

# **Issues in Anti-Corruption Law: Can an Activist Regulatory Stance Overcome Legislative Problems in Preventive Anti-Corruption Agencies Like Montenegro's?**

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Introduction.....	2
The Role of Preventative Anti-Corruption Agencies in Anti-Corruption Law .....	3
Montenegro's Legal Framework Related to the Prevention of Corruption .....	6
Weaknesses in Existing Montenegrin Anti-Corruption Law and Potential Remedial Strategies.....	10
Activist Regulatory Remedies for Weak Legislative Provisions in Montenegro's Anti-Corruption Legal Framework .....	14
Conclusions and Directions for Future Research.....	20

## **Abstract**

Article 6 of the UN Convention Against Corruption requires that signatory states establish an anti-corruption agency (or agencies) responsible for preventing corruption. However, the Convention – and legal scholarship in general – provides little direction about how such agencies should be organised. Moreover, the piece-meal nature of anti-corruption legislation in most developing countries makes the efficient operation of such agencies difficult to impossible. This article argues that regulatory instruments can help overcome the inherent weaknesses of legislative governing many anti-corruption agencies. Using the Montenegro's Directorate for Anti-Corruption Initiatives (DACI), I show how the design of a regulation – relying on already existing legislative and other legal provisions – can help improve the preventive anti-corruption agency's ability to tackle corruption. I provide an analysis of the specific provisions of such an activist regulation point out potential pitfalls in the use of such regulations as a way of circumventing the legislature's weakness in fighting corruption.

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### **Introduction**

Anti-corruption agencies are mushrooming across Central Europe and the Former Soviet Union. In 2009, over 40% of the countries in the region had some form of anti-corruption agency.<sup>1</sup> Many of these agencies are preventive – rather than repressive. Namely, they serve to co-ordinate policy (often serving as the international contact point for international co-operation), help educate the public about the harms of corruption and conduct research on corruption-related issues.<sup>2</sup> The legislation devolving these competencies to such agencies often consists of highly abstract language, riddled with ambiguities, and often provides the same competencies to other agencies (such as preventive departments in repressive agencies in police, customs and sometimes even a special office in the prosecutor's office charged with finding and chasing large bribe takers and receivers).

The design of preventive anti-corruption agencies is of interest to legal scholars for three reasons. First, the anti-corruption law – and particularly questions related to the organisations needed to enforce such law – represents a burgeoning field of public law and international law.<sup>3</sup> As argued below, articles 5 and 6 of the UN Convention Against Corruption impose obligations on signatory states which make the issue of preventive anti-corruption policy necessary and timely. Second, the question brings legal scholars into the realm of organisational theory – hitherto the preserve of management scholars, economists and scholars of public administration. Legislation which sets out the organisational design and function of an anti-corruption agency touches on all the classic issues tackled by both classical and post-modern organisational theorists.<sup>4</sup> Third,

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<sup>1</sup> Data taken from de Sousa (*infra* at 2), Klemencic and Stusek (*infra* at 4) and Steves and Rouso's Chart 1 (*infra* at 13).

<sup>2</sup> Professor de Sousa carried out a survey of anti-corruption agencies in 15 countries. His Table 10 provides a measure of the extent to which an anti-corruption agency engages in preventive, repressive and complaint collection-only measures. See Luis de Sousa, *European Anti-Corruption Agencies: protecting the Community's financial interests in a knowledge-based, innovative and integrated manner*, 2006. Available at: [http://anchorage-net.org/content/documents/larmour,%20peter%20\(australian%20national%20university\).pdf](http://anchorage-net.org/content/documents/larmour,%20peter%20(australian%20national%20university).pdf). As described below, scholars still actively debate the classification of anti-corruption agencies into repressive, preventive and other categories.

<sup>3</sup> Since 2006, the number of articles in legal journals dealing with the UN Convention Against Corruption and various countries' anti-corruption laws have radically increased. Both the American Bar Association, various European bar associations and increasing law firms organise anti-corruption conferences for lawyers only. As such, lawyers – and the issue of law – is rightfully regaining its place in the anti-corruption scholarly discourse.

<sup>4</sup> No single author has yet provided a single overview of research in the field of organisational theory as applied to anti-corruption work. Nevertheless, the interested reader will be interested in Peter Huang and Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J. OF LAW, ECON, AND ORG. 2: 390-406, 1994 (for a highly stylised view) and ... Guangdong's Challenges: Organizational Streamlining, Economic Restructuring and Anticorruption. PACIFIC AFFAIRS, 2000 (for an example of the "location problem" in the specific context of China).

practically everyone -- except legal scholars (the people who are supposed to draft and implement anti-corruption agencies) -- has written about the optimal structure of an anti-corruption agency. The issue has provoked debate in the international development, political science, and economics literatures. As the design of a preventive anti-corruption agency represents a legal problem, legal scholars should – and probably will – devote more energy to the issue.<sup>5</sup>

This article argues that preventive agencies – especially like Montenegro’s Directorate for Anti-Corruption Initiatives (DACI) – have a key role to play in supporting the work of repressive law enforcement agencies if regulatory (rather than legislative instruments) clearly define their role in anti-corruption work. The first part of our paper reviews the legal issues involved in creating a preventive anti-corruption agency. The second section provides an overview of Montenegro’s anti-corruption legal framework – showing the relevant law related to the function of the Montenegrin preventive anti-corruption agency -- the DACI. The third part of the paper discusses legal weaknesses which prevent the DACI from operating as an effective preventive anti-corruption agency. The fourth section describes the issues involved in the adoption of an activist regulation which would correct the flaws in Montenegro’s anti-corruption law. An activist regulation (for our purposes) comprises a regulation which interprets existing legislation as providing the DACI with competencies (unless prohibited by law). The section also provides the basis for such as activist regulation – explaining the major provisions and the way such a regulation would improve DACI performance. The final section concludes by presenting further issues of legal scholars to research. I most emphatically do not argue for a Montenegrin executive “run amok;” or one which takes power for itself. Instead, I simply focus on one particular area of Montenegrin law, and make observations about the way in which the executive can increase performance without denying Montenegrin citizens of any positive or negative liberties.

### **The Role of Preventative Anti-Corruption Agencies in Anti-Corruption Law**

The preventive anti-corruption agency emerged as a construct of the 1990s work by donor agencies (like the World Bank) with an eye of the Hong Kong experience. Such work relied heavily on analysis such as Dr. Meagher’s, who in a study of anti-corruption agencies in the early 1990s, finds that the main – and most important role -- of an anti-corruption agency is to centralise information and co-ordinate activities across disparate government agencies.<sup>6</sup> However, little consensus – in both donor agencies and in the member countries they serve -- has emerged on exact legal competencies these agencies should have. Article 5 (on preventive anti-corruption policies and practices) and article 6 (on preventive anti-corruption body or bodies) of the UN Convention against Corruption creates the obligation for each signatory to establish a preventive anti-corruption agency.

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<sup>5</sup> Dr. Charron says it best when he notes, “based on the numerous case studies in the literature on Singapore and Hong Kong, which demonstrate the positive impact of such an agency on curbing corruption, studying the effect, scope and independence of newly founded agencies outside of Southeast Asia should be a fruitful path for scholars to take in the road to better understanding the fight to combat corruption” (2). See Charron *infra* at 9.

<sup>6</sup> See Patrick Meagher, *Anti-Corruption Agencies: Rhetoric Verses Reality*, 8 J. OF POL. REFORM 1: 69-103, 2004.

