Refurbishing Montenegrin Anti-Corruption Institutional Framework: The Promise of an Independent Regulatory Agency

by

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The Author's Declaration

I, the undersigned, Mensur Bajramspahić, hereby declare that I am the sole author of this thesis. To the best of my knowledge this thesis contains no material previously published by any other person except where due acknowledgement has been made. This thesis contains no material which has been accepted as part of the requirements of any other academic degree or non-degree program, in English or in any other language.

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Introduction

Following the reinstitution of its independence in 2006, the political elites in Montenegro undertook as its primary goal the improvement of social, economic and political life of the country. With Croatia recently taking its rightful place in the European Union, Montenegro has assumed the role of a primary candidate for the accession and an example for the Balkan region. Such remarks, however, stem largely from the internal stability in the country, especially in regard to the status of minorities. The high level of corruption in the country, especially on political level, represents the greatest obstacle in the accession process. It suffices to say that not as much as one member of Montenegrin political elite has ever been convicted for corruption.

The poor results in the fight against corruption have been largely attributed to poor implementation of the adopted legislative standards, mostly due to a deficient institutional framework. Although reports from international actors note some of these shortcomings, a more detailed analysis of institutions tackling political corruption has not been made. Moreover, recent political controversy revolving around the planned misuse of state resources by the ruling party, for electoral purposes, has put the importance of institutional approach to curbing political corruption into the spotlight yet again. The long recommended reform of the judiciary has been adopted in the Parliament, mere days ago.

Naturally, current institutional framework and prospects for its reform have not been analyzed in the light of the current political context. To that end, the analysis looks into the literature on the delegation of independent regulatory agencies with the aim of identifying the arrangements that ensure effective institutions. Against the backdrops of the apparent lack of political will and the evident inefficient institutional framework, the literature on formal, de-facto

independence and credible commitments is consulted. The analysis does not expand the literature; rather, the only theoretical contribution made here is in its application.

Upon examining the reports on corruption made by relevant international actors, the analysis shifts to the current political context in Montenegro. The most recent political controversy is recounted predominantly through newspaper articles, primarily because its proceedings and implications have not yet been systematically observed. The criteria extracted from the literature is then implicitly used to analyze the two most prominent and most budgeted institutions tasked with addressing political corruption, the Directorate for Anti-Corruption Initiative and the State Electoral Commission.

Granted, not all of the institutions tasked with curbing corruption have been the subject of analysis. The current institutional framework in the relevant field is burdened by an excessive abundance of actors that have overlapping, yet weak mandates, poor resources and no tangible activities or results achieved[1]. A detailed look into all these actors far surpasses both the limits and the ambition of this paper. The analysis concludes with a brief development of institutional reform scenarios. These are used to further contextualize the proposed approach to the reforms, the centralization of institutional framework, discussed lastly as the third scenario.

[1] The only remaining institution in the field, the Commission for Conflict of Interests, is omitted from the analysis for spatial reasons. For all intents and purposes, the insights on the State Electoral Commission are tantamount for the Commission for Conflict of Interests. This is because the institutional design, more notably the degree and the manner of its politicization is identical for both bodies.

Chapter 1: Unfolding the Independent Regulatory Framework - The Literature Review

This chapter will examine theoretical insights that deal with the establishment of Independent Regulatory Agencies (hereinafter: IRA) and their promise for curbing the corruption. The theory is indispensable for outlining conditions that ensure adequate functioning of these bodies, most notably the mechanisms that both secure and balance out their independence and accountability. The theory suggests that the sustainability of organizational structure, clear and strong formal mandate, financial sufficiency and stability and fixed office holding, all need to be adequately linked to legislative solutions. The transparency mechanisms, in turn, foster proper relationship between the agency and the regulatees, bestowing the agency with the highest degree of autonomy.

Certain regulatory bodies, however, fail to deliver adequate results, especially in contexts where political will is largely lacking. Some countries, bent on dealing with domestic pressure from voters, or addressing requests posited by external actors, establish IRAs to send positive signals to stakeholders. In such contexts, governments retain control over regulatory agencies by tampering with the institutional design and weakening some of the mechanisms of independence or accountability. The study on credible commitments and the de-facto independence seem particularly pertinent in explicating why the current institutional framework has failed in Montenegro.

The literature identifies a set of institutional and legislative arrangements that ensure the necessary autonomy under which IRAs are more likely to deliver results. These criteria will be contextualized in the last section of this paper with the primary aim of identifying the current institutional deficiencies, and their causes, in the Montenegrin anti-corruption institutional

framework. Secondarily, the insights will be used to provide a set of recommendations that may help ameliorate such shortcomings.

1.1. Independence and Accountability: The Building Blocks of IRAs

The anti-corruption field receives immense attention on both political and academic levels. A political concern for some, a matter of public management for others, the field of corruption curbing has been a matter of concern for many and across different contexts. Regardless of the field being highly contentious, much of the scholarship examines and explicates the importance institutions have on the corruption control (de Sousa 2010). The scholarship seems to converge in stating that the incidence of corruption is high in contexts where institutions are weak (Rothenstein 2007). To make the matters more complicated, in countries where levels of political corruption are high, it is difficult to expect any results coming from governmental institutions. An obvious response to this dilemma is the notion of delegation to independent agencies, "bodies of a durable nature, with a specific mission to fight corruption" (de Sousa 2010, 5). Such bodies, equipped with the strong mandate in the fight against corruption, bear the promise of overcoming the political shortcomings and governmental failure, while at the same time strengthening the institutional framework. As a result, the introduction of a new actor in the fight against corruption would, even despite the short-term lack of political support, represent both "a catalyst and a building block", for future improvements (as cited in, Batory 2012, 643).

Although domestic policy concerns or external pressures usually provide for a sound basis for the establishment of independent regulatory agencies, there are other conditions that may incentivize such decision-making. Given the often ambiguous motives that lay behind the establishment of regulatory agencies, ensuring their independence represents an imperative. Bearing in mind various definitions, independence can sometimes be considered synonymous with

autonomy. In the regulatory sense, this blur is more important because IRAs build their credibility by earning respect of the electorate through policy enforcement. Therefore, independence represents a building block under which IRAs not only function effectively, but also ensure their own sustainability as a regulator.

Independence has been a subject of substantial discussion and can be most simply accounted for as governments' "reluctance to surrender political control over regulatory decisions" (Warrick 1997, 1). In other words, regulatory agencies ought to preserve discretion if they are to perform their work effectively. Smith calls this "an arm's length relationship with political authorities" that is ensured essentially through organizational autonomy (Ibid, 2). The organizational autonomy of the regulatory agency is crucial for ensuring insulation from improper influence, while at the same time allowing for the organization to develop and implement best policy practices.

The literature recognizes different forms of independence. The formal independence of the institution is rooted in legislative provisions that delineate the scope of responsibilities of the regulatory body, as well as prescribe the manners in which they are accomplished. The formal independence mechanisms represent a necessary condition under which an institution can effectively operate. Accordingly, scholars also recognize de-facto independence, reflected in day-to-day operation of the body. The latter will be discussed in greater detail in the last part of this chapter.

Gilardi views formal independence as rooted in legislative mechanisms that establish the functioning of the regulatory body and guarantee its independence, especially from elected politicians (Delegation to Independent Regulatory Agencies: Insights from Rational Choice Institutionalism 2002). This form of independence is comprised of several characteristics, most

importantly addressing the agency's powers and responsibilities and its structural separation from government's institutions or officials. The characteristics that underpin agency's formal independence also represent an indispensable analytical tool, as their strength, or lack thereof, delineate the decision-makers' true regulatory intentions (Maggetti 2007).

