns over the proposed evaluation system, some of which are based on European norms and best practices¹¹:

- The proposed rules attempt to quantify criteria as much as possible, even 'qualitative' indicators, and the experts doubt whether such criteria - for example, the time taken to reach decisions - can be considered fair unless they are carefully interpreted in context - for example, taking

11 In particular, Council of Europe Parliamentary Assembly (PACE) Recommendation no. 1604 (2003) 1 (Role of the public prosecutor's office in a democratic society governed by the rule of law); Council of Europe Committee of Ministers (COM) Recommendation no. R (87) 18 (Declaration of Bordeaux), COM Recommendation no. R (94) 12 (on the independence, efficiency and role of judges), European Charter on the Statute for Judges, adopted in Strasbourg, 8-10 July 1998, COM Recommendation no. R (2000)19 (Role of Public Prosecution in the Criminal Justice System, COM Recommendation no. (2012)11 (Role of the Prosecutors outside the Criminal Justice System), Opinion no. 3 of the Consultative Council of European Judges (On the Principles and Rules Governing Judges' Professional Conduct, in Particular Ethics, Incompatible Behaviour and Impartiality), Report of the European Commission for the Efficiency of Justice on the European Judicial Systems, Edition 2012.

into account whether a judge/prosecutor had a higher-than-usual workload of difficult cases, etc. In this case, allocating scores is likely to become a highly complicated exercise. More generally, quantitative indicators may not be accurate indicators, while qualitative indicators are almost inevitably more subjective.

- In particular, the evaluation criteria rely significantly on statistics for judges and prosecutors on the 'success' of their cases - namely, the number of decisions that are reversed on appeal (in the case of judges) or resulting in conviction (prosecutors). As the Consultative Council of European Judges has underlined (Opinion no. 6 (2004)), "[T]he use of reversal rates as the only or even necessarily an important indicators to assess the quality of judicial activity seems inappropriate...". As the Consultative Council of European Judges (CCEJ) also underlines, evaluation of the quality of justice should not be confused with evaluation of the professional ability of every single judge. Although the example concerns judicial decisions, the same argument applies to the use of conviction rates as a criterion for evaluating judges.
- In the case of prosecutors, the fact that evaluations serve as criteria for promotion if "successful" or "exceptional", and as grounds for dismissal if "unsatisfactory", and the fact that the SPC may initiate evaluations outside the usual three-year cycle raises significant concerns about possible harassment or pressure given the concerns over independence already set out in this assessment. Several prosecutors specifically expressed fears that the new evaluation system will be used to target prosecutors, and that difficulties in implementation of the new CPC will facilitate this. Indeed, evaluation of both prosecutors and judges must be conducted by bodies that are independent, which in the Serbian case is not currently the case if the assessment of the HJC and SPC in Section 4.1 is accurate.
- The current legal framework (Law on Pub-

lic Prosecution) establishes processes for appealing performance evaluation decisions to the SPC. However, it does not establish any mechanism by which prosecutors may provide input and feedback on their evaluation during the process of evaluation, nor any mechanism for appealing performance evaluation findings to a court, contrary to international recommendations such as Committee of Ministers Recommendation R(2010)12.

Recommendations:

24. Criteria for the evaluation of judges and prosecutors' performance should be established in a consensus-based manner, i.e. through extensive consultation with those to be evaluated as well as other legal professionals. They should not include indicators that depend on other factors than judges' performance, unless these factors can easily be taken into account and controlled for in the process of evaluation.
25. Reflecting the recommendations in Section 1, it is essential that the full independence of the HJC and SPC are established if they are to perform the role of appeal body in performance evaluations.
26. Responses to poor evaluation scores should be made on a case-by-case basis, and should not automatically lead to dismissal. The consequences of mediocre or poor performances should be widened to allow for example compulsory training to address skills or knowledge gaps.
27. Procedures for issuing evaluations of prosecutors and judges should include mechanisms by which those evaluated have a chance to provide feedback on their evaluation during the process, as well as clear opportunities to appeal evaluation findings to a court.