Namely, the Convention’s provisions require preventive anti-corruption bodies – like the DACI -- to “ensure the existence of a body or bodies, as appropriate, that prevent corruption.” Article 6(1a) requires the preventive body to “implement[] the policies referred to in article 5 of this Convention and, where appropriate, oversee[] and coordinat[e] the implementation of those policies.” Yet, as shown in Figure 1, those policies (as defined in article 5) are extremely problematic. Article 61(b) further requires “increasing and disseminating knowledge about the prevention of corruption.” However, no textbook exists summarising knowledge about preventing corruption – or even defined what constitutes such knowledge.<sup>7</sup>

**Figure 1: Weaknesses of Article 5 of the UN Convention Against Corruption**

<b>Provision from UN Convention</b>	<b>Weaknesses for Legislative/Regulatory Adoption</b>
Article 5(1): “develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.”	<ol style="list-style-type: none"> <li>1. no litmus test for determining if policy is “effective” or “coordinated.”</li> <li>2. no litmus test to establish an adequate level of “reflect[ion]”</li> <li>3. no definition of “rule of law,” “proper management of public affairs and public property,” “integrity,” “transparency” and “accountability.”</li> </ol>
Article 5(2): “establish and promote effective practices aimed at the prevention of corruption.”	<ol style="list-style-type: none"> <li>1. no definition of “practices aimed at the prevention of corruption”</li> <li>2. no definition of “effective”</li> <li>3. the article is tautological – the section requires preventive agencies to engage in policies aimed at preventing corruption!</li> <li>4. substantively repeats article 5(1).</li> <li>5. does repression constitute an effective preventive practice (through deterrence)?</li> </ol>
Article 5(3): “shall endeavour to establish and promote effective practices aimed at the prevention of corruption.”	<ol style="list-style-type: none"> <li>1. The phrasing “shall endeavour” is tantamount to “should” – imposing no definitive legal obligation.</li> <li>2. repeats article 5(2)</li> </ol>
Article 5(4): “collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article”.	<ol style="list-style-type: none"> <li>1. no definition of “collaboration”</li> <li>2. requires “promoting and developing the measures referred to in this article” (which are in themselves ambiguous).</li> </ol>

Source: authors.

Article 5.2 requires that “each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence...to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.” The article runs into four problems. First, independence in corruption cases often proves difficult or impossible to define and establish (and is not even desirable) – as the prosecution service, judiciary, and other bodies must act as advocates for policies recommended by the preventive anti-

<sup>7</sup> A number of scholars have tackled the epistemological problem of trying to define what consists “anticorruption knowledge.” For a comprehensive overview, see Harald Mathisen and Nick Duncan, Knowledge Management for Anti-Corruption: Problems, Perspectives and Prospects. U4 ISSUE 2: 2006.

corruption agency. Such a problem has seriously (and negatively) affected the ability of anti-corruption commissions around the world from effectively co-ordinating anti-corruption policy.<sup>8</sup> Second, as will be shown the in DACI's case, a preventive anti-corruption agency still requires support from a ministry or other part of government – to militate for policies in cabinet as well as to ensure internal audit provides sufficient accountability for the way the agency uses government funds. Third, as numerous anti-corruption commissions show, the inclusion of non-governmental organisations does not promote the commission's (or agency's) independence. In some cases, the commission can serve business or special interests to represent special interests' views in government anti-corruption policy. In other cases, the commission can serve as a vector to coerce business or NGOs to accept government policy.<sup>9</sup> These three examples show the difficulties and ambiguities inherent in interpreting the Convention.

Such difficulties and ambiguities have resulted in rather different approaches being chosen for legislation establishing these “article 5 anti-corruption agencies.” Indeed, a number of countries – particularly in Central and Eastern Europe – have taken very different legal approaches to the implementing the policy of establishing a preventive anti-corruption agency. Most authors divide anti-corruption agencies into three categories: multi-purpose, law enforcement and preventive agencies.<sup>10</sup> In brief, preventive agencies – like the Albanian Anti-corruption Monitoring Group – engage in (or encourage) trainings, speeches and research. They tend to be organisationally structured as either independent research centres or as committees/commissions. Human resources and staff tend to draw from different government agencies. Law enforcement agencies – like Romania's National Anti-Corruption Directorate -- focus on investigating and prosecuting corruption. These agencies tend to be part of the prosecutor's office (in order to have the competence to conduct law enforcement activities). Human resources tend to be investigators and prosecutors from law enforcement agencies like police, military (in limited extents) customs and the prosecutor's office. Multi-purpose agencies – such as those in the Baltic – can conduct both educational activities and engage in some investigatory and prosecutorial functions.

In practice, most non-repressive agencies tend to have repressive elements as well. First, the preventive agency must work with law enforcement agencies – necessitating in-depth knowledge (and even experience with) law enforcement and other repressive methods of fighting corruption. As Hussman *et al.* note, “as the UNCAC requires such bodies to be in place not only for coordinating and supervising preventive anti-corruption policies, but also for their implementation [of these preventive bodies], it is unavoidable that this

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<sup>8</sup> If the anti-corruption agency or commission remains overly insulated from administrative political pressures from other parts of government, the organisation becomes sidelined (as in the case of the Latvian anti-corruption agency). If, as in the Polish case, the anti-corruption agency becomes beholden to bureaucratic interests, the agency or commission becomes ineffective.

<sup>9</sup> For several examples of such two-way coercion (transmitted through organisational design of anti-corruption policy, see Peter Larmour, *International Action against Corruption in the Pacific Islands: Policy Transfer, Coercion and Effectiveness*, 15 *ASIAN J. OF POL. SCI.* 1: 1-16, 2007.

<sup>10</sup> For an overview of these agencies and legal background on each of these types, see Goran Klemencic and Janez Stusek, *SPECIALISED ANTI-CORRUPTION INSTITUTIONS*, Organisation for Economic Co-operation and Development, 2007.

implies the involvement of a variety of institutions.”<sup>11</sup> Such involvement necessarily implies a closer overlap in functions between the multi-purpose, repressive and preventive agencies so neatly delineated above. Second, many of these preventive agencies have recently been given the competency for controlling asset declarations and conflict of interest declarations. These new competencies force these preventive agencies to bump up against rules of evidence, reasonable doubt and other legal concepts required in law enforcement. In other cases (as in the case of Montenegro), national action plans require these preventive agencies to either train law enforcement agencies, oversee such training, or evaluate their work. Clearly, the preventive anti-corruption agency needs to know repressive measures as well as the law enforcement agencies they are training or evaluating. Article 5(2) of the UN Convention requires signatories to “establish and promote effective practices aimed at the prevention of corruption.” However, the Convention does not take a position on whether deterrence through repressive measures consist a preventive anti-corruption practice. Indeed, agencies with law enforcement powers were the norm.<sup>12</sup> Thus, the line separating a preventive and repressive agency is far from clear.

Recent evidence also questions the effectiveness of preventive agencies on the grounds that they simply do not work. Dr. Charron, looking at 18 anti-corruption agencies worldwide fails to find any statistically significant effects of these preventive agencies on the incidence of corruption in places like Montenegro.<sup>13</sup> Such findings echo authors, such as Steves and Rouso, who also fail to find any significant effect on corruption of work in educating citizens on the harms of corruption or co-ordinating anti-corruption policies across agencies.<sup>14</sup> Indeed, they quite explicitly state “omnibus anticorruption activity [having an action plan and anti-corruption commission or agency] and membership in international anti-corruption conventions have not resulted in reductions in the level of administrative corruption [in Eastern Europe and the Former Soviet region” (28: italics mine to put the quote into context).

### **Montenegro’s Legal Framework Related to the Prevention of Corruption**

Unlike many other countries in the region, Montenegro has a highly disarticulated set of laws and institutions governing anti-corruption work. Figure 2 shows a schema of Montenegro’s anti-corruption law and the organisations which such law spawned.<sup>15</sup>

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<sup>11</sup> See Karen Hussmann, Hannes Hechler and Miguel Penailillo, Institutional Arrangements for Corruption Prevention: Considerations for the Implementation of the United Nations Convention Against Corruption Article 6. U4 ISSUE 2009:4, 2009.