In short, a regulator is independent to the extent that the founding legislation and statutes regulating its work, render instructions, threats or other impediments impossible (Hanretty, Larouche and Reindl 2012, 24). Bearing this in mind, such statutory provisions effectively confer powers to IRA to comprehensively enforce, license, regulate and sanction inadequate behavior (Thatcher 2005, 352). According to Smith, formal safeguards need to be introduced to ensure independence of the agency, even more so in countries with a limited tradition of independent public institutions (Warrick 1997, 3). The safeguards include: (a) clear and strong mandate that insulates the institution from governments' capture, (b) carefully laid out appointment procedure, carried out by a diverse set of stakeholders, including both the executive and legislative branches, (c) fixed terms for office holding, which mitigates governments' interference and coercion and (d) sufficient and reliable funding that both attracts professionals and ensures independence.

Needless to say, the danger for agency capture may persist regardless of these safeguards. This observation holds an even stronger ground in countries with weaker democratic traditions. A mere adoption of mechanisms that develop a sophisticated regulatory system may well be obsolete in countries where basic democratic principles have not been incorporated and upheld on an institutional level. However, the establishment of independent regulatory agencies may well be worth the risks for various reasons. Smith underlines this reasoning by remarking that "independence must be understood as a relative, rather than an absolute concept" (Warrick 1997, 3).

The safeguard mechanisms discussed above provide for a developmental trajectory that may foster a development of adequate institutional framework, even in the gravest environments. The budgetary sufficiency of the institution, for example, may well insulate the institution from political capture, but also help in attracting more qualified professionals. In turn a more robust and comprehensive decision-making and implementation of activities may well be expected, which enhances institution's position and authority. More importantly, even if independent functioning of the agency is not expected in the short run, concentrating expertize within a body, Smith argues, develops professional organizational norms, which in turn curbs vulnerability to political influence (Warrick 1997).

The notion of independence needs to be followed by measures that ensure accountability of the regulatory agency. This is so because IRAs are delegated with considerable autonomy in order to promote public interest: to achieve this, regulatory bodies need to regularly cooperate with their regulatees. Such cooperation fosters better implementation of regulatory policies (Maggetti 2007, 272). Viewed in this context, regulatory bodies represent an intermediary actor between the governments and its citizens, as they seek to ameliorate deficiencies and implement activities that promote public good. Consequently, maintaining adequate relationship with regulatees, by informing them on implemented activities, represents a building-block of IRA's autonomy and independence.

Mulgan discusses accountability as an obligation of "keeping the people informed and powerful in check" (2003, 1). In the regulatory context, some view accountability as a specific relationship in which "an individual or an agency is held to answer for performance that involves some delegation of authority to act" (Dubnick and Romzek 1998, 6). The accountability measures ensure that the regulator implements activities in line with its mandate, but also curb engagement

in corrupt activities or more broadly ensure more efficient functioning. Smith recognizes the difficulty in striking the balance between independence and accountability and thereat identifies the following measures that need to be put in place: (a) transparency in the decision-making process, (b) measures that prohibit and prevent conflict of interest, (c) effective decision-making process, with arrangements that provide for their appeal, (d) comprehensive review process that involves both internal and external auditing procedures, as well as involvement of watchdogs, (e) removal from office in cases of proven wrongdoings (Warrick 1997, 3-4).

The accountability measures ensure greatest degree of dissemination of information about activities conducted by the regulatory agency. The availability of information, in turn, provides for the rectification of mistakes, the introduction of sanctions and generally ensures smoother and more effective operation of the agency (Scholten 2011, 26). The approach fosters trusts between the regulator and the regulatee, which in turn increases institution's authority and curbs space for political capture. Simply put, accountability mechanisms inform beneficiaries on conducted activities, consequently allowing them to raise their opinions and concerns, while also insulating the agency from political pressures. In sum, the main factors of regulatory accountability are rooted in organizational structure and its linkage to the legislature. Naturally, it follows that the adoption of internal procedures that ensure activity transparency, employee accountability and annual reporting be in place.

1.2. Tackling the Taint: The Credible Commitments and the De-Facto Independence

Adequate institutional design, coupled with formal safeguards of independence and accountability measures all ensure adequate functioning of IRAs. Their importance can be best explicated in the fact that politicians can retain control over regulatory bodies by exploiting deficiencies in formal mechanisms. Some of these include: nominating and discharging members,

overturning their decisions, constraining activities through budgetary control and narrowing competencies through legislation (Thatcher 2002). Consequently, ensuring statutory autonomy of the agency and strong mandate needs to be followed by formal safeguards and accountability mechanisms, if the agency is to function effectively. The importance of the aforementioned safeguards and mechanisms for the functioning of IRAs can be conceptualized through concepts of 'credible commitments' and the 'de-facto independence'.

The benefits of establishing independent regulatory agencies are not solely confined to the regulatees. Governments seeking to pursue a well-defined framework of policies establish IRAs to ensure their stable implementation over time. Also, the decision-makers may choose to delegate regulatory powers to an independent body in order to demonstrate commitments, or shift responsibilities. Finally, governments may delegate powers to independent bodies in areas that are highly controversial, and often do so under external pressure. Be it as it may, the underlying reasons that drive the establishment of such bodies may well have a decisive impact on their institutional design, which in turns delineates the degree of their independence and accountability (Egeberg and Trondal 2009).

The credibility hypothesis is fairly straightforward: political sovereigns delegate their regulatory powers to independent actors and in doing so, increase the credibility of their policy commitments (Majone 1997, 139-140). The delegation process involves a regulatory approach under which institutional actors are insulated from political influence (La Spina and Majone 2000). The important mechanisms that ensure adequate institutional design have been discussed in the earlier section of this chapter. The credibility hypothesis and the notion of de-facto independence, provide for a conceptual framework that better exemplifies the importance of independence and accountability safeguards. In turn, these provide for an analytical tool under which institutional

frameworks can be assessed. Finally, the logic inherent in the literature on the credible commitments and de-facto independence can be useful for approximating the Montenegrin anti-corruption institutional framework.

Fabrizio Gilardi studies the regulatory experience of the Western Europe and develops the 'credibility hypothesis' - the governments' delegation of powers with the aim of enhancing the credibility of their policies (Policy Credibility and Delegation to Independent Regulatory Agencies: A Comparative Empirical Analysis 2002, 873). The author notes that credibility in the regulatory context involves the establishment of IRAs as a means of signaling governments' intent and commitment towards a set of policy goals. In turn, such an approach addresses time inconsistency in policy-making and generates stability in the implementation (Gilardi 2004, 72-73).

The credibility concern is increasingly more important, the literature suggests, in contexts where policy-makers cannot rely on coercion during policy implementation, as it provides for a highly robust policy-implementation framework (Majone 1997). The delegation approach within the institutional framework may arise from various circumstances, some being the desire to please domestic voters, shift responsibilities in controversial regulatory areas or conform to pressures from external actors. In all these contexts, the claim is that the independent bodies will provide results that the government has failed to achieve. As a result, the establishment of IRAs, at least on paper, promises to resolve the principal-agent dilemma (Batory 2012, 642).

