

Podgorica, 20 February 2017

Ministry of Justice

Subject: Comments submitted by the Centre for Civic Education (CCE) regarding the Draft of law on the amendments of Criminal Code of Montenegro.

GENERAL COMMENTS

Centre for Civic Education (CCE) assesses as positive that Ministry of Justice has begun with the amendments of Criminal Code during the process of harmonisation with the *acquis communautaire*, as well as with the documents of Council of Europe and United Nations, especially considering the importance of progress in meeting the benchmarks set out within the chapter 23 – Judiciary and Fundamental rights.

Clear and complete legal framework represents the basis for the implementation of complex and challenging reforms in various areas, especially the one covered by the Criminal Code. Innovation of legal framework based on the recommendations such as the ones that are contained in the reports of MONEYVAL, Istanbul Convention, Lanzarote Convention, as well as in other documents of CoE, EC and UN, including those of older date, which deal with some of the ever-present issues in the area of criminal legislation, that were not addressed in Criminal Code, through the defined legal norm in the amended version of Criminal Code, can be supportive both in the protection of human rights and freedoms, and in the fight against the corruption, organised crime and many other deviant forms which obstruct the development of Montenegrin society.

SPECIFIC COMMENTS

In the abovementioned context, it is important that these norms do not imperil the achieved level of acquired rights and freedoms. This, primarily, refers to **Article 29**, from the Draft of law on the amendments of Criminal Code of Montenegro, within the chapter "**Obstruction of justice**". CCE assesses that the need to protect the reputation of judiciary cannot be detrimental for freedom of expression as one of the fundamental human rights. In addition, the proposed solution is not in accordance with the case law of European Court of Human Rights. Hence, the deprivation of freedom of expression, which also implies the social critique, is not a good option on the path to strengthen the democracy, which should undoubtedly be one of the pillars of democratic society.

Within its comments, CCE has specifically opted for the interventions in one area which this draft law on the amendments of Criminal Code of Montenegro does not address, and in trust that the Ministry of Justice recognises the significance of issue of plagiarism, we suggest an amendment in that part.

Namely, based on the analysis of legislative framework¹, as well as the existing practice, and by monitoring the issue of corruption and related actions in higher education, CCE has found that it is necessary to introduce the concept of plagiarism in Criminal Code. Considering the immense detrimental consequences along with its long-term duration, plagiarism not only undermines the

¹ More on that in study „Academic Honour in Montenegrin Manner – Plagiarisms in Montenegro and their (non)processing“, M. Popović, D. Uljarević, W. Tiefenbacher, CGO, Podgorica, 2016, available at: <http://media.cgo-cce.org/2016/12/cgo-cce-akademski-cast-na-crnogorski-nacin.pdf>

foundations of academic integrity, but poses a severe form of reckless behaviour that ought to be sanctioned by this Code, and thus act repressively towards the identified cases, as well as preventively to new and potential ones. In developed democratic states this issue is resolved mostly based on the internal university acts, with a significant success rate, whereby the court of public is often efficient on its own as well. Unfortunately, in Montenegro and countries of region, this is not an efficient response, hence we need to introduce a criminal-legal norm.

Law on Higher Education, Official Gazette of Montenegro, no. 44/14, 52/2014, corr. 47/2015 and 40/2016 stipulates in Article 78 Protection against plagiarism

Authorised work (professional, scientific or artistic), for which the competent body determines that it presents a plagiarism, is considered null and void, and the same applies to grades, accolades and titles of person who acquired those things based on that plagiarism. The institution is obliged to declare null and void all grades, accolades, titles which the person referred to in paragraph 1 of this article has acquired on that institution, based on such work.

The process of determining the plagiarism is determined with the statute of that institution, in line with special law.

In that regard, CCE proposes the amendment of Criminal Code within the chapter related to criminal offenses against intellectual property - the introduction of term **PLAGIARISM** as criminal offense of particular significance.