<sup>12</sup> Frank Anechiarico, Prosecution as Corruption Control: Paradigms of Public Integrity in Context, WAYNE L. REV., 2006.

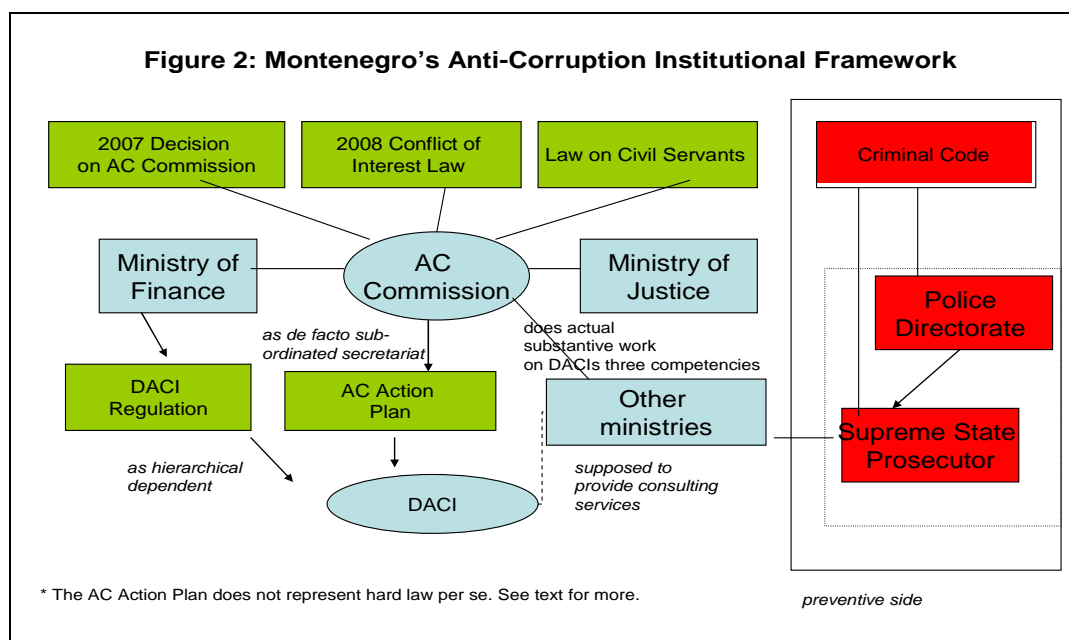
<sup>13</sup> Nicholas Charron, Mapping and Measuring the Impact of Anti-Corruption Agencies: A New Dataset for 18 Countries. New Public Management and the Quality of Government Conference, November 13-15 2008. Göteborg, Sweden, available at:

[http://www.qog.pol.gu.se/working\\_papers/SOG%20papers/Charron%20-%20SOG%20Conference%20Nov08.pdf](http://www.qog.pol.gu.se/working_papers/SOG%20papers/Charron%20-%20SOG%20Conference%20Nov08.pdf)

<sup>14</sup> Franklin Steves and Alan Rouso, Anti-Corruption Programmes in Post-Communist Transition Countries and Changes in the Business Environment 1999-2002, EBRD WORKING PAPER 85, 2003.

<sup>15</sup> A number of other authors find similarly. See Marijana Trivunovic, Vera Devine and Harald Mathisen, Corruption in Montenegro 2007: Overview over Main Problems and Status of Reforms, CMI REPORT

Unlike other countries, such as Macedonia, Montenegro has no single, consolidated law on fighting corruption.<sup>16</sup> The 2007 Decision on the Establishment of the Anti-Corruption Commission (hereinafter the Anti-Corruption Commission Decision) creates the competence for a commission of 11 people to take decisions about national anti-corruption strategy.<sup>17</sup> The Commission clearly looks temporary as specific individuals are specifically nominated (instead of general posts) – necessitating the amendment of the Decision every time specific individuals need to be changed.<sup>18</sup> The 2008 Conflict of Interest Law (revised in 2009 and hereinafter the Conflict of Interest Law) establishes competencies for the Commission to monitor conflict of interest declarations. The Law on Civil Servants (hereinafter Law on Civil Servants) prohibits civil servants from taking bribes.



2007:9 (2007). These authors note that, “with such a deficient regulatory framework in place, it is perhaps no surprise that compliance with the rules is low. In its 2006 report, the [Anti-Corruption] Commission noted that 6% of state-level and 38% of local/municipal level officials are in violation of the conflict of interest rules, and these are almost exclusively elected (vs. appointed) officials” (16, brackets ours).

<sup>16</sup>In this way, Montenegro reflects a Western European approach to legislating on anti-corruption issues. In such Western European model countries, anti-corruption provisions are scattered across a number of laws. In contrast, the Eastern European model relies on a single anti-corruption act. See Bryane Michael and Natalya Mishyna, A Review and Critique of Azerbaijan’s Anti-Corruption Law, 1 J. EURASIAN L. 2, 2009.

<sup>17</sup> Decision On Establishing the National Commission for Monitoring the Action Plan for implementation of the Programme for the Fight against Corruption and Organized Crime (Official Gazette of the Republic of Montenegro, no. 15/07 of March 14 2007), available at: [http://www.rai-see.org/montenegro/index.php?option=com\\_docman&task=doc\\_download&gid=28&Itemid=61](http://www.rai-see.org/montenegro/index.php?option=com_docman&task=doc_download&gid=28&Itemid=61). See also the subsequently passed Rules of Procedure of the National Commission for monitoring the Action plan for implementation of the Programme for the Fight against Corruption and Organized Crime available at: [http://www.rai-see.org/montenegro/index.php?option=com\\_docman&task=doc\\_download&gid=29&Itemid=61](http://www.rai-see.org/montenegro/index.php?option=com_docman&task=doc_download&gid=29&Itemid=61)

<sup>18</sup> The full legal name of the Commission is the National Commission for the Monitoring of the Implementation of the Action Plan for the Fight Against Corruption and Organised Crime. I naturally refer to the short name of the Anti-Corruption Commission for ease of exposition.

These laws – along with an Anti-Corruption Action Plan (which I discuss below) create and define the competencies of the Anti-Corruption Commission). The Commission – like most of its kin – must (in relation to the Action Plan): a) manage, organize and harmonise the activities of governmental and other relevant institutions, b) manage funds allocated for implementation, c) set priorities, dynamics and deadlines for implementation, as well as assess results achieved and d) submit reports to the Government, at least twice a year, reviewing progress on measures taken and remaining to be taken.<sup>19</sup>

One of the chief obligations of the Anti-Corruption Commission lies in monitoring the Anti-Corruption Action Plan. To date, action plan reports have been issued for 2007<sup>20</sup> and 2008.<sup>21</sup> The Action Plan calls for a staggering 280 activities to be implemented by various government and non-government actors covering a wide-range of governmental bodies. The Action Plan holds a confusing place in Montenegrin law. On the one hand, the Montenegrin Parliament has adopted the Action Plan – giving it at least the cachet of law. The Action Plan also creates on-going obligations on the Anti-Corruption Committee and invests particular organisations with both obligations and competencies.

Nevertheless, from an outside perspective, the Action Plan fails to constitute a solid basis for binding administrative law for three reasons. First, the Action Plan does not create well-defined competencies and obligations expected of pieces of legislation. As shown below in Figure 3, many of the admonitions of the Action Plan are too vague to be considered legally binding administrative law *per se*.<sup>22</sup> As such, the Action Plan represents an expression of parliamentary intent or a resolution instead of a sound statutory basis for administrative rulemaking. As I argue below, the Action Plan “law” provides no tests for compliance with the Action Plan (which an administrative judge could use to rule for or against the agency charged with implementing a particular provision). Indeed, in several cases, the Action Plan assigns tasks to agencies outside of the executive’s jurisdiction – such as NGOs. The tasking of agencies outside governmental jurisdiction clearly signals a role for the action plan as a political instrument instead of the basis for hard law.

