



Montenegro

Agency for the Prevention of Corruption

Number: UPI 02-01-358/6-2020

Pursuant to Article 38 of the Law on the Prevention of Corruption (Official Gazette of Montenegro 53/14), acting *ex officio* to determine whether Duško Marković, as a public official, violated the provisions of the Law on the Prevention of Corruption, and having completed the proceedings on 24 December 2020, the Agency for the Prevention of Corruption has adopted the following

DECISION

IT IS HEREBY DETERMINED that Duško Marković, as a public official, violated Article 12 paragraph 3 and Article 13 of the Law on the Prevention of Corruption, because after taking the public office of a Member of the Parliament of Montenegro, on 23 September 2020, he continued to exercise the public office of the Prime Minister of Montenegro after the expiry of the statutory period.

Statement of Reasons

The Agency for the Prevention of Corruption of Montenegro (hereinafter the Agency) initiated *ex officio*, in accordance with its legal competences set out in Article 78 of the Law on the Prevention of Corruption, the proceedings for determining whether Duško Marković, who has exercised the office of a Member of the Parliament of Montenegro since 23 September 2020, violates, as a public official, Article 12 paragraph 3 of the Law on the Prevention of Corruption in the way that after the expiry of the statutory period he has exercised the public office of the Prime Minister of Montenegro at the same time as the public office of a Member of Parliament.

Under Article 34 of the Law on the Prevention of Corruption, the public official Duško Marković pointed out in his written statement dated 12 November 2020 that he considers that, in accordance with the legal regulations, he submitted a notice that he would not participate as a public official in the work of the Parliament until the new composition of the Government was elected, stressing that his mandate of a member of the Government, in accordance with Article 110 paragraph 1 of the Constitution of Montenegro, ended on the same day as that of the Parliament of Montenegro. He further pointed out that in accordance with Article 110 paragraph 2 of the Constitution of Montenegro he was obliged to perform his obligations in the new Parliament and that he considered that he had fulfilled his obligations as a public official, as required by the provisions of the Law on the Prevention of Corruption.

To clarify this administrative matter, the Agency adduced the following evidence; it read the statement of the public official Duško Marković dated 12 November 2020, it read the letter of the Parliament of Montenegro number 00-32-5/20-49/1 dated 11 December 2020, it inspected the letter of the

Government of Montenegro number 01-4909 dated 23 October 2020 signed by the public official i.e. the President of the Government of Montenegro Duško Marković, it inspected the letter of the Government of Montenegro number 01-4895/2 dated 21 October 2020 signed by the public official i.e. the President of the Government of Montenegro Duško Marković, and it inspected the official records for the public official Duško Marković.

Based on the letter of the Parliament of Montenegro number 00-32-5/20-49/1 submitted to the Agency, on 14 December 2020, it has been established that following the verification of MPs' mandates at the sitting of the Parliament of Montenegro held on 23 September 2020 Duško Marković has held a public office in the Parliament of Montenegro and that the Parliament did not calculate salary for the above-named person.

Based on the letter of the Government of Montenegro number 01-4895/2 dated 21 October 2020 signed by the public official i.e. the President of the Government of Montenegro Duško Marković, it has been established that the above-named person submitted a notice, filed under number 02-01-2461, in which he stated that the Prime Minister and members of the Government whose MPs' mandates in the Parliament of Montenegro were confirmed would not participate in the work of the Parliament until the new composition of the Government was elected, in order to ensure that the Constitution of Montenegro is applied.

Based on the letter of the Government of Montenegro number 01-4909 dated 23 October 2020 signed by the public official i.e. the President of the Government of Montenegro Duško Marković, it has been established that the above-named person submitted a notice, filed under number 02-04-4-4637/3, in which he stated that on 23 September 2020 his MP's mandate in the Parliament of Montenegro was confirmed and that under Article 110 paragraph 2 of the Constitution of Montenegro which prescribes that the Government shall continue its work until the election of the new composition of the Government he still held the office of the Prime Minister of the former Government and that after his MP's mandate was confirmed he continued receiving the salary he was entitled to as the Prime Minister and that he did not receive any other salary arising from professional employment.