4.7 Integrity Plans

Under the Law on the Anti-corruption Agency, every public institution is obliged to develop an 'Integrity Plan' of "legal and practical measures which prevent and eliminate possibilities for the occurrence and development of corruption", in particular:

- Assessment of exposure to corruption for a particular institution;
- Description of the work process, decision making procedures and identification of activities which are particularly exposed to corruption, as well as tasks and activities, i.e. functions an official may not perform during discharge of public office and manner of control thereof;
- Preventive measures for the reduction of corruption;

The ACA has issued guidelines for the development of integrity plans, which are specific to different areas of public administration. In general, the templates have 6-7 areas that are common to all institutions, and 1-2 that are specific to each sector. For example, for the judiciary the template has seven common sections (areas that are included for any institution): Management of the institution; Management of finance; Management of public procurements; Documentation management; Management of human resources; Security; and Ethics and Personal Integrity. The last area is further subdivided into: conflict of interest; acceptance of gifts; effective reaction to reported cases of corruption and unethical or professionally unacceptable behaviour; and protection of whistleblowers. In addition, the judiciary has one institution-specific section, „Case management“.

For all sections, risks are divided into three parts - 'regulations', 'staff' and 'practice'. The ACA distributed questionnaires to all courts and prosecution offices (as it did to all public institutions) to circulate anonymously in electronic form to prosecutors, judges and other staff. Apart from completing the anonymous questionnaire by the employees, a separate working group is assigned to carry

out a risk assessment. Based on this assessment, staff responses to the questionnaire, assessment of relevant regulations and interviews with employees, the working group finalises the integrity plan. According to ACA, once integrity plan is completed and uploaded, the system automatically generate measures that could be undertaken to mitigate the identified risk. Institutions are obliged to revise their integrity plans every three years.

The experts have mixed feelings concerning integrity plans. While the idea of an integrity plan is a laudable one, the way in which this is carried out in practice in Serbia does not appear to be functional at all. In particular:

- It is not clear why every individual institution within a sector should produce an integrity plan, or that this is an effective way of designing policy. For the judiciary and prosecution, this means that every single court from basic to Supreme produces a separate plan, with no apparent coordination within the sector. The fact for example that the HCJ (and/or Supreme Court of Cassation) and SPC /Republic Prosecutor's Office are responsible for producing integrity plans only for themselves rather than for the judiciary/prosecution as a whole appears illogical.
- The template produced by the ACA for the judiciary and prosecution appears to be so prescriptive and detailed that it leaves little or no discretion for these institutions to identify risks themselves, and therefore little incentive for them to think pro-actively about preventing and addressing misconduct.

Taken together, these problems appear to have encouraged a formalistic 'rubber stamp' approach by courts and prosecution offices. Judges and prosecutors were either not aware of whether their court/PO had submitted an integrity plan already, or were largely dismissive of it as a formal 'administrative exercise'. In addition, despite an original deadline of 31 December 2012 that was extended to 31 March 2013, not all institutions

had submitted one as of December 2013 - including for example the High Judicial Council.

In terms of content, there appears to be a gap between the risks identified by Integrity Plans on the one hand, and the real risks on the other. For example, the Republic Prosecutor's Office stated during the expert visit that the 'weakest links' in the prosecution system are risks of prosecutors either dropping cases before investigation or discontinuing cases during an investigation. The RPO Integrity Plan however does not appear to mention this issue, and reads more like a formal checklist in which almost no problems are acknowledged. Although the RPO introduced a mandatory instruction in 2007 to address risks in case management/processing (see Section 4.4.5), it would be logical for an Integrity Plan to summarise the state of play in terms of how well the risk has been addressed and what further measures if any need to be taken; the RPO Integrity Plan does not do this, however. Members of the Supreme Court of Cassation did not seem familiar with the content of their Integrity Plan, and the Plan identified no risks at all under the category of Case Management.

Recommendations:

28. The duty to formulate Integrity Plans should not be imposed on all individual institutions of a sector, but only on those with an important coordinating role. For the judiciary this should be the HJC or HJC together with the Supreme Court of Cassation; for the Prosecution it should be the SPC together with the Republic Prosecutor's Office, given the important role played by the latter already in overseeing anti-corruption mechanisms within the prosecution.
29. The template for Integrity Plans should be altered to make it less prescriptive, and in particular to provide specific institutions with guidelines and a framework for how to think about specific problems within their own institutions, rather than

predetermining the issues to be solved and even measures to do so. In addition, the guidelines should be amended so that Integrity Plans are not narrowly focused on 'preventing and fighting corruption', but more broadly oriented towards underpinning integrity and good conduct - only one component of which is anti-corruption policy in a narrow sense.