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<sup>19</sup> Paraphrased from sec. III of the Decision on the Anti-Corruption Commission (*supra* at 17). Paraphrase used due to the poor quality of the English translation available.

<sup>20</sup> The First Report on the Implementation of the Anti-Corruption and Organised Crime Action Plan (2006-2007).

<sup>21</sup> Revised Action Plan for the Implementation of the Anti-Corruption and Anti-Organised Crime Programme for 2008-2009. As each year’s report simply consists of an update on the original Action Plan, I only refer to the Action Plan without mentioning specifics of any particular year’s updated version.

<sup>22</sup> For more on the conditions required in many jurisdictions for properly formed administrative law, see Michael Head, *ADMINISTRATIVE LAW: CONTEXT AND CRITIQUE*. New York: Federation Press, 2008. Specifically, three factors militate against Action Plan items comprising a solid basis for rulemaking. First, Action Plan items are assigned to multiple agencies – sometimes as many as 14 – without any precision about derived authority should be allocated among them. Second, the items in the Action Plan are sometimes so vague that no parliamentary intent can be deduced. Third, no sanctions (and no resources) are provided to ensure execution – suggesting weak parliamentary interest in actual enforcement.

In this rather muddled legal framework, the Government established the Montenegrin Directorate for Anticorruption Initiatives (hereinafter the DACI).<sup>23</sup> The DACI Competencies Decree,<sup>24</sup> the DACI Regulation<sup>25</sup> and possibly various items in the Action Plan which are tasked to the Directorate regulate the work of the Directorate. Figure 4 shows the DACI's competencies arising from these various legal instruments. As shown, these competencies (and quasi-competencies in the case of Action Plan obligations) may be divided into three categories – promotional and preventive activities, international co-operation activities and “co-ordinative” activities.<sup>26</sup> Promotional competencies include printing flyers about the harms of corruption (and other educational activities), preparing reports on anti-corruption actions undertaken by the government, and the preparation of reports, surveys and other analyses.<sup>27</sup> Competencies relating to international co-operation give the DACI the mandate to make proposals for legislative changes – particularly with regard to the SPAI and the GRECO.<sup>28</sup> The DACI also has the mandate to draft bills on the protection of whistleblowers, a new law on Integrity in Public Sector, and the ratification of Council of Europe Conventions ETS 97, ETS 189, ETS 190, ETS 196 and ETS 198.<sup>29</sup> Co-ordinative activities comprise fundraising for anti-corruption activities (point 7 of the Action Plan) and substantive training of police in receiving complaints about corruption from the public (point B3 of the action plan).

However, the legal framework governing the DACI's work severely weakens the Directorate's ability to play an effective part in Montenegro's anti-corruption policy. Perhaps the most striking flaw relates to the lack of specificity of the authorities and obligations given to the Directorate. Figure 3 shows the specificity of the various legal provisions from the Action Plan governing the DACI's work. Less specific provisions (represented by a score closer to 1) signify that the provision defines a relatively abstract and non-specific obligation. For example, Action Plan point 7 requires the DACI to (paraphrased due to problems with the English version provided) define priorities in the fight against corruption and organized crime, draft projects and propose them for budgetary financing or financing from international organizations and institutions as well as ensure financial support from the budget for the government bodies implementing

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<sup>23</sup> See <http://www.gov.me/eng/antikorup/index.php?akcija=rubrika&rubrika=&row=30&>. In various documents, such as the Anti-Corruption Action Plan, the DACI is called the Anti-Corruption Initiatives Directorate (ACID). I use the DACI to avoid the unfortunate acronym as well as on the grounds that DACI is more prevalent.

<sup>24</sup> Competencies of the Directorate for Anti-Corruption Initiative as per Official Gazette number 16/07, *hereinafter* the DACI Competencies Decree.

<sup>25</sup> Regulation on the Internal Organization and Systematization of the Directorate for Anticorruption Initiatives, *hereinafter* the DACI Regulation.

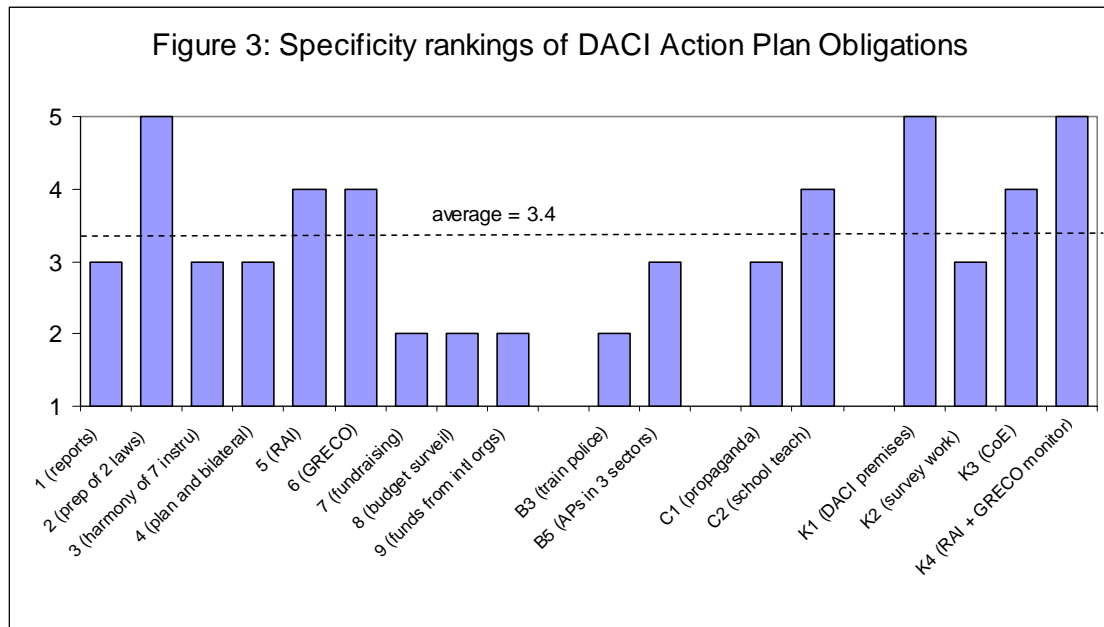
<sup>26</sup> The first two competencies are defined in arts. 3 and 4 of the DACI Regulation while the co-ordinative activities are defined in the Action Plan (item numbers cited in Table 4). Quasi-competencies refer to obligations imposed on the DACI where the DACI's competencies to fulfil those obligations are not clearly defined in Montenegrin legislation. Presumably, the government would not create an administrative obligation without implicitly creating an equal competency or authority in order to fulfil that obligation. K1 of the Action Plan dealt with acquiring staff and premises for the DACI (thus not constituting a competency).

<sup>27</sup> art. 3 of the DACI Regulation.

<sup>28</sup> art. 4.5 of the DACI Regulation.

<sup>29</sup> As derived from Action Plan points 2 and 3.

these projects. Clearly, the point provides no guidance on the types of projects which the DACI can propose nor sets the terms under which the DACI can contract with donors or third-parties in such fundraising.<sup>30</sup>



The disarticulated nature of the legal framework governing the DACI’s work has severely restricts the Directorate’s ability to tackle the more hard-hitting aspects of anti-corruption work. As of this writing, the DACI has been unable to exercise its authority and has mostly been conducting speeches (often labelled as trainings).<sup>31</sup> Namely, of the 48 activities mentioned on the DACI website, over a quarter of those activities present public lectures or signed held by “Vesna Ratkovic PhD” (the Directorate’s Director) while the rest consist of public lectures given by other staff, the announcement of the adoption of various legislative acts, and other speeches, round-tables and memoranda of understanding.