In the international context, the notion of credibility further gains in relevance. According to Majone this is because the trade-off between credibility and coercion in international contexts does not exist (1996). Gilardi's empirical study on credibility in Western Europe provides interesting statistical results. Although, the results discard economic interdependence as a drive

for delegation to IRAs, they are rather promising in regard to the 'market opening 'variable, yielding positive and statistically significant relationship (Policy Credibility and Delegation to Independent Regulatory Agencies: A Comparative Empirical Analysis 2002, 884-885). These results may be highly indicative for countries that undergo democratic transition, and more particularly, the countries of the Balkans that are undergoing, albeit at a different pace, the accession to the European Union. The observation goes hand-in-hand with the notion that the establishment of independent regulatory bodies, and their insulation from political influence, can never be favored by politicians "on technical grounds alone" (Moe 1995, 137).

Insofar it is safe to presume that the delegation of regulatory powers to independent institutional actors may, in certain contexts, be driven by political considerations, rather than credible policy concerns. In other words, although commitments for establishing IRAs may arise from functional factors, such as the political uncertainty, domestic pressure or time-inconsistency in policy-making and implementation, other factors may diminish the credibility behind delegation. In literature, these are recognized as "contextual factors" that induce governments to consider developmental paths they would otherwise not take into account (Thatcher 2002). In contexts where political will is not the main driving force of reforms, elected politicians retain control over the IRAs by severely diminishing formal mechanisms of independence and accountability, or by instituting a more subtle control over resources or staff of the regulatory body.

The literature seems to be clear on the manner in which the control of IRAs can diminish its autonomy and render its functioning ineffective. Both formal and informal mechanisms can be deployed by elected politicians, who facing external pressures delegate regulatory bodies, but still retain control over them. Gilardi's work on credible commitments delves into formal mechanisms of control employed by politicians, mostly through legislative and institutional designs that limit

the scope of independence in IRA's decision-making and activity implementation. The formal independence is here operationalized as: (a) agency's head status, (b) the management board status, (c) the general frame of the relationships with the government and the parliament, (d) financial and organizational autonomy and (e) the scope of delegated competencies (Policy Credibility and Delegation to Independent Regulatory Agencies: A Comparative Empirical Analysis 2002, 880-881). The criteria here resemble well the safeguard mechanisms of independence, discussed in the earlier section of this chapter. These will be used as an analytical tool that assesses and identifies deficiencies in the current anti-corruption institutional framework in Montenegro.

The work of Thatcher further refines the mechanisms of control, by delineating formal from de-facto independence. The examination of "alternative methods of control", according to Thatcher is necessary because the relationship between autonomy and control is highly convoluted (Thatcher 2005). The primary rationale here is that the post-delegation control relies more often on informal control, or no control at all when institutional actors follow the preferences of their delegators. The contextual factors that render such relationship are rooted in specifics of institutional design and coercion, especially when "IRAs depend on elected politicians for many resources – budgets, enforcement, information and new powers" (Ibid, 364). Aware of such control, IRAs anticipate the policy preferences of their delegators in order to obtain increased powers and budget. The analytical framework here entrenches the formal safeguards as an analytical tool, with an added value of institutional interdependence under which IRAs obtain information and implement activities in cooperation with other, governmental actors.

1.3. The Analytical Framework: Lessons Learned

The findings presented in this chapter are of critical importance for the analysis of the current anti-corruption institutional framework in Montenegro. The literature identifies specific

mechanisms that ensure smooth operation of independent regulatory bodies, most notable being the independence and accountability measures. Furthermore, the literature seems to suggest that governments do not always delegate powers to independent institutions out of credible commitments. Sometimes, governments establish regulatory bodies to address domestic or international pressures. The latter is increasingly more important in the regulatory area, as governments have a much narrower field for ensuring cooperation with external actors, unlike on the national level. This observation suggests that IRAs insulation from political influence is prone to being overridden in contexts where credibility concerns arise are devoid of technical concerns.

The institutional design of IRAs is critical for their adequate performance. The literature converges in noting that such the design of IRAs need to ensure the greatest degree of independence possible, rooted in formal, legislative solutions. The so called safeguards of independence include: (a) clear and strong mandate that insulates the institution from political pressure, (b) carefully laid out appointment procedures, with the involvement of the largest array of stakeholders, (c) stable office holding, (d) sufficient, independent and reliable funding that both attracts professionals and ensures independence. Cumulatively, these safeguards provide IRA with the strongest authority to undertake delegated obligations, equips them with the necessary resources towards that aim and ensures the highest quality of human resources. The mechanisms not only serve to protect independence, but also allow for the best developmental trajectory for such bodies and foster maintenance of strong position within the broader institutional framework.

The accountability measures serve to foster proper relationship between the regulator and its relevant stakeholders. This not only curbs corruption, but allows for a better deliverance of results. The dissemination of information on conducted activities provides for a mechanism under which mistakes can be rectified and sanctions introduced. In turn, the accountability measures

further strengthen the autonomy of the institution and curb vulnerability to political capture. To this aim, a set of internal procedures that ensure activity transparency, employee accountability and annual reporting need to be in place. The mechanisms include: (a) transparent and efficient decision-making, (b) prevention of conflict of interests, (c) comprehensive review process, including internal and external auditing, (d) impeachments in cases of proven wrongdoings.

The literature presented herein is particularly pertinent to Montenegro, for reasons aplenty. The Montenegrin institutions have proven consistently to be highly inefficient with curbing corruption. The most recent affairs, revolving particularly around the April Presidential Elections have further exacerbated the deficiencies of the current framework, namely the taint of numerous, yet weak institutions that are not equipped with the necessary resources to fight corruption. The study of these institutions is relevant to the literature presented here, as anticorruption agencies are "bodies analogous to IRAs" (Batory 2012, 640). Furthermore, the study of 'credible commitments' and the 'de-facto independence', simply put, additionally delineate the importance of independence and accountability mechanisms. More importantly, this strand of literature shows that despite institutional and legislative arrangements, the functioning of IRAs is highly dependent on the existence of political will.

The observation is particularly relevant for Montenegro, where adequate legislative solutions have been adopted since the accession process has been initiated, however, with practical results largely lacking. The deficient institutional framework, in line with suggestions from the literature on credible commitments, has been a by-product of the accession process, under which legislative adoptions served solely to send positive signals to the external actor. Simply put, they represent an 'empty word on a piece of paper'.

Nevertheless, the study on adequate institutional design under which IRAs should operate is relevant for this study for several reasons. Primarily, the safeguard mechanisms identified within the literature provide for an adequate analytical tool with which the current institutional framework in Montenegro can be studied. The political pressure from the EU, further exacerbated by the most recent political controversies, has opened up space for the introduction of institutional amendments, rendering these lessons particularly viable, both politically and technically. This presents itself as a unique opportunity for incorporating lessons from the delegation literature, and introducing adequate institutional arrangements. Despite the current political shortcomings and the lack of political will, the concentration of expertize within a regulatory body, with strong formal powers and technical capacities, can foster institutional culture that is currently largely lacking in Montenegro. Such a body would most profoundly be preferable to the currently weak and highly diffused anti-corruption institutional framework, as it would represent both "a catalyst and a building block", for future improvements (as cited in, Batory 2012, 643). Currently, the body would foster accountability and provide for an operational framework under which the fight against corruption would be carried out unilaterally, concisely, clearly and with adequate resources.

Chapter 2: Putting the Bread on the Table - A Montenegrin Corruption Story

The problem of corruption in Montenegro has been consistently marked as the most important issue in its path to European accession. Various international actors have in the past period, pointed that corruption is a significant adverse phenomenon in Montenegro. The reports converge in stating that corruption is most severe in the political arena and that despite recent legal advancements, the practical results in the fight against corruption are largely lacking. The primary reason for the lack of results, as reported by all relevant international actors is in deficient and overly complex institutional framework. These institutions, facing serious backdrops in mechanisms that ensure their independent and efficient operation, have consistently failed to curb corruption and deliver results they have been tasked with. As a result, insofar none of the political elites have been charged with and convicted for corrupt wrongdoings.