Based on the official records for the public official Duško Marković, it has been established that the above-named person is a public official and that, following the elections held on 30 August 2020, his MP's mandate in the Parliament of Montenegro was verified and confirmed at the constitutive session of the Parliament of Montenegro held on 23 September 2020, and that he has also exercised the public office of the Prime Minister of Montenegro.

Article 12 paragraph 3 of the Law on the Prevention of Corruption (Official Gazette of Montenegro 53/14) stipulates that the public official who performs work in state administration and local government bodies may not perform the function of an MP or councillor, while Article 13 of the same Law imposes an obligation to resign and states that a public official who, while holding a public office, accepts to perform another duty or office referred to in Article 11 paragraph 1 or Article 12 paragraphs 1 and 3 of this Law, shall resign from public office, within 30 days from the beginning of the exercise of that other office or duty. The status of a public official is regulated by the provision of Article 3 of the Law on the Prevention of Corruption which sets out that public officials shall mean the persons elected, appointed or assigned to a post in a state authority, state administration body, judicial authority, local self-government body, local government body, independent body, regulatory body, public institution, public enterprise or other

company or legal person exercising public authority, i.e. performing the activities in the public interest or which is State-owned, as well as the person whose election, appointment or assignment to a post is subject to consent by an authority, regardless of the duration of the office and remuneration.

Article 104 of the Constitution of Montenegro stipulates incompatibility of duties and lays down that a Prime Minister and a member of the Government shall not discharge duties of a Member of Parliament or other public duties or professionally perform some other activity, while Article 110 prescribes termination of mandate of the Government and lays down that the Government mandate shall terminate: with the expiry of the Parliament mandate, by resignation, when it loses the confidence vote and if it does not propose the Budget by March 31 of the budgetary year.

The Government whose mandate terminated shall continue its work until the election of the new composition of the Government. The Government whose mandate terminated may not dissolve the Parliament.

Furthermore, Article 101 of the Law on the Election of Councillors and Members of Parliament states, inter alia, that the mandate of a councillor or MP shall terminate before the expiry of the period for which they were elected if one of the cases of incompatibility of councillor duties with another duty occurs, as laid down in the Constitution and law, and that councillors or MPs whose mandates terminated on those grounds (para. 1 item 4 of Article 101) shall remain on the candidate list and they may gain the councillor or MP seat again, in accordance with this Law.

Based on the conducted evidentiary procedure and the evaluation of the presented evidence – of each individual piece of evidence and of relationships between those individual pieces of evidence, the Agency established that the public official Duško Marković violated Article 12 paragraph 3 and Article 13 of the Law on the Prevention of Corruption.

During the proceedings, it has been established that Duško Marković, a Member of the Parliament of Montenegro, continued to exercise as a public official the public office of the Prime Minister of Montenegro after the expiry of the statutory period, thereby violating the provisions of the Law on the Prevention of Corruption relating to restrictions in the exercise of public offices prescribing in Article 12 paragraph 3 that a public official who performs work in state administration and local government bodies may not perform the function of an MP or councillor. The fact that the public official Duško Marković is an MP in the Parliament of Montenegro and that he exercises the function of the Prime Minister of Montenegro has been established by inspecting the official records of the Agency and from the reply of the Parliament of Montenegro.

In view of the facts proven during the proceedings and the provision of Article 13 of the Law on the Prevention of Corruption prescribing the obligation to resign i.e. that a public official who, while holding a public office, accepts to perform another duty or office referred to in Article 12 paragraph 3 of this Law, shall resign from the public office within 30 days from the beginning of the exercise of that other office or duty, it has been established beyond any doubt that the public official Duško Marković did not comply with the mentioned Article and did not resign from public office within 30 days from the beginning of the exercise of the other office or duty.

The Agency assessed the arguments made in the written statement of the public official Duško Marković, in which, as a party, he referred to the constitutional provisions prescribed by Article 110 of the Constitution, as well as the statement of 21 October 2020 that he would not participate in the work of the Parliament until the new composition of the Government was elected, but it has established that those arguments had no effect in terms of making a different decision in this administrative matter. By informing the Parliament of Montenegro that he will not participate in the work of the Parliament of Montenegro until the new composition of the Government is elected, the public official Duško Marković's office as an MP did not terminate even though he was not remunerated on his own request, because the legislation of Montenegro does not recognise the institute of "dormancy" of an MP's office but only termination of such office, which did not happen in this particular case as the public official Duško Marković's office as an MP did not terminate.