30. Institutions should be obliged to update Integrity Plans either at more regular intervals¹², or in response to circumstances as they arise - for example, the coming into effect of the new Criminal Procedure Code.

4.8 Conflict of interest and regulation of standards/ethics

Both judges and prosecutors in Serbia are subject to extensive regulations to prevent situations of conflict of interest arising, ensure that such situations are addressed appropriately when they arise, and to promote and enforce standards of conduct in general. In particular:

- The Law on the ACA defines conflict of interest in a standard way as a "situation where an official has a private interest which affects, may affect or may be perceived to affect actions of an official in discharge of office or official duty in a manner which compromises the public interest" (Article 2). It prohibits the holding of various external positions, and obligates officials to declare to the Agency any doubts concerning a possible conflict of interest. The Agency may request information from the official, notifies him/her and his/her institution if it determines there is a conflict of interest, and recommends measures to the institution in which s/he works to address/resolve such conflicts.

¹² Although Article 19 of the Guidelines for Integrity Plan Development states that the head of institution may request the preparation of integrity plan earlier/ between these intervals and when he/she estimates that the integrity of institution is compromised, this remains to be an optional/discretionary right only.

- The laws on Judges (Article 30) and Prosecutors (Section 5) contain clear prohibitions on external activities that may compromise impartiality, duties to notify superiors of activities that may do so and request exclusion from processes, as well as the duty to adhere to their respective codes of ethics.
- The Code of Ethics of Judges was approved by the HJC in December 2010, and the Code of Ethics of Prosecutors in October 2013. The Codes contain extensive and comprehensive rules and exhortations to good conduct. For prosecutors, the Regulation on Administration in the Public Prosecution also contains many of the same or similar provisions.

The formal legal framework for ensuring good conduct is satisfactory. It might even be argued that there is more than enough regulation, with the laws on judges and prosecutors, codes of ethics and prosecutorial regulation overlapping considerably with provisions of the Law on the Anti-corruption Agency. However, the Code of Ethics of Judges does not appear to have been disseminated actively. Judges at two different higher courts were not sure that the Code had even been approved, for example. In addition, the content of both codes of ethics is oriented heavily towards 'exhortation' to good conduct, and there is no guidance within the codes on how judges or prosecutors should behave in situations where they are subject to improper approaches, pressures or threats. For prosecutors, there is a provision (Article 4) of the Regulation on Administration in the Public Prosecution stating that prosecutors must inform the Republic Public Prosecutor through his/her superior prosecutor of "any impact made by executive or legislative authorities on the performance of the Public Prosecutor's Office". However, there is no guidance for either judges or prosecutors on how to respond to improper approaches or pressures, or what procedure should be followed in reporting such approaches. Nor are there clear mechanisms within the prosecution or judiciary under

which judges or prosecutors may seek advice/counselling on appropriate conduct in particular cases. The Judicial Academy does provide five days of training on ethics as part of the introductory training at the Academy for future prosecutors and judges, but does not provide training on ethics and conduct to judges and prosecutors on an on-going basis. The HJC has undertaken the preparation of a permanent curriculum component on this subject with participation of the HJC disciplinary prosecutors.

Recommendations:

31. Judges' and prosecutors' rules and standards of conduct, such as those in the codes of ethics should be disseminated more actively by the HJC and SPC, and the curricula of the Judicial Academy should be revised to include ethics and standards of conduct as a permanent component of ongoing training of judges and prosecutors.
32. Internal guidelines and mechanisms for advisory services (providing advice to prosecutors on appropriate conduct on request) within Prosecution Offices and courts should be introduced. Training should also cover these guidelines through real-life scenarios, such as ethical dilemmas and attempts at improper influence. Training should also involve attorneys and lawyers, in order to encourage common values in the new criminal procedure system.

4.9 Sanctions and disciplinary proceedings

The performance by judges and prosecutors of activities that violate the legal provisions on activities incompatible with the performance of function, engagement in inappropriate relations with parties to proceedings of legal counsels, and serious violations of the Code of Ethics are disciplinary offences (Article 104, Law on Public Prosecution; Law on Judges, Article 90). Sanctions can be a public reprimand, salary reduction of up

to 50 % for a period not exceeding one year, or prohibition of advancement for a period of up to three years. Where a judge is found guilty of disciplinary offences three times, or whose violation caused “a serious disruption in the exercise of judicial power or regular duties at the court or a severe damage to the dignity of the court or public trust in the judiciary, and in particular if it results in the statute of limitations causing serious damages to the property of the party in proceedings”, the Disciplinary Commission is to institute dismissal proceedings. The Law on Public Prosecution also establishes similar categories of similar and repeated offences as grounds for dismissal (Article 104, 92).