The indicators of corruption cause a matter of concern. According to the survey conducted in 2009, 95% of the respondents who were asked for a bribe by a governmental employee, did not report the corrupt wrongdoing (Directorate for Anti-Corruption Initiative 2009, 17). The research shows that the primary reason for not reporting a request for the bribe lies in the lack of trust in the relevant authorities. Results are indicative of the fact that the competent authorities have consistently failed to undertake meaningful activities in sanctioning corruption. Research also shows that Montenegrin citizens single out the poor application of laws and regulation as the main cause of corruption in the country (Ibid. 15). According to Transparency International's Corruption Perception Index, Montenegro was ranked 75th out of 176 countries, with a score of 41/100 (Transparency International 2012).

As the corruption remains highly diffused within the Montenegrin society, the inclination towards corrupt wrongdoings in time becomes internalized as a value and is rendered socially acceptable. The most recent political controversies, especially the one revolving around the April Presidential elections, strongly re-affirm the deficiencies of the institutional framework in Montenegro. These 'political affairs' clearly delineate the high prevalence of corruption in the political arena and demonstrate that the current framework fails to address wrongdoings in the area of political party funding and elections. Therefore, in the face of apparent lack of political will and highly diffused power system that emanates from a political elite ruling the Montenegrin society for over 2 decades, systematic amendments are necessary to foster the fight against-corruption, both in the short and long-term perspectives.

The most recent political controversies have opened up space for an unprecedented political dialogue, giving way to consideration of amendments never [seriously] considered before. The current political signals from the government, including the very recent adoption of strategic documents in the Parliament, promise the establishment of an effective and impartial justice system in Montenegro. Furthermore, the proposed reforms of the justice system, open up space for more institutional refinements in the anti-corruption framework. The adequate justice system is crucial for the deliverance of results from anti-corruption institutions, granting that their proper design is in place. Therefore, the current political proceedings in Montenegro, coupled with the intensified EU accession process, lends as an opportunity for introducing amendments to the institutional framework, which are gravely needed.

This chapter provides for a descriptive analysis of corruption in Montenegro. The intent here is to provide for a contextual lens, under which theoretical insights can be adequately employed. Primarily, the analysis presented herein will delineate the broader state of corruption in

Montenegro. To that end, domestic and international reports that stipulate deficiencies in the anti-corruption efforts in Montenegro will be considered. These observations will be further assessed against the most prominent political controversies, which lend themselves useful in crystalizing the deficiencies in the current anti-corruption framework in Montenegro. The insights from this chapter will allow the analysis to proceed, in chapter 3, with the assessment of the institutional design, and a provision of recommendations.

2.1. The Law and its Undertakers: The Legal Framework and the Judiciary

Montenegro declared its independence via the referendum on May, 21, 2006, effectively ending the State Union of Serbia and Montenegro (BBC News 2006). Following the independence, Montenegro undertook as its primary political goal the accession to the European Union, thereat engaging in various reforms of its social, political and economic life. In regard to the corruption, a lot has been done in the adoption of new legislation, in order to harmonize and approximate relevant regulation to the European standards. Although much has been done, the implementation of the legal provisions has been observed as substantially lacking, either due to imprecise wording or the failure on institutional part. Despite the fact that most of the legislative deficiencies have been amended, the implementation of laws still remains on the 2006 level, where "the authorities responsible for applying the new legislation were not always in position to do so" (Group of States against Corruption 2006, 5). Consequently, the criminal charges were never brought against the political elites in Montenegro, while the fight against petty crimes also proved to be unsuccessful (SIGMA Programme 2010, 45). According to the report of the National Tripartite Commission, for the period of 2006-2010, out of 1039 cases where criminal investigation for the alleged acts of corruption was initiated, a mere 20 concluded with the imprisonment (National Tripartite Commission 2010, 25).

As mentioned before, Montenegro has, in the past period, adopted a set of legislative solutions that approximate the regulation to European standards. It is important to note that Montenegro has ratified the Criminal Law Convention on Corruption and the Additional Protocol, without reservations, in force as of June, 6, 2006 and March, 17, 2008, respectively (Council of Europe 2013). The Penal Code, as the most important legislative document that regulates the fight against corruption, has been amended several times to better comply with international standards, the latest amendment adopted in 2011 (The Government of Montenegro 2011). The GRECO generally appraised the amendments and stated that "the framework for the criminalization of corruption is generally in line with the standards of the Criminal Law Convention on Corruption" and it's Additional Protocol (Group of States against corruption 2010, 17). Although some amendments still remained problematic[2], the GRECO remarked that the main challenge in fighting corruption in Montenegro lies not in the harmonization of legislation, but in its enforcement (Ibid.).

The European Commission Opinion notes that the legislative framework in the fight against corruption has been largely in place, albeit with substantial short-backs in its implementation (European Commission 2010, 7). The report, once again, stipulates that the main cause of inconsistent implementation is in weak institutional actors that "lack the full legal powers and the capacity to ensure enforcement of the legislation" (Ibid.). The EC further outlines weak legislative and institutional provisions that regulate the areas of political party financing and, more importantly the independence of the judiciary. The Analytical Report of the Commission notes "sound progress" in the judicial reform, however noting serious concerns over the independence

[2] The main concerns expressed by the GET are related to: (a) ambiguous wording of bribery and trading in influence offences, (b) the conceptions of bribery need to be extended to adequately and comprehensively include public officials and the private sector.

of the judiciary, "as the legal framework leaves room for disproportionate political influence" (Analytical Report 2010, 18).

The main cause of concern, according to the Analytical Report is the appointing of procedure, conducted by the Parliament and, consequently by the government. The fact being that the public prosecutors, including the Supreme Public Prosecutor and their deputies are elected by the simple majority in the Parliament, allows for substantial space for political capture of the judiciary. Selection and appointment procedures further exacerbate the issue. The entry procedures into the system are monitored and implemented by the Judicial Council, whose members are appointed by the Parliament, in accordance with the Article 127 of the Constitution (The Government of Montenegro 2007). This constitutional provision, unfortunately, enables a "dominant political influence" on the judiciary, further aggravated by the lack of a unified appointment procedure and carefully prescribed criteria that ought to drive the process (Human Rights Action 2012, 11). Finally, the dismissal and disciplinary proceedings against the prosecutors, undertaken by the simple majority in Parliament, create a risk of discretionary implementation due to the lack of transparency (Analytical Report 2010, 18-19).

Similarly, the joint OECD and EC assessment, notes the significant advancements in the adoption of legislative documents governing the anti-corruption field, albeit with little concrete results that stem from inadequate implementation (SIGMA Programme 2010, 45). The report outlines the anti-corruption activities in the field of political party financing and privatization - as largely insufficient, with all policy advancements being "excessively driven by international obligations" (Ibid. 48). The deficiencies in the institutional arrangements are further exacerbated, according to the report, by a weak independence and integrity regimes of the judiciary and law enforcement whose set-up is "based on nominations by political parties and cannot protect the

judiciary system from politicization" (Ibid. 42). The analysis further stipulates that the independence of the police remains a subject of grave concern, despite the introduction of legislative amendments that aim to strengthen the integrity of the police system. The underlying issue behind these drawbacks, according to the analysis can be found in the insufficient transparency of the administration, which has rendered introduction of key reforms and developmental projects – innefective (Ibid).