In the opinion of the Agency, in view of the fact that the legislative framework presented above that regulates this situation does not provide a clear definition of a public office and when it terminates in the case when the Government continues its work until the election of the new composition of the Government, it was necessary to give legal interpretation, as pointed out also by the European Court of Human Rights in the decision *Vidaković v. Montenegro* (application no. 27524/00, §§ 56 and 58) stating, inter alia, that however clearly drafted a legal provision may be, in any system of law, there is an inevitable element of judicial interpretation and there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. When the arguments of the European Court of Human Rights in the decision *Vidaković v. Montenegro* are linked to the legal situation of the public official Duško Marković, it can be concluded beyond any doubt that an interpretation must be provided as to what a public office of a Prime Minister is, when it starts and when it terminates.

Therefore, undoubtedly, the public office of a Prime Minister begins with the beginning of the term of the Government and ends with the end of the term of the Government. However, in the situation when the Government continues its work until the election of the new composition of the Government, it remains unclear whether, during that time, the Prime Minister exercises a public office. In order to get that answer, we need to take into consideration a broader definition of a public official's mandate, which implies that "The mandate is the period of powers, obligations and responsibilities of public office holders, which begins with taking office and ends with the expiry of the period" (as explained by Prof. Zoran Ivošević, PhD, in his scientific paper on *Legal position of public officials*). Hence, a Prime Minister exercises office in the Government until the new composition of the Government is elected, which means that he/she has all the rights and duties as in the moment when he/she took office except that they cannot dissolve the Parliament. Thus, when someone has powers that directly affect the public interest and has the opportunity to make the most important decisions in all fields of life of the citizens of a country, he/she definitely exercises a public office. Furthermore, although the Law on the Election of Councillors and Members of Parliament is also unclear, the interpretation of the provision of Article 101 may lead to the conclusion that since the public official Duško Marković decided to continue performing the duties of the Prime Minister of Montenegro, he should have resigned from the office of a Member of the Parliament of Montenegro due to the conflict of interest, and by doing so he would remain on the candidate list and

would be able to gain the MP seat again in accordance with the mentioned Law. What makes this piece of legislation unclear as well is that in Article 101 paragraph 1 item 4 the legislator linked the conflict of interest to a councillor, but the same Article in paragraph 4 stipulates that councillors or MPs whose mandates terminated on the basis of paragraph 1 item 4 of this Article shall remain on the candidate list and may gain the councillor or MP seat again, in accordance with this Law, therefore, the absence of word “MP” in paragraph 1 item 4 of this Article may be a result of an omission which may be rectified if paragraph 4 of that same Article is interpreted correctly. Furthermore, this is the only article in the Law on the termination of mandate due to a conflict of interest, and it refers to the termination of mandate before the expiry of the period for which a public official was elected, which additionally makes this legal situation unregulated.

In view of the lack of legal provisions which would explicitly regulate this legal issue and the legal position of a Prime Minister after the expiry of mandate and until the new composition of the Government is elected, when interpreting the provisions the Agency established beyond any doubt that, when exercising his powers after the termination of the mandate of the Parliament of Montenegro and, consequently, of the mandate of the Government that Parliament elected, while still exercising the office of the Prime Minister until the new composition of the Government is elected, Duško Marković, the Prime Minister of Montenegro, had all the powers he had as the Prime Minister in its full mandate, except to dissolve the Parliament, therefore, he exercised a public office and, thus, was subject to the provisions of Title II of the Law on the Prevention of Corruption on “Restrictions in the Exercise of Public Offices” and on the incompatibility of duties provided for by the same Law in Article 12 paragraph 3.

Based on the afore-mentioned, it has been decided as stated in the operative part of this Decision.

Instruction on legal remedy: This Decision is final. Administrative dispute may be initiated against this Decision within 20 days from the day of receipt of the Decision.

DIRECTOR
Jelena Perović