More precisely, CCE proposes the introduction of following norm:

Art. X PLAGIARISM

- 1) Whoever knowingly takes particularly any of the following actions, thereby violating the standards of scientific-research work: takes over the material without specifying that it was someone else's copyright or part thereof, someone else's important scientific finding or parts thereof, hypothesis, theories, scientific procedures, information acquired based on scientific research, or conducts any other similar actions and presents them as his/her own authentic work, shall be sanctioned with the sentence of imprisonment of up to 3 years.**
- 2) If the offense referred to in paragraph 1 of this Article was perpetrated by a member of academic community in order to secure academic appointment, or to maintain that position, or progress in his/her line of work, or appointment to public office, shall be sanctioned with the sentence of imprisonment in the duration from 3 months to 5 years, with the imposition of a security measure, thereby banning the professional activities and responsibilities.**

EXPLANATION

There is a substantial difference between the newly proposed criminal offense – *plagiarism* – and the existing offense from Article 233 of Criminal Code of Montenegro – *violation of moral rights of authors and interpreters*.



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Dr Vladimir V. Vodinelić, PhD, explains the difference, by stating, inter alia²:

“Specific combination of elements which constitutes plagiarism in a copyright, consists of following seven constitutive, and cumulatively, necessary elements of plagiarism:

- a) *that there is a copyright work³, with or without the copyright protection (hereinafter referred to as: original work or taken work)*
- b) *that there is another work (plagiarised work) which completely or significantly matches the original work;*
- c) *that this matching work was created later;*
- d) *that it was created with deliberate or careless appropriation of someone else’s original work;*
- e) *that it was published without specifying the original work and/or its author;*
- f) *that it was published as one’s own, by appropriating the original work of authorship, or as a work of named or anonymous third person, thereby attributing the third person the authorship of original work;*
- g) *that the unlawfulness of its publication is not exceptionally excluded.”*

Also, it should be noted that criminal offenses covered by the Criminal Code **are only protected by the form (expression) of copyright work, but not by the content (idea) of that work, scientific finding, hypothesis, teaching and theory contained in that work.**

Plagiarism represents the connection of several actions in one whole or an identical action, and it is indisputable that it is the case of criminal offense in extended duration.

In addition, it should be noted that the most severe sentence for a continued criminal offense of plagiarism is imposed if it is the case of series of offenses within this offense which the perpetrator has performed during a longer period of time, continually, deliberately (extended intent), which is why there is a concern that continued activities of future action could be continued on the basis of plagiarism that had already been achieved by the previous perpetrator.

Plagiarism can result in the acquisition of undeserved appointments, performance of activities and duties, appointment to public functions, acquisition of certain rights. Hence, the intention behind it is the realisation of certain benefits and rights which, on the longer run, make the basis for the realisation of material gain.

Plagiarism is always perpetrated with the intent, hence it should be prosecuted *ex officio* in each of its forms, due to the arising consequences. Considering that it is often a result of joint action by several people who act in an organised and consensual manner in order to implement that illegal action, for the purpose of realisation of certain benefits, we should consider the possibility of rendering this criminal offense under the competence of Special Prosecution.

² Expertus forensis, the magazine of the Association of Court Experts of Montenegro, No. 24, October 2016, the text of Prohibition and right to citation in science, Vladimir V. Vodinelić PhD, p. 39-118

³ Copyright work is a collection of four constituent ingredient, cumulatively required for a work of authorship - that it is about: creation of an identified or identifiable human representing the spiritual (mental, intellectual) content, expressed in a particular form (form) and original (in particular, unique, individual), ibid. p. 55 and 56





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The statute of limitations for this crime should be prescribed appropriately to prescribed sanction for the basic form of work as well as its aggravated qualified forms. Considering the emphasised social danger and need to protect the interest of public, CCE proposed that this criminal offense becomes obsolete in 20 years.

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