Finally, in the Joint First and Second Evaluations, GRECO notes the vulnerability of the judiciary to political influence. The GET states that, although "no general rule or international standard preventing their election by Parliament" exists, the lack of objective criteria that drives the appointment process adversely affects the independence, efficiency and role of judges and prosecutors (Group of States against Corruption 2006, 10). In light of that observation, GRECO recommended a review of the recruitment procedure of judges and prosecutors so as to ensure objectivity in their appointment as well as their independence (Ibid. 31).

The views of all relevant international actors regarding the anti-corruption institutions in Montenegro seems to highly converge as well. The GRECO notes serious shortcomings in the independence and specialization of bodies engaged in the fight against corruption, recommending the establishment of "a specialized, independent anti-corruption body with sufficient resources" (Group of States against Corruption 2006, 24). Elaborating more closely on the bodies regulating the political party financing, GRECO also recommended that a new or existing institution "be given appropriate independent authority and resources" to suppress wrongdoings in this area (Transparency of Party Funding 2010, 18). The European Commission Analytical Report notes high fragmentation in the anti-corruption institutional framework, recommending that it "needs to be streamlined and properly coordinated" (European Commission 2010, 100).

A more detailed analysis of the current anti-corruption institutional framework will be subject of attention in the chapter 3. For now, it suffices to say that all relevant international actors agree that adequate legislation has been adopted in Montenegro. However, its implementation, according to the reports, has been largely lacking due to weak and highly fragmented institutional framework. Further, the analysis shows that the anti-corruption activities seem to fail most prominently in the areas of political party financing, privatization and the elections, while all of the actors note serious deficiencies in the appointment and independence of judges and prosecutors.

The analysis presented herein makes it clear that, despite legal advancements, Montenegrin efforts in the fight against corruption have failed significantly due to weak institutional arrangements and a particularly vulnerable justice system. Although the recommendations were made from several important international addresses, much of the observed deficiencies have not been addressed. The recent controversies revolving around Presidential elections in April, however, constituted a political momentum that promises to ameliorate some of the observed deficiencies. The opposition, united under a joint presidential candidate, supported by a traditional coalition partner of the ruling party and the civil sector, along with strong statements from the European Commission, incentivized the government to set in motion much needed reforms. The Parliament has, just recently, adopted recommendations that both address independence issues of the judiciary, as well as strengthen its supervisory role in the fight against corruption. These proceedings have generated a strain of reforms that provide for a framework under which the competencies of current anti-corruption bodies can be revised to deliver maximum results. The detailed examination of this political controversy, and its implications, follows in the next section.

2.2. The Truth for the Blind and Hope for the Needy – The Recording Affair and the Promise of Reforms

The misuse of state resources by political parties has always been a subject of intense political contestation in Montenegro. In a recent interview, the EU ambassador to Montenegro, Mr. Mitja Drobnic noted that such allegations gained in further prominence due to the most recent political affair revolving around presidential elections (Independent Daily News Vijesti 2013). The affair has been exposed by the printed Montenegrin media "Dan", which published audio recordings and transcripts from the meetings of the Governing Board of the ruling party, the Democratic Party of Socialists (hereinafter: DPS)[3]. The recordings revealed a discussion among the most prominent members of the political elite about the alleged misuse of state resources, with the aim of entrenching and enlarging voter support at the upcoming presidential elections. In light of the political pressure from both domestic and international actors, the ruling party supported the opposition's parliamentary initiative for reforming the judiciary. The endorsement of such reforms provide for an unprecedented political moment for the introduction of broader reforms of the anti-corruption institutional framework.

The independent Montenegrin newspaper "Dan", published in the period of February, 1 – April, 15, 2013, audio recordings from the meetings of the Governing Board of the ruling party, the DPS. The recordings reveal intentions of the Governing Board to maximize voter support by utilizing state resources (Dan 2013). Mr. Zoran Jelić, head of the Directorate for Employment, remarked the success of the employment projects, financed through the governmental budget, under which the voter support was strengthened (Ibid). Mr. Babetić, the head of the party's municipal board, demanded resources that would be distributed via social care programs to the

[3] All of the recordings can be found on the main web-site of the media, at: www.dan.co.me

target population, with the aim of ensuring votes for the party (Affair Recording: New Audio Recording Reveals new Misuses of State Resources 2013). Furthermore, the former Political Director of the DPS, Mr. Branimir Gvozdenovic, discussed the importance of the Labor Fund and the funds granted by the European Investment Bank, which are to be diverted to unemployed factory workers, again, with the aim of securing their votes (Votes bought with the funds of the European Investment Bank 2013). Mr. Gvozdenovic concluded by stating that invalid ballots should be "*turned into party advantage*", also noting the potential of ballots casted by mail (CDM 2013).

Following the disclosure of the wrongdoing, the relevant anti-corruption institutions failed to address the potential misuse of state resources. More notably, the State Electoral Commission, as the highest administrative body monitoring and managing the electoral process, failed to even release a statement regarding the issue[4]. The opposition, united under a joint Presidential Candidate, filed a criminal complaint against the DPS to the State Prosecutor's Office. The complaint was based on the reasoning that the audio-transcripts posit a reasonable doubt that "*the accused violated the Labor Law and the Constitution of Montenegro and violated the right to equal employment to citizens of Montenegro*" (Radio Slobodna Evropa 2013). The Supreme State Prosecutor, Mrs. Ranka Čarapić, declined the complaint on the reasoning that none of the statements made at the board meeting „*contained any element of any criminal act as foreseen by both the Penal Code of Montenegro and the Law on Financing of Political Parties*" (Pobjeda 2013).

The State Prosecutor's response was followed by substantial political pressure, exerted by both domestic and international actors. The European Commission issued, in mid-May a press

[4] The state Electoral Commission, in accordance with the statutory powers, has the competence to, inter alia, initiate a preliminary investigation regarding any alleged wrongdoings relevant to the electoral process.

statement calling upon the political elites to end various political challenges. The European Commissioner for Enlargement, Mr. Štefan Füle, noted that one of the noted challenges represents the lack of citizens' trust in the institutions of the system, which need to be addressed with adequate institutional and legislative reforms (Vijesti 2013). The opposition boycotted the work of the Parliament and backed by the nongovernmental sector and independent intellectuals, organized civil protests. Following the dispute with one of the coalition partners that almost obstructed the presidential inauguration of their candidate, the DPS finally gave in. The Montenegrin Parliament, on May, 25, 2013, unanimously adopted the Conclusions on Building Trust in the Electoral Process (The Parliament of Montenegro 2013). The document envisages legislative changes based on which the Supreme State Prosecutor will be elected by a qualified majority, which a step in the direction of recommendations provided by the Venice Commission (Ibid. 1). Finally, the document further stipulates that such changes will enter into force even prior to the foreseen amendments.

The judicial reforms adopted by the Parliament are monumental for the fight against corruption. Ensuring the independence of the judiciary promises not only the better rule of law, but provides the basis for carrying out broader reforms of anti-corruption institutional framework. The institutional arrangements for the fight against corruption in Montenegro, unfortunately, do not promise the deliverance of results in the field, despite the recent reforms. Without the strong anti-corruption bodies to undertake the monitoring activities and preliminary investigations, it is difficult to imagine how an independent judicial office would conduct an effective and comprehensive control of corruption. Although a step forward, the judicial reforms cannot ameliorate deep, structural deficiencies of an entire institutional framework and threaten to be yet another 'empty word on a piece of paper'.