### **Weaknesses in Existing Montenegrin Anti-Corruption Law and Potential Remedial Strategies**

A number of factors explain the failure to invest the DACI with the needed competencies and training in order to serve as an effective preventive anti-corruption agency. By all indications, the Government of Montenegro created the DACI to comply with international donors’ advice and the obligations imposed by the UN Convention. However, Prof. Heibrunn notes, in his review of anti-corruption commission

<sup>30</sup> As discussed below, the DACI is sub-ordinated to the Ministry of Finance. Its lack of independence would mean the Ministry of Finance would determine the cost of over-heads (such as office space, staff time and so forth) the DACI can charge for projects. The potential for the Ministry of Finance to “capture” these projects also impacts on the DACI staff’s incentives to request funding – as they benefit less.

<sup>31</sup> [http://www.rai-see.org/montenegro/index.php?option=com\\_content&view=frontpage&Itemid=1](http://www.rai-see.org/montenegro/index.php?option=com_content&view=frontpage&Itemid=1)

performance, that “anti-corruption commissions are especially problematic when political leaders are only responding to demands from international donors” (1).<sup>32</sup> In the most recent Council of Europe report – of the Group of States Against Corruption (GRECO) – the report only mentions the DACI four times.<sup>33</sup> Each of those mentions relates to a speech or other relatively minor event. A possible – through wrong – explanation for the DACI’s lack of hard-nosed wins would see the lack of DACI’s competence as a strategic choice. Mr. Messick has argued that a legislature should craft laws around enforcement capacity.<sup>34</sup> Such a view suggests that the parliament (and people) have given the DACI all the authority it can reasonable handle. Yet with a staff of roughly 22 people and a multi-million dollar budget, the DACI hardly seems a dilapidated organisation. Clearly, the DACI’s inability to exercise its authority stems from deeper rooted problems in the DACI’s legal framework.

Perhaps the most important problem with the DACI’s legal structure lies in its lack of independence. According to article 5 of the UN Convention, the preventive anti-corruption agency (or agencies) should be independent. However, neither the DACI Competencies Decree nor the subsequent DACI Regulation provide direction related to the relationship between the Ministry of Finance and the DACI (as a sub-ordinated entity).<sup>35</sup> Such a lack of independence means the Director can not safely make denouncements or critical reviews of the government’s anti-corruption work (as required by Montenegrin law). Indeed, to date, the DACI has served as a government cheerleader – announcing successes while overlooking failures. For example, the DACI’s website still reads like a Socialist propaganda platform, announcing that “Montenegro Made Success in the Process of Implementation of GRECO Recommendations.”<sup>36</sup> More critical reports, such as the recent UNDP financed report carried out by independent consultants working for the U4 Centre in Bergen Norway do not appear on their website.<sup>37</sup>

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<sup>32</sup> See John Heilbrunn, ANTI-CORRUPTION COMMISSIONS: PANACEA OR REAL MEDICINE TO FIGHT CORRUPTION? World Bank Institute, 2004. Professors Doig *et al.* find enough support for the assertion that donor assistance cripples anti-corruption agencies that they make the assertion one of their three broad hypotheses for future empirical research. See Doig, Alan, David Watt, Robert Williams. Hands-on or hands-off? Anti-Corruption Agencies in Action, Donor Expectations, and a Good Enough Reality, 26 PUBLIC ADMIN. & DEV. 2: 163 – 172, 2006.

<sup>33</sup> GRECO, Joint First and Second Evaluation Rounds: Compliance Report on Montenegro, GRECO RC-I/II (2008) 5E, 2008, available at: [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2\(2008\)5\\_Montenegro\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2(2008)5_Montenegro_EN.pdf) Mentions on pages 2, 18 and 19.

<sup>34</sup> Dr. Messick strongly argues that anti-corruption laws should be drafted with the enforcement capabilities of the executive in mind. Such an approach clearly ignores the liberal view of legislation as seeking to stretch the state’s capacities. See Richard E. Messick, Writing an Effective Anticorruption Law, PREM NOTES 58, 2001.

<sup>35</sup> The data on the DACI’s independence are somewhat mixed. De Sousa (*supra* 1) categorises the DACI as independent in his table 7 –finding for the DACI’s independence on the grounds that the head can not be removed. However, the DACI Competencies Decree does not guarantee the head such immunity from removal (the de Sousa data relied on surveys filled in by agency staff themselves).

<sup>36</sup> <http://www.gov.me/eng/antikorup/index.php?akcija=vijesti&id=167377>

<sup>37</sup> The only study available on the website consists of a study on Governance in Education from the International Institute for Educational Planning in Paris. The study does not refer to Montenegro. Available at: <http://www.gov.me/files/1187007034.pdf>

Another implication of the DACI's lack of independence relates to ambiguity in the DACI's rights to procure for services. In all likelihood, the DACI does not have the skills required to carry out more technical aspects of its work – from the conduct of sophisticated statistical studies to the analysis of international law. As such, the DACI will need to contract with independent experts, businesses and NGOs. In theory, as the DACI is sub-ordinate to the Ministry of Finance, the Minister would decide the DACI's expenditure priorities – clearly a violation of the principle of independence. Point 7 of the 2008-2009 Anti-Corruption Action Plan gives the DACI the obligation to obtain funds for anti-corruption projects. However, the DACI clearly does not have the equal authority as other ministries or agencies to negotiate with the Ministry of Finance as part of the annual budget cycle or to submit independent proposals for funding.

The DACI also does not have sufficient authority to collect the vast range of anti-corruption related information required by the Action Plan. Good government lawmaking sets off each obligation with a corresponding competence (or authority). The Action Plan charges the DACI with a number of obligations related to the co-ordination of information -- for final submission to the National Anti-Corruption Commission. For example, Action Plan point 5 notes that the DACI must collect reports from institutions, which are mentioned in the Stability Pact Declaration<sup>38</sup> and GRECO Recommendations - including the Ministry of Justice (point 3 of the Stability Pact Declaration), political parties (point 3 of the Stability Pact Declaration), customs (point 4 of the Stability Pact Declaration for white-listing), "all government agencies" (point 5 of Stability Pact Declaration for freedom of information provisions), the SECI Centre, Europol and Eurojust (point 6 of Stability Pact Declaration), the government audit organisation (point 7 of Stability Pact Declaration), local government, public procurement, energy, education, health, infrastructure, tax administration, customs, business registration and licensing, banking, insurance and pensions (point 8 of the Stability Pact Declaration) and the prosecutor's office and Unit for Economic Crime (to oversee the implementation of the 24 GRECO recommendations). However, no remedies are in place for agencies who fail to provide the DACI with information. Indeed, technically, while the DACI has the obligation to collect such information, its counterpart organisations do not have the administration obligation to provide such information!

The DACI's unclear relationship with the Ministry of Justice will likely create significant problems in the Directorate's ability to submit proposals for legislative amendments to anti-corruption related bills. Point 2 of the DACI Regulation clearly gives the DACI the competency to work on legislation related to international conventions. However, action point 3.2 of the 2009 Anti-Corruption Action Plan omits the DACI as a body responsible for "continu[ing] with the harmonization of legislation with the UN Conventions against corruption (Palermo, UNTOC Convention), and other conventions in field of fight against organized crime." In practice, the Ministry of Justice currently does the "real" work on legal drafting – leaving the DACI to continue giving speeches in schools.

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<sup>38</sup> *Declaration on 10 joint measures to curb corruption in South Eastern Europe*, adopted at the Ministerial Conference on Joint Measures to Curb Corruption in South-East Europe, May 12, 2005.