The laws cited in Section 4.1.6 together with judges’ Rules on Disciplinary Proceedings (approved by HJC in September 2010) and prosecutors’ Rules on Disciplinary Proceedings (approved by the SPC in July 2012) establish clear frameworks for addressing disciplinary violations, notably: Disciplinary Prosecutors and Disciplinary Commissions established by both the HJC and SPC (for the HJC, the Disciplinary Prosecutor is appointed from among judges).

The experts regard it as too early to make an assessment of implementation of the new disciplinary system. However, as with other issues covered in this assessment, there are potential concerns about the ability of the HJC and SPC to perform their key roles in the disciplinary system with legitimacy, and concerns over the independence of judges and autonomy of prosecutors are particularly relevant here (see Section 4.1).

4.9.1 Declarations of assets and income

Another important mechanism for preventing and detecting venal misconduct is the system of declarations of assets and income to the Anti-corruption Agency. All prosecutors and judges must submit such declarations on assuming and leaving office, and must notify any changes on an annual basis. The ACA may conduct verifications (i.e. checks of the accuracy) of the declara-

tions. In total the ACA receives declarations from around 34,000 public officials. In 2013 it checked 496 declarations, and its Annual Plan stated that it would verify the declarations of all judges of the Supreme Court of Cassation and commercial courts. In 2013 the Agency initiated 9 criminal charges against officials for failing to submit declarations or providing false information, out of which (as of January 2014) 2 indictments were raised, investigations are running in 5 cases and prosecutors are considering 2 charges. In the same period the ACA filed 12 misdemeanour charges against officials who failed to submit declarations within the deadlines, leading (as of January 2014) to 5 convictions and 2 cases suspended.

The main problem for the ACA appears to be ensuring access to the information held by other public authorities (such as land register, vehicle registration etc.) it needs to verify declarations properly. The ACA does not have automatic access to such databases, although memoranda of understanding have been concluded with several other institutions (Tax Administration, Serbian Business Registers Agency, Republic Geodetic Authority, Central Securities Depository and Clearing house) to ensure direct access to certain type of data. In addition, negotiations for the conclusion of similar memoranda with the Ministry of Interior and the Customs Administration are underway.

Recommendation:

33. In accordance with Objective 3.1.2.4 of the Anti-corruption Action Plan, the necessary legal amendments and institutional steps should be implemented in order to ensure the ACA has access to other public databases of property, assets and income of public officials.

CONCLUDING REMARKS

On the evidence and testimonies and opinions heard during the research for this assessment, there is little evidence of venal misconduct among prosecutors or judges. However, poor conduct should be understood in a much wider sense as i) not restricted to corruption but also covering other individual categories including incompetence, and ii) conduct that is the result of pressure, including political influence. On this wider understanding, legal and institutional structures, established patterns of their implementation and the political context exhibit important gaps in both preventive and mitigative mechanisms to minimise the risks of poor conduct.

First and foremost, while many mechanisms for ensuring good conduct and/or preventing poor conduct are adequate, their proper implementation requires legitimate and credible governance of the prosecution and judiciary. Currently, systems of governance facilitate political pressure and influence on both branches, most obviously in the case of prosecutors. A number of

deficiencies in the systems for appointment of judges and especially prosecutors, and in the system of governance of the two branches raises acute risks of encroachment of political pressures on the processing of cases, and especially cases that concern politicians or persons they have an interest in protecting. The same systems of governance also preclude the performance by the two key governance bodies of their key functions in a manner that would command legitimacy and therefore be effective. Second, a number of other issues and factors - notably a lack of resources together with the impact of legal and institutional changes - place considerable practical obstacles in the way of prosecutors and judges performing their functions optimally.

The Serbian National Judicial Reform Strategy 2013-2018 (and to a lesser extent the National Anti-corruption Strategy 2013-2018) contains a large number of objectives and measures directed at some of the problems identified in this assessment. This assessment has provided recommendations that are formulated in the context of these objectives and measures, but in a number of cases go further or are more specific.