Chapter 3: Wasting the Taxpayer's Money: Institutions against Political Corruption

Ever since the reinstitution of its independence in 2006, Montenegro undertook a clear path towards taking its place in the European family of states. In the past period, significant progress has been made in the social, economic and political life of the country. However, the greatest challenge still remains in the field of anti-corruption. Although much of the relevant legislation has been adopted, its implementation has failed largely due to a redundant institutional framework with "no clear division of competences" (European Commission 2010, 100). The European Commission stated, on several occasions, the need to refurbish the anti-corruption institutional framework, noting the lack of "single authority with clear legal powers and the capacity to monitor and enforce commitments" (Ibid).

The government has, in the past period, failed to deliver any viable results in the fight against corruption. No political elites were ever incriminated for corruption, leaving the efforts in the area only to address petty crime. This, followed by serious flaws in the institutional design, point that the government's efforts in the fight against corruption are mostly driven by obligations arising from the European integration process, rather than constituting a credible commitment. Despite the lack of political will, recent events rendered the institutional reform both viable and desirable. The Parliament, in the wake of recent affairs related to the misuse of state resource by the ruling party, unanimously adopted much needed judicial reforms. This represents a monumental step for a more comprehensive and institutionalized fight against corruption in Montenegro.

Halting the reform process at the judicial level bears no promise for the effective fight against corruption. Without a strong, well-resourced institutional actor that would monitor and

undertake preliminary investigations, an independent judiciary would fail to deliver comprehensive results. Much of the resources diverted to the current institutional framework are wasted due to an overly complex and redundant system, under which institutional actors either have weak or overlapping mandate. The number of institutions tasked with fighting corruption in Montenegro is startlingly high, although their competences often fail to constitute the raison d'être. According to the legislation, all state administrative bodies are obliged to report corruption. The European Commission report notes more than 54 institutions whose competences include, inter alia, at least the reporting obligation (European Commission 2010, 100). Consequently, the institutional reform, more precisely its centralization, represents a reasonable course of action inasmuch that it promises a more responsible use of the taxpayer's money.

To illustrate: the adoption of strategic documents falls within the competence of the Working Group, its adoption is undertaken by the Government of Montenegro, principal implementation is conducted by a plethora of institutions, while its oversight by the National Commission. Other institutions, such as the Directorate for Anti-Corruption Initiative, receive substantial resources for conducting awareness raising campaigns and consultations. Finally, institutions tasked with the mitigation of corruption in specific areas have failed to deliver results, due to either the narrow competences, financial dependence or dubious appointment procedure that both hampers its independence and mitigates human resource development. In other words, the institutional shortcomings, more notably the lack of independence safeguards and transparency, substantially limit the effectiveness of these bodies.

The subsequent section examines the institutional design of bodies tasked with curbing the political corruption in Montenegro, the Directorate for the Anti-Corruption Initiative and the State Electoral Commission. Due to a somewhat limited scope of this analysis, the examination and

assessment of the remaining institution that regulates the political corruption, the Commission for Conflict of Interests (here: the Commission), has been omitted. The reason to this is that the appointment procedure for the staff of the SEC is tantamount to that of the Commission. Keeping in mind the earlier observation that no political elites were ever infringed upon in Montenegro[5], the analysis of the deficiencies in the institutional design of the SEC is highly indicative for evaluating the autonomy of the Commission. In other words, these two bodies share the same institutional shortcomings that render them highly vulnerable to political capture.

The selection rationale for anti-corruption institutions is as follows: the analysis of all Montenegrin anti-corruption would prove to be an undertaking equal only to the task of the Sisyphus. Some of the institutions have too weak of a mandate for their analysis to be relevant. Also, the sheer number of institutions that regulate anti-corruption activities is too vast for the purpose of this paper. Finally, the anti-corruption activities have failed most notably on political level: as noted in the earlier chapter, no political elites were ever infringed upon for alleged corrupt wrongdoings. Therefore, this section concerns only with institutions whose: (a) competences, be they repressive or preventive, fall exclusively with addressing the corruption in the political arena, (b) current mandate and/or the budget are at the top of the institutional hierarchy.

3.1. Not even a Paper-tiger: The Directorate for Anti-Corruption Initiative

The first anti-corruption body in Montenegro, the Directorate for Anti-Corruption Initiative (hereinafter: the Directorate) was established in 2001, through the adoption of the Regulation on the Establishment of the Agency for Anti-Corruption Initiative (The Government of Montenegro 2001). The initial competences of the Agency included implementation of prevention and awareness raising activities, consultative role in the ratification of international standards and the

[5] See (SIGMA Programme 2010, 45)

founding of other bodies tasked with combating corruption (Directorate for Anti-Corruption Initiative n.d.). The Agency, reformed into the Directorate in 2004, saw its competences expanded in 2007, within the broader reform of the organization and the work of state bodies (The Government of Montenegro 2007). The Directorate has the largest budget among the institutions whose competences include the fight against corruption.[6]

The competences of the Directorate, according to the latest amendments (Article 4), include: (a) promotional and preventive activities, such as awareness raising campaigns; (b) cooperation with the competent authorities in developing regulation and strategic documents in the anti-corruption field; (c) coordination of the reporting procedures on alleged wrongdoings, i.e. the forwarding of the reports on corrupt wrongdoings, received by other institutions, to competent authorities and (d) the monitoring of the implementation of GRECO recommendations (The Government of Montenegro 2012). Besides the educational and coordination role, the Directorate, receives reports on corrupt wrongdoings via email, website or phone and provides free legal advice to citizens. According to its annual report, the Directorate will, in the ensuing period, develop its analytical capacities for preventive purposes and further commit to coordinating the reporting procedure and its forwarding to competent authorities (Directorate for Anti-Corruption Initiative 2012). Furthermore, the report stipulates Directorate's commitment to raising awareness on adverse effects of corruption and a continual development of its capacities and organizational efficiency.

The scope of Directorate's competences delineate its rather weak mandate. Aside from conducting awareness raising campaigns as its primary role, the Directorate forwards the reports

[6] The budget of the Directorate has been consistently raising: from the mere 70.000€ in 2007, the budget plummets to 382.432 in 2009, 392.232 in 2010, 397.415 in 2011 and 325.421 in 2013. It is interesting to note that the Directorate consistently expends around 50%, or more, of its approved funds to salaries.

on corrupt wrongdoings to relevant institutions. This statutory arrangement is seriously flawed: the Directorate serves mainly as a record-keeping unit that administers the complaints, without any consequent jurisdiction. According to its annual reports, the directorate was most busy in 2012, where it received and forwarded 209 reports on wrongdoings (Directorate for Anti-Corruption Initiative 2012, 5). Given that the Directorate has no jurisprudence in processing and sanctioning the wrongdoings, it has no access to the data on whether its referrals reached the last judicial instance[7]. Although very important, the administrative processing of reports on corruption is not exclusive to the Directorate, but rather falls under the competence of all other state bodies, according to the state administration legislation (The Government of Montenegro 2012).

The Directorate employs 17 workers. According to the relevant legislation, the head of the Directorate is appointed by the Government of Montenegro. The Directorate is organized as a unit of state administration; until 2011 it was an organizational unit of the Ministry of Finance, when it was transferred to the Ministry of Justice and Human Rights[8]. The Directorate has, until 2011, submitted annual performance reports and budgetary proposals to the competent ministry. In turn, the ministry determines the budget of the Directorate and monitors the expenditure of approved funds. With its transfer to the Ministry of Justice and Human Rights, the already narrow administrative competences of the Directorate were further reduced. The Office of General Affairs and Finances of the Directorate was terminated, with the management of administrative, technical, human and financial resources moved under the jurisdiction of the ministry (Ministry of Justice and Human Rights 2012).