Another significant reason for the DACI's resort to "safe" activities – like giving speeches at schools – stems from unclear job functions and insufficient specification of skills required. Unclear specification of job functions derives from Montenegro's continued use of the former Yugoslav method of "systematisation." In the systematisation exercise, government agencies create enormous tables where they place the number of staff they want in the next budget cycle. The job specifications for each post must fit into the row in the systematisation table. Many descriptions are cut-and-paste – resulting in both duplication and ambiguity. These categorisations should be supplemented by specific Terms of Reference for each member of the DACI – which include performance targets.

Moreover, and more importantly, the 2009 Anti-Corruption Action Plan requires DACI staff to work extensively in law enforcement areas (assessing laws, providing legal advice to citizens and government agencies, and assessing action plans). For example, the DACI has the obligation to provide "training of police officers and employees for the implementation of the instructions on reporting corruption to the police" (under point 3.3), assistance in drafting an anti-corruption action plan for the health sector (point 5.1), education (under point 5.2) and "spatial planning" (under point 5.3). Publicity campaigns require skills in marketing, poster design, internet page design, the organisation of focus groups (to check how messages are received) and other skills. Survey work requires a basic knowledge in statistics (knowledge about efficient estimators, survey instrument design, objective versus subjective indicators, sample sizes, stratification and blocking...among other issues) in order to create valid results. Such work requires extensive law-enforcement experience (and even persons doing studies on laws should have served as practicing law enforcement officers). The systematisation (as per article 6 of the DACI Regulation) does not require any law enforcement experience – making DACI staff unqualified to provide advice based on practical law enforcement work.

At the heart of each of these problems lies the vagueness of the present DACI Regulation. At less than one page, the regulation defines in very broad terms the obligations incumbent on the Directorate. In a Western European administrative law context, such a regulation may be sufficient – as administrative jurisprudence in most EU member states and in the Anglo-Saxon jurisdictions across the Atlantic allow civil servants to work in the way they think will result in the most efficient outcomes. However, in the post-Yugoslav context, public officials view law as provided instructions on actions which they are allowed to take. Such a restrictive view of law requires lawmakers (at both the legislative and regulatory levels) to define very precise drafts.<sup>39</sup>

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<sup>39</sup> New Institutional Economics also predicts that Montenegrin lawmakers should prefer more specific to less specific drafts. Given uncertainty about rights (both within and outside of the state) and large enforcement costs (due to a weak judiciary), more specific drafts would help the lower transaction costs of enforcing anti-corruption law. For more background on this type of analysis, *see* Frank Stephen and Stefan van Hemmen, *Laws, Enforcement, Legality, and Economic Development*, 26 WASH. U. J.L. & POL'Y 37, 2008.

## **Activist Regulatory Remedies for Weak Legislative Provisions in Montenegro's Anti-Corruption Legal Framework**

A more activist DACI regulation could provide the DACI with clarification about the competencies required to fulfil the mandates given by the DACI regulation itself and the Action Plan. Trivunovic *et al.* note that the Montenegrin parliament has been rather antithetical toward passing effective anti-corruption legislation – noting floundering on the draft law on conflict of interest in July 2006, changes to the Criminal Procedure Code, providing for the use of special investigative measures, changes in the Law on the State Audit Institution (which reduced the institution's independence), and parliament's refusal to lift immunity for several members under investigation for corruption.<sup>40</sup> Moreover, the provisions already in place (as shown in part in Figure 3) provide the DACI with extremely ill-defined competencies. So the most effective legal strategy lies in a liberal – or activist -- interpretation of the existing legislation already adopted.

In order to pass such an activist regulation – namely one which interprets existing legislation as providing the DACI with competencies (unless prohibited under existing law) -- two conditions must be (and are) present. The first condition requires that the executive possesses sufficient authority to use legal ambiguities in existing legislation in order to engage in activist regulation. As far as black letter law is concerned, article 5 of the Administrative Procedure Law allows Montenegrin executive agencies to regulate “[not] opposite to...legally established public interests” in order that “such measures are sufficient for the achievement of the objective of the law.”<sup>41</sup> As long as no substantive rights are removed from Montenegrin citizens – and the conduct of surveys and teaching can hardly impinge on such liberties -- executive agencies should take a teleological view of rule-making.<sup>42</sup>

Established legal practice also militates for an activist view of regulating the DACI. Over the past 2 years, the government of Montenegro has passed a number of government decrees which have no direct basis in legislation. The decree on the establishment of the Anti-Corruption Commission and the establishment of monitoring mechanisms for GRECO and SPAI recommendations are two notable examples where the executive has used its prerogative to engage in activist administrative law-making. While the Parliament has not adopted a piece of legislation as active as the US Administrative Procedure Act, precedents for activist rulemaking in Montenegro clearly exist.<sup>43</sup>

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<sup>40</sup> Trivunovic *et al.*, *supra* at 7, p. 22.

<sup>41</sup> Decree on the Proclamation of the Law on General Administrative Procedure (“Official Gazette of the RMN”, No. 60/03, 28.10.2003, hereinafter Administrative Procedure Law). relying on article 12(3) of Decree 15/94 and 4/97 and article 17a(4 and 5) of the Rules of Procedure of the Government of the Republic of Montenegro (Official Gazette 45/01 and revised as 91/03, 71/04 and 71/06) may also be interpreted in favour of DACI-led rulemaking.

<sup>42</sup> As clumsily expressed in English in article 5.1 of the Administrative Procedure Law, “when conducting a procedure and deciding in administrative matters, the authorities shall enable parties to as easily as possible protect and realize their rights and legal interests, taking into account that the realization of their rights.”

<sup>43</sup> §5 U.S.C. 1001–1011

The second condition requires Montenegrin courts to uphold provisions – or at least fail to sanction executive agencies like the DACI – contained in such activist regulation. More simply put, would activist regulation expose the executive to adverse administrative court decisions which would revoke its authority? Article 38 of the State Administration Law clearly allows the Ministry of Finance – and thus the DACI -- to “pass bylaws, orders and instructions for the enforcement of laws and other regulations,” whereas article 39 requires that such “instructions shall prescribe the manner of work and performance of affairs of administrative authorities...in performing delegated, respectively entrusted affairs.”<sup>44</sup> As the Law on Administrative Disputes provides no over-arching principles upon which administrative judges would adjudicate cases, the principles I previously mentioned from the State Administration Law and Administrative Procedure Law seem to form a reasonable basis for activist rulemaking.<sup>45</sup> Such an activist regulation, satisfying both conditions, would therefore need to be crafted “close to” the legislation. Through such a crafting, the regulation would retain the substantive rights (and obligations) already available to the DACI – and perhaps clarifying those already inherent rights -- while only changing the procedural rights.