[7] Nor do the other institutions of the system maintain such records. For illustration, see: (National Tripartite Commission 2010).

[8] According to the relevant laws on the Budget of Montenegro, acts no: 01-842/55, for year 2011; 01-675/2, for year 2012; 33/12-2/46, for year 2013.

The institutional design of the Directorate for Anti-Corruption Initiative suffers from serious flaws. It is questionable whether an institution with such narrow competences and weak autonomy should exist. The statutory powers of the body are too narrow and allow only for meaningful implementation of awareness-raising campaigns. Its role in compiling and forwarding the reports on corrupt wrongdoings to relevant authorities is trivial for a statutory power, given that the relevant legislation prescribes the same obligation to all state bodies. Flawed institutional design, coupled with a weak mandate, budgetary dependence and human resource management, render its formal independence virtually inexistent, consistent with the literature on formal independence (Warrick 1997). Moreover, the dominant position of the Ministry of Justice and Human Rights that determines and manages administrative, human and financial resources of the Directorate, further incentivizes its staff to follow the preferences of elected politicians. This observation is in line with Thatcher's framework of "alternative methods of control" (Thatcher 2005).

3.2. The Prosperity through Obedience, the Discipline through Control: The State Electoral Commission

The State Electoral Commission (hereinafter: SEC), according to the statutory provisions, represents the most important body in the electoral administration of Montenegro (The Monitoring Center CEMI 2009, 14). The body was established in 1990, during the first multi-party elections in Montenegro. Over the past 2 decades, the Law on the Election and Dismissal of MPs has been subject to much of the debate, with the latest amendments taking place in 2011[9]. Despite these proceedings, the underlying competences and the structure of the SEC have remained on the 1990 level, with the latest amendments introducing only the permanent staff to the body (The

[9] The Law on Amendments to the Law on Election of MPs, Act no. 01-1050/2

Monitoring Center CEMI 2009, 14). According to the legislation, the SEC employs eleven workers: the President, the Secretary and nine senior and junior officials. The premises of the SEC are located in the same building as the Parliament, as the commission is funded as a Parliamentary organizational unit. The budget of the SEC varies substantially: during the pre-electoral period, the budget may be as low as 60.000€, while during the last elections it was 913.800[10].

The Law on the Election and Dismissal of MPs defines the competences of the SEC within the framework of pre-electoral, during elections and post-electoral periods. This encompasses regulation of all administrative and regulatory concerns related to the electoral period, including the financing of political parties. The competences of the SEC during the pre-election periods are substantially reduced are predominantly administrative in nature and include: (a) validation of electoral lists, in accordance with the relevant legislation, (b) maintenance and publishing of the data on the electorate, (c) maintains the elections data, and other (The Government of Montenegro 2011, 5). During the elections, according to the article 32 of the Law, the SEC ensures lawful undertaking of elections and monitors its implementation, monitors the work of municipal commissions and provides recommendations for the improvement of their functioning (Ibid). Upon the completion of elections, the SEC publishes electoral results, stratified on municipal level and submits to the Parliament a detailed report on the elections and electoral candidates.

The mandate of the State Electoral Commission is unclear and poorly rooted in the statutory and regulatory framework. The functioning of the State Electoral Commission is regulated only by three articles of the Law on the Election and Dismissal of MPs[11]. The lack of clear regulatory provisions, unfortunately, substantially limits the effectiveness of this body. The

[10] See laws on the budget of Montenegro, year 2011 and 2012.
[11] Articles 30, 31 and 32 of the Law on the Election and Dismissal of MPs, available at: http://www.rik.co.me/regulativa/Zakoni/zakon_o_izboru_odbornika_i_poslanika.pdf

recently adopted Rulebook on the Work of State Electoral Commission, sadly, does not contain any provisions that stipulate the manner in which the underlying duties of the SEC are carried out (State Electoral Commission 2013). As a result, much of the SEC competences are either conducted partially, or not at all.

The oversight of elections, according to the legislation are not followed by investigative powers. Instead, the SEC publishes reports on its website on the adherence to electoral standards, without the guarantees that such reports will have legislative merit (State Electoral Commission of Montenegro n.d.). There are no provisions that clearly delineate its oversight function, which in practice, positions the SEC as a body that disseminates information to the general public. Although the legislation notes its role in controlling the financing of political parties, in practice, the SEC only publishes audit reports on the financing of political parties which are prepared by the Ministry of Finance (Reports on the Financing of Political Parties n.d.).

Relatively recent amendments to the Law on the Financing of Political Parties attempt to address these concerns, by further delineating competences of the SEC in the area of political party financing.[12] According to the Article 23, the SEC has an explicit jurisdiction in undertaking the auditing of finances of political parties. The SEC conducted the auditing and published the reports for the year 2012 on its website (State Electoral Commission 2012). However, the unclear and fully politicized appointment procedure severely diminishes the implementation of duties as foreseen by this law. According to the Article 29 of the Law on the Election and Dismissal of MPs, the Parliament appoints the SEC staff from "a list of candidates proposed by political parties who have representatives in the Parliament". The President and the Secretary of the SEC are appointed

[12] Act no: 23-2/11-7/25, adopted in 2011

from the candidates of political parties that were first and second, respectively, in the number of votes won during the previous elections (Article 30).

The relevant legislature that prescribes the appointment criteria contains no provisions that would limit the vulnerability of the SEC to political capture. Besides provisions that secure the governing positions within the SEC to ruling parties, the only additional appointment criteria for requires the staff to be 'bachelors of law'[13]. This 'professional proliferation' of the SEC involves significant degree of ambiguity, ultimately enabling complete influence to ruling political parties over a body that is supposed to supervise and monitor and sanction their financial functioning (Pavićević 2002). This observation is obvious in the functioning of the SEC. Since the adoption of amendments to the Law on the Financing of Political Parties in 2008, which provided the SEC with a jurisdiction to decide on complaints of political parties on the electoral process, the commission endorsed twenty-one decision (State Electoral Commission 2008-2013). From these, all of the complaints (19) submitted by the opposition parties were rejected. The remaining two, submitted by the ruling party, were accepted and forwarded to the competent judicial authority.

3.3. To Sin but not to Punish: A Wrap-up

The fight against corruption remains as the most prominent political issue in Montenegro. Although much has been done in the harmonization of the Montenegrin legislation, its application has been largely inconsistent due to a deficient institutional framework. The lack of the independence safeguards, more notably the weak mandate, financial dependence and an unclear appointment procedure severely diminish the effectiveness of anti-corruption bodies. As a result, the corruption remains high, especially in the political arena. This chapter examined the institutional design of the Directorate for Anti-Corruption Initiative and the State Electoral

[13] Article 30, point 8 of the Law on the Election and Dismissal of MPs.

Commission, bodies that take the top place in the anti-corruption institutional hierarchy and receive the highest budget in the field.

Both of the bodies suffer from serious institutional flaws that effectively eliminate their independence. A weak and ultimately redundant mandate of the Directorate hardly justifies the budget this body is awarded. Competences of the SEC are hardly rooted in the statutory provisions, rendering this body unable to undertake some of the core activities that are central to its mission. The ambiguity of the appointment procedure effectively ensures high politicization of the SEC, with the governing seats in the body effectively secured for the ruling party. As a result, the SEC failed to initiate as much as one infringement procedure against the ruling coalition, despite numerous complaints from the opposition. The same rationale applies to the Commission for Conflict of Interests, with appointment procedures virtually tantamount to the SEC.

Similarly, the autonomy of the Directorate is severely diminished by a dominant position of the Ministry of Justice and Human Affairs that monitors its work, approves its budget and manages its human resources. Altogether, such provisions further incentivize its staff to follow the preferences of elected politicians. After all, this seems to be the only 'reasonable' competence for a body that has consistently allotted 50% of its financial resources to salaries.

Conclusion: The Perspective of Institutional Reform

All of the relevant international actors commend Montenegrin efforts in harmonizing the anti-corruption legislation. At the same time, the actors observe significant failure in the implementation of the adopted standards, primarily due to poor functioning of competent institutional actors. The literature examined in the first chapter discusses, among other, the notion that political elites might engage in certain institutional reforms out of international pressures. Lacking credible commitments, political elites design institutions that are either effectively under their control or too weak to produce any viable results.

The Montenegrin anti-corruption institutional framework can be characterized as excessive and redundant, especially in the area of political corruption. While the mandate of many bodies is too weak to be relevant for their mission, other institutions lack the formal independence mechanisms necessary for their effective functioning. As it is now, these institutions represent only a burden for Montenegrin taxpayers. The European Commission, SIGMA and GRECO all note the abundance of institutions that have weak, yet overlapping mandates, which renders them ineffective in implementing the legislation. The European Commission noted on several occasion the need to streamline and coordinate the work of such institutions, if meaningful results in the field are to be achieved.

The two most prominent anti-corruption agencies in Montenegro, the Directorate for Anti-Corruption Initiative and the State Electoral Commission suffer from serious institutional shortcomings. The Directorate has a weak mandate that hardly justifies the largest budget any anti-corruption body receives in Montenegro. The only meaningful duty this body performs is confined to educational and repressive areas. The Directorate is under complete jurisdiction of the Ministry of Justice and Human Affairs, which manages its administrative, technical, financial and human

resources. This arrangement renders obsolete the little mandate that the organization has outside the preventive area. The State Electoral Commission is a classical story of a body that cannot undertake activities that constitute the basic rationale for its establishment, mostly due to weak mandate that is not formally defined through statutory provisions. The SEC is highly politicized, with the governing seats of the body reserved for the ruling coalition through a rather ambiguous appointment criteria.

Where there is a will, there is a way, the saying goes. But what of the opposite? The current institutional arrangements clearly indicate the lack of political will that is central for an effective fight against corruption. It is therefore reasonable to question any proposition for institutional reforms in a country where the political elite deliberately designs them to fail. There is still hope, however. The recent controversy involving the alleged misuse of state resources by the ruling party, for electoral purposes, have set in motion a series of events that are promising for the introduction of broader institutional reform. Facing domestic pressure from citizens and united opposition that abandoned their work in the Parliament, as well as some harsher remarks from the European representatives, the ruling coalition engaged in a much required reform of the judiciary. It seems that the political elite finally learned the notion that 'life is not fair, only fairer than death'. The Parliament, mere days ago, unanimously adopted a set of conclusions that, normatively speaking, ends political control over the appointment of judiciary.

It goes without saying that an independent judiciary is central for the fight against corruption. To a certain degree, it is all that is needed. However, due to a peculiar context of Montenegro, broader reforms are needed for an effective fight against political corruption in Montenegro. Confining this burden solely to the judiciary would substantially strain its resources and expose it to additional political pressure. A more centralized anti-corruption institutional

framework would significantly enhance investigative, criminal and judicial efforts in the fight against political corruption. This approach would directly cut into the observed institutional deficiencies, thereat providing for a better framework of oversight, transparency and control.

In order to better contextualize the proposed reform, two scenarios are considered: (a) relying on judicial reforms and (b) enhancing the current institutional framework. The underlying rationale that goes in favor of these scenarios is weighted against the current political context in Montenegro, pertinent to the insights in previous chapters. The status-quo scenario is not developed here because it is implied in the analysis presented in chapters 2 and 3. The paper concludes with making a strong case for the establishment of a single regulatory body tasked with fighting political corruption, presented as scenario three.

1. *The let-it-be approach.* According to this scenario, no further reforms would be initiated. An independent judiciary is the only body that bares the necessary legitimacy as well as the duty to undertake the fight against corruption. A strong, independent judiciary, supported by other state administrative bodies whose competencies include the fight against corruption is all that is needed.

   Sadly, the ruling party has already undertook its steps that may undermine the reform process in the long run. The initial proposal from the opposition envisaged the appointment of the Supreme State Prosecutor by a more than two-thirds of votes in the Parliament has been narrowed down to a 'qualified majority' criteria. This alleviates some of the pressure on the political elite by giving it a foothold into the control over this position, possibly through coalition forming in the Parliament. It also leaves the possibility for further manipulation as this criteria puts opposition and majority at odds and may lead to

indecisions. As a result, the criteria may be degraded for particular cases where decisions cannot be made to simple majority.

2. *The 'economical' approach.* The anti-corruption institutions are already in place. Substantial resources have been invested in designing, establishing and equipping these bodies. Rather than engaging in a broader institutional reform, the current bodies should be strengthened and observed deficiencies ameliorated on a case-to-case basis.

   All relevant institutional actors observe redundant anti-corruption institutional framework. There are simply too many agencies, with both weak and overlapping mandates. This substantially constricts coordination between bodies that, to make things worse, lack in the basic, formal safeguards of independence. The European Commission has continually noted in its analytical reports that the current government has much to do in the coordination of an entire state apparatus. Consequently, the current state capacities do not favor the conditions foreseen by this scenario.

   Furthermore, strengthening and ameliorating the shortcomings of the current institutional framework could prove rather taxing. There is simply too much to fix. Also, even with formal independence safeguards in place, maintaining an abundance of institutions would [excessively] complicate the oversight of their work, leaving [at least] some of these bodies still vulnerable to political capture. This would completely undermine the anti-corruption efforts, as contradictory activities /conclusions are most likely to occur.

3. *A comprehensive approach.* The establishment of a sole independent regulatory agency lends itself as the most viable option for circumventing the lack of political will in the fight against corruption in Montenegro. It is certainly more preferable to the status quo, as its

design would directly cut into the shortcomings of the current institutional framework. Despite the risk of facing the political pressure in future and potential termination, the smoother operation of the body can be safeguarded through the prescription of detailed, yet clear set of duties and a periodic review process.

The formal safeguards of independence, coupled with strong mechanisms of oversight would keep the political elite 'at the arm's length'. The agency would be constituted by a merger of all institutions currently tasked with fighting political corruption. The administrative, technical, financial and human resources invested in the current framework would not be wasted, while also better utilized through their centralization. Viewed in this light, the establishment of a sole, independent regulatory actor can serve as a stepping stone for future reforms in the country.

Beside a clear mandate, clearly rooted in the statutory provisions, a comprehensive and meaningful appointment procedure would ensure a plethora of veto players in its work. The appointment criteria would be clearly defined to ensure the highest degree of professionalism in its work. A stable office holding as well as adequate salaries would be provided in order to foster development of human resources. Having a unitary body would facilitate both better transparency and a smoother oversight of its work, ensuring its integrity even against more subtle efforts for control from the political elite. The work of the body would be initially subject to substantial control, with all governmental, non-governmental and international actors invited to conduct the oversight separately. Content of the review would be deliberated upon, resulting in the drafting of concise recommendations for the improvement of the work agency.

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