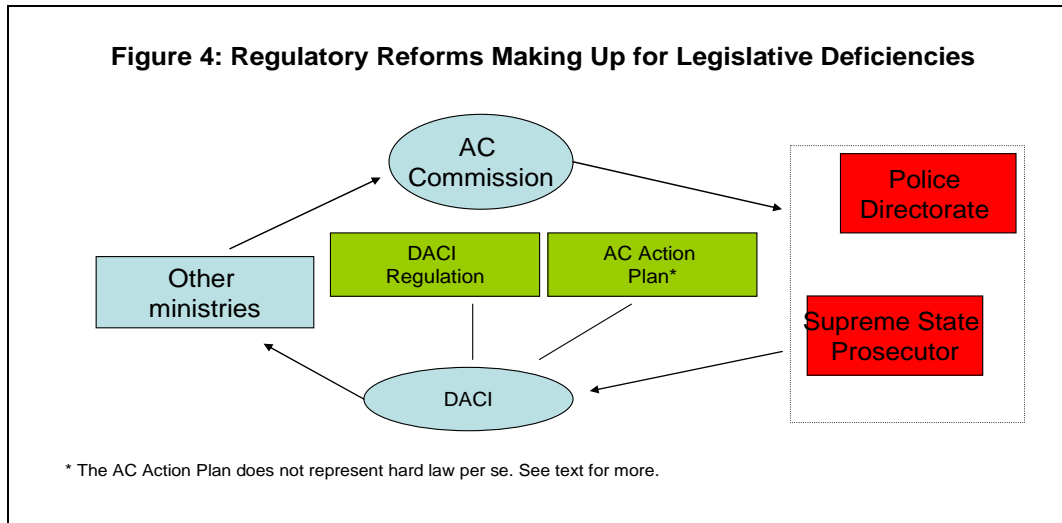
Such a regulation would need to “rearrange” already existing authority in order to simplify the law related to the fight against corruption. Figure 4 presents such an approach. A revised DACI regulation – which explicitly gives the DACI the mandate as the Anti-Corruption Commission’s secretariat and empowers the staff to learn about – and train in – particular methods of policy analysis and law enforcement would eliminate much of the confusion in Montenegro’s anti-corruption legal framework. The quasi-competencies enshrined in the Action Plan would need to be incorporated in the revised DACI regulation. Independence from the Ministry of Finance would ensure the DACI can play the neutral role which the members of parliament clearly intended for the Directorate.<sup>46</sup>

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<sup>44</sup> Decree on the Proclamation of the Law on State Administration (June 25, 2003, No. 01-332/2), hereinafter the State Administration Law.

<sup>45</sup> Decree on the Proclamation of the Law on Administrative Dispute (Official Gazette of the RMN, No. 60/03, 28.10.2003).

<sup>46</sup> All the pieces of legislation (and derived regulations) referring to the DACI require the Directorate to engaging in assessments of anti-corruption compliance and performance across the executive. Clearly, the members of parliament wanted the DACI to play the role of independent assessor instead of cheerleader. As such, the obligations imposed on the DACI clearly create an implicit requirement for the DACI’s political and operational independence from the rest of government.



Given parliament’s likely reluctance to engage in activist legislation to promote the DACI’s interests, can the Ministry of Finance unilaterally grant the DACI independence? Can the Ministry of Finance “cut away” (grant independence) to a dependent entity? The answer is yes and no. The Ministry must still – as required by the Law on State Administration – be responsible for the functioning of the DACI. The Ministry of Finance must still control the legality of the DACI’s acts. However, the Minister can agree to give the DACI director freedom by agreeing to not interfere in Directorate’s activities. Unless prohibited by the Law on State Administration, the Ministry of Finance can outline the DACI’s operational independence in a Memorandum of Understanding between the DACI and its parent organisation (the Ministry of Finance). Such a Memorandum of Understanding would also define the responsibilities of the Ministry of Finance to request budgetary support for DACI initiatives as well as the responsibilities of the Ministry of Finance to bring DACI-led policy initiatives before the Cabinet of Ministers.

In order to make such independence operational in practice, a provision should be put in place for the defense of those rights. Should the DACI Director deem that the DACI’s independence has been politically or operationally compromised -- or if any other state agency tried to exercise undue pressure on the DACI Director -- he or she shall, in the first instance, file a petition with the body of administrative disputes (as defined in the Law on Administrative Disputes). Failing satisfactory remedy, the DACI Director could publicise any interference with the DACI’s activities in the media, in annual reports, and to the parliament.

Once (and only when) the DACI obtains operational and political independence, the Directorate can serve as an effective Secretariat for the Anti-Corruption Commission. Point 1.2.1 of the Anti-Corruption Action Plan charges the DACI with “delivering periodic reports based on the Innovated Instruction on preparation of the reports on implementation of the Action Plan, and delivering of other analysis and reports relating

the corruption and organized crime.”<sup>47</sup> However, the ambiguity of section II of the National Commission Decision (listing the specific names of people rather than institutions as members) as well as the failure of the decision to nominate a Secretariat clearly hinder the DACI from playing that role.

Naturally, a provision should be put in place in such an activist regulation in case a dispute arises about the DACI’s powers or responsibilities. An activist regulation should require the DACI Director to summarise the dispute in writing (and provide a copy of the dispute to the agency making the dispute), send the dispute to the Anti-Corruption National Commission seeking clarification from its members, await a decision (which the DACI shall consider legally binding) by the Anti-Corruption National Commission members either taking an opinion outside of officially planning meetings or during a planned meeting. Failing satisfactory recourse, the DACI Director should be allowed to appeal to an administrative instance without interference from the Ministry of Finance.

Procedures should also be put in place to task the DACI (and the DACI in turn should have the right to refuse tasking). Any member of the Anti-Corruption National Commission should have the right – by virtue of the authority in the revised regulation -- to task the DACI with preparing things such as agendas and issues papers for Anti-Corruption National Commission meetings. The DACI may have right to refuse if the tasks fall outside of the DACI’s competence or if the task represents bureaucratic work which is unlikely to have a significant impact on corruption in Montenegro, among other things.

Another major area for activist regulation involves the extent to which the DACI – rather than the Ministry of Justice – drafts bills and amendments to existing laws. The DACI must have the right, as defined by point 2 of the DACI Competencies Regulation, to draft new bills or legal projects for 1<sup>st</sup> reading by the parliament in co-operation with the Ministry of Justice. However, the DACI can not do this unless its experts are as qualified – or more qualified -- than Ministry of Justice staff. In order to ensure they are capable of such legal drafting, four provisions should be in place. First, DACI staff should have very liberal rights to attend trainings and engage in self-study. Second, a formal “division of labour” should be in place; contact persons should be nominated in each agency, and the DACI must have consultative rights on drafts produced by the Ministry of Justice (and visa versa of course). Again, a Protocol or Memorandum of Understanding would be required as the DACI can not unilaterally engage in rule-making on elements which involve the Ministry of Justice. Moreover, provisions for resolving disputes should be included in the Memorandum of Understanding – as anti-corruption lawmaking tends to be a contentious activity.

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<sup>47</sup> Other provisions can be cited in defence of the DACI’s right to serve as the Commission’s Secretariat. Point (b) of the DACI Competencies Regulation mandating DACI “cooperation with relevant state bodies aimed at drafting and implementing of the legislative and programmatic documents that are important for prevention and combating corruption.” Fourth, article 3A of the Systematisation Regulation providing for “expert assistance in the elaboration of reports submitted by competent state authorities and preparing draft report on realization of measures defined in the Action Plan for the implementation of the Programme of fight against corruption and organized crime.”

A fourth element which would need to be included in a revised DACI regulation involves the definition of consulting and assurance services offered by the Directorate. As previously discussed, the Action Plan clearly requires the DACI to engage in consulting (particularly of the police) and in assurance (in evaluating progress of work on the Action Plan and GRECO/SPAI recommendations). Provisions in a revised DACI regulation would need to define liberal terms for the acceptance and conduct of such training. In other words, if other Montenegrin institutions are to trust and use the DACI's services, the revised DACI regulation should enable staff to informally receive requests and respond to them without the heavy handed bureaucracy of filling in forms or getting approvals from the DACI Director. However, in order for DACI staff to obtain the qualifications needed to respond to such training needs, staff should be granted liberal rights to attend lectures by local and international experts, encouraged (through promotion prospects) for engaging in independent study and allowed to "shadow" staff in other agencies (or undertake study visits to other Montenegrin agencies).<sup>48</sup>

As for assurance services related to anti-corruption activities carried out across the public sector, a revised regulation would define clearly the role of the DACI (as opposed to internal audit) in carrying out anti-corruption assessments – though allowing for both parties to be involved in audits as needed. Ideally, the assessment methodology would follow the Law on Public Internal Financial Control System. Namely, the DACI would apply the same standards of quality for anti-corruption related audits and research as those used by any internal auditor acting under the law – interpreting those standards as comprising the standards defined by the International Framework of Professional Practices set forth by the International Audit and Assurance Standards Board.<sup>49</sup> The DACI should also assess its own performance – with independent assurance of that report being undertaken by the internal auditor of the Ministry of Justice.

If the present DACI Competencies Regulation spans only one page, an activist regulation might span 20 or 25 pages and look roughly as presented in Figure 5. Antecedent provisions would deal with the legal basis for establishing such an activist regulation. One chapter would delineate (in some detail) the way the DACI interacts with the Anti-Corruption Commission, the Ministry of Finance and the Ministry of Justice. A clear division of responsibilities for representing the republic abroad in anti-corruption coordination and consultation meetings would need to be specified. The Directorate's rights for assembling and using information – particularly information related to corruption-related cases – would need to be scrupulously defined (as issues such as privacy,

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<sup>48</sup> Such provisions, while legal in Montenegro, would encounter deep cultural resistance. For more, *see* Erakovich Rodney, Kolthoff Emile, Sherman Wyman, and Kavran Dragoljub, *Comparative Analysis of Ethical Leadership and Integrity Development in Local Government: US, Netherlands, Montenegro and Serbia*, 57 PRAVNI JIVOT 7-8: 7-25, 2008.

<sup>49</sup> As previously mentioned, the DACI has an ambitious assessment schedule – being legally required to assess the Ministry of Justice, political parties, customs, all government agencies, work of the SECI Centre, Europol and Eurojust, government audit organisation, local government, public procurement, energy, education, health, infrastructure, tax administration, customs, business registration and licensing, banking, insurance and pensions. The IAASB standards would provide a comparable and internationally recognized standard for conducting those assessments.

confidentiality and even state secrets are involved).<sup>50</sup> Another chapter would need to deal with the division of labour in legal drafting between the DACI and the Ministry of Justice. A further section would define the terms under which the DACI provides consulting and assurance services. A final section would tackle training and skills issues through the creation of knowledge management systems and a liberal performance assessment and improvement system. Memoranda of Understanding with the Ministry of Finance and Ministry of Justice would need to be appended to the regulation.

**Figure 5: Table of Contents for Potentially Revised Activist Regulation on the Functioning of the DACI**

**ANTECEDENTS**

Chapter 1: Antecedents

**RELATIONS WITH OTHER ORGANISATIONS**

Chapter 2: Competencies Related to Secretariat Functions for the Anti-Corruption National Commission

Chapter 3: Relations Guaranteeing the Independence and Accountability of the DACI

Chapter 4: Relations with Other Domestic, Foreign and International Organisations

**INFORMATION USE, PROCESSING AND MANAGEMENT**

Chapter 5: Rights and Obligations of Using Information from Other Agencies

Chapter 6: Procedures for Obtaining, Processing and Using Statistical Information about Corruption

Chapter 7: Rights and Obligations for Posting Information on Agency's Website

Chapter 8: Procedures in Cases of Public Complaints about Specific Cases of Corruption

Chapter 9: Rules and Recommendations Related to Press Contacts

**CO-OPERATION ON LEGAL DRAFTING AND RULEMAKING**

Chapter 10: Work on Draft Laws and Legal Advising

Chapter 11: Procedures for Working with the Ministry of Justice on Anti-Corruption Legal Reform

Chapter 12: Opinions and Advisories Issued by the DACI to other State Bodies

**CONSULTING AND ASSURANCE SERVICES**

Chapter 13: Provision of Consulting and Training Services

Chapter 14: Provision of Anti-Corruption Assurance Services

**INTERNAL PROCEDURES**

Chapter 15: Procedures to Implement ISO 9001:2001 (Knowledge Management)

Chapter 16: Performance Appraisal and Management

Chapter 17: Training Requirements for DACI Recruits and Retraining Existing Staff

**FINAL DISPOSITIONS**

Chapter 18: Final and Executing Dispositions

**APPENDIX 1: MEMORANDUM OF UNDERSTANDING BETWEEN THE DACI AND THE MINISTRY OF FINANCE**

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<sup>50</sup> In many former Yugoslav countries, the issue of state secrets continues to arise as much government information comprises a state secret (partly as a way for civil servants to circumvent new freedom of information laws being adopted by parliaments across the region). Hopefully, private information about citizens will cease to become a state secret once collected by a state agency.

## Conclusions and Directions for Future Research

Montenegro's anti-corruption laws require significant amendment if the DACI wishes to play an effective role in preventing corruption in Montenegro. However, the parliament is unlikely to amend legislation anytime soon – and legal scholars as well as international conventions provide no guidance on ways of bolstering Montenegro's preventive anti-corruption efforts. As such, the legal strategy should be to engage in an activist regulatory approach. Such an approach would encourage the DACI to take a pro-active role in anti-corruption legislative work and consulting. Such a regulation would also clear up significant organisational design issues which would allow the DACI to collect information on (and objectively) assess Montenegro's anti-corruption work.

Making generalisations on the basis of only one country's experience always represents a perilous adventure. However, some generalisable lessons may be possible -- as Dr. Smilov notes "institutions with preventive and coordinative functions, whose prerogatives are limited to creating anticorruption strategies and plans, monitoring their implementation, advising the government... became very popular in Southeast Europe during 2000-2004: in Albania, there was the so-called Anticorruption Monitoring Group; in the Former Yugoslav Republic of Macedonia, the State Commission against Corruption; etc."<sup>51</sup> The countries in the region, to some extent, are following a similar mold. The primordial research question arising from our paper asks about the extent to which the Montenegrin (and other executive agencies in developing countries) should use their regulatory discretion in order to promote the goals and aims of the anti-corruption legislation which provides their mandate. In many former Socialist countries, public officials cast a very wary eye on the exercise of administrative and regulatory discretion. I assume regulation-writers and rule-makers will craft regulatory provisions of their secondary legislation close to the substantive rights they are granted in the primary legislation – and in the interest of citizens. However, the difference between our liberal approach and the conservative approach actually taken by anti-corruption regulators probably masks a series of interesting research questions which explain the relative failure of these transition economies to adopt pro-active anti-corruption laws.

Further research can also shed light on more anti-corruption specific questions. First, given the obvious problems related to clearly defining the mandate of a preventive anti-corruption agency, how should article 5 of the UN Convention Against Corruption evolve? Tellingly, few if any Western European or North American countries have created the same types of (donor financed) commissions and agencies which became popular in Eastern Europe and the Former Soviet Union. Second, how does variation in the type of preventive anti-corruption commission or agency across countries reflect the legal tradition of those countries? The UN Convention takes great pains to impose obligations only "in accordance with the fundamental principles of its legal system" Such a conditional clause opens up enormous room for legislative and regulatory differences

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<sup>51</sup> Daniel Smilov, *Designing anticorruption institutions in Central and Eastern Europe*, Development and Transition 12, 2009, available at: <http://www.developmentandtransition.net/index.cfm?module=ActiveWeb&page=WebPage&DocumentID=710>

between signatory states. Such variation may tell scholars something about the effects of “legal origins” on anti-corruption performance.<sup>52</sup> Does variation in preventive anti-corruption agencies shed light on the deeper questions related to the basic effects of a legal system on law enforcement outcomes? While I answered the main question which I posed in this paper from a normative perspective, a definitive answer will require a positive (empirical) analysis. In other words, can an activist regulatory stance overcome legislative problems in preventive anti-corruption agencies like Montenegro’s? Only time – and data – can tell.

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<sup>52</sup> The legal origins literature (or more formally, the law and development literature) seeks to explain everything from the development of capital markets to enforcement powers of the tax authorities as the result of historical differences in the way legal systems developed across countries. The law and development literature has developed sufficiently to find some good reviews. *See* Mathias Siems, *Legal Origins: Reconciling Law & Finance and Comparative Law*, 52 MCGILL L REV. 1, 2007.