



Montenegro
Agency for Prevention of Corruption

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Pursuant to Articles 78 and 79 of the Law on Prevention of Corruption (Montenegro Official Gazette, no. 52/14) and Article 10 of the Statute of the Agency for Prevention of Corruption, the Agency for Prevention of Corruption, acting ex-officio, has passed:

THE OPINION

Certain provisions of the Law on civil servants and state employees (Montenegro Official Gazette, no. 39/2011, 50/2011, 66/2012, 34/2014) (hereinafter: the Law), related to conflict of interest, prohibition of receiving gifts, additional work, prohibition to establish enterprises, limitations to membership in bodies of enterprises upon termination of employment for civil servants and state employees (Articles 69-78) make it possible to jeopardise public interest and may impact undermining of integrity, equality and transparency of procedures deciding on the rights and obligations of the civil servants and state employees stipulated in Articles 2 and 3 of the Law.

RATIONALE

Implementing ex-officio procedure, in line with Article 79 of the Law on prevention of corruption enabling the Agency to provide opinions for the purpose of improving corruption prevention, eliminating corruption risks and strengthening ethics and integrity in government bodies and other legal entities, the Agency has analysed provisions of the Law on civil servants and state employees. This identified potential risks of jeopardising public interest due to lack of precision and clarity of the norms related to conflict of interest, prohibition of receiving gifts, additional work, prohibition to establish enterprises, limitations to membership in bodies of enterprises upon termination of employment, which have the impact on the scope of right and obligations of the civil servants and employees.

Namely, certain provision of Articles 69 – 78 of the Law on civil servants and state employees are not specific enough, which allows for the possibility of jeopardising public interest and may impact undermining of integrity, equality and transparency of procedures used to decide on the rights and obligations of the employees in state bodies.

Based on the ex-officio procedure regarding the quoted provisions of the Law on civil servants and state employees the following was identified:

Law on prevention of corruption (Montenegro Official Gazette, no. 53/2014) stipulates measures for prevention of conflict of public and private interest and shall regulate restrictions in the exercise of public functions, submission of reports on assets and income by public officials, protection of persons reporting threats to the public interest that indicate the existence of corruption, as well as other issues of importance to the prevention and suppression of corruption – Article 1.

In Article 2 of the Law corruption is defined as any abuse of official, business or social position or influence that is aimed at acquiring personal gain or for the benefit of another.

For the purpose of this Law, threatening the public interest shall mean a violation of regulations, ethical rules or the possibility of such a violation, which caused, causes or threatens to cause danger to life, health and safety of people and the environment, violation of human rights or material and non-material damage to the state or a legal or natural person, as well as an action that is aimed at preventing such a violation from being discovered. – Article 44, Paragraph 2, of the Law.

Integrity shall mean a legitimate, independent, impartial, accountable and transparent performance of duties based on which the public officials and other employees of an authority protect their reputation and the reputation of the authority, provide confidence of citizens in the performance of public functions and the operation of the authority and eliminate doubts about the possibility of the emergence and development of corruption. – Article 72 of the Law.

Thus Law on prevention of corruption has introduced in systemic manner institutes of prevention of corruption that have been identified and requested from Montenegro as an obligation in line with international conventions and documents ratified by Montenegro, **for the public officials category defined in Article 3 of the Law.**

Provisions of Article 8 and Articles 69 – 78 of the Law on civil servants and state employees (Montenegro Official Gazette, no. 39/2011, 50/2011, 66/2012, 34/2014) regulate the issues related to conflict of interest, prohibition of receiving gifts, additional work, prohibition to establish enterprises, limitations to membership in bodies of enterprises upon termination of employment for **civil servants and state employees.**

These are institutes that have been regulated in a systemic way for public officials in the Law on prevention of corruption, so that the given provision of the Law on civil servants and state employees were analysed in relation to obligations which the public officials have regarding these institutes.

In the Opinions the Agency has been calling upon provisions of the Constitution and relevant laws, but not in terms of assessing constitutionality and lawfulness, but in terms of application and implementation of the purpose of Article 79 of the Law on prevention of corruption.

The analysis of the above mentioned articles of Law on civil servants and state employees, the Agency has identified the following:

Law on civil servants and state employees (Montenegro Official Gazette, no. 39/2011, 50/2011, 66/2012, 34/2014) stipulates the following:

Avoiding conflict of interest

Article 8

In performing their duties, a Civil Servant and/or State Employee, shall not give private interest precedence over public interest or abuse the performance of their duties to obtain material or other gain.

Avoiding conflict of interest

Article 69

In performing their duties, a Civil Servant and/or State Employee, shall avoid situations in which private interest influences or can influence impartial and objective performance of tasks and duties under the scope of his/her job.

Private interest is defined as ownership or other material or non-material interests of a Civil Servant and/or State Employee.

Norms from the Articles 8 and 69 of the Law on civil servants and state employees related to avoiding the conflict of interests of Civil Servants and State Employees do not recognize, in addition to private interest which involves ownership and other material or non-material interest, the benefit for another.

In terms of this, the Agency recommends expanding the private interest definition to the benefits which Civil servants and/or State Employees can gain for another, similar to Article 2 (Definition of the corruption) in the Law on prevention of corruption.

Obligation to report possible conflict of interest

Article 70

Civil servants and/or State Employees are obliged to inform their direct supervisor in writing on the following:

- Private interest which he/she or person associated with him may have with regards to activities under the scope of competencies of the government body in which she/he is participating;

- Ownership over shares and bonds or financial and other interests in enterprises in terms of which the government body where he/she works is performing administrative activities from under the scope of its competencies;

- Natural or legal persons that she/he was in contractual, i.e. business relationship, two years prior to employment in the government body, and with regards to which the state body where he/she works is performing administrative activities from under the scope of its competencies.

- Associated person for the purpose of this law is relative of the civil servant and/or state employee, in a straight line and to the second degree in lateral line, a relative by marriage to the first degree, married and common-law spouse, adoptive parent and adoptive child.

In case of circumstances described in Paragraph 1 of this Article, the supervisor from the government body shall take a decision on exemption of the civil servant and/or state employee from certain activities, in line with the law regulating general administrative procedure.

Data on possible conflict of interest from Paragraph 1 of this Article, as well as decision from Paragraph 3 of this Article, are entered into personal file of the civil servant and/or state employee.

The question that emerges when defining the obligation to report possible conflict of interest from Article 70 of the Law on civil servants and state employees is who and in which way will monitor and establish the conflict of interest, if the civil servant and/or state employee fails to report it.

The Agency would like to highlight the need to identify the instance (e.g. supervisor from the government body or integrity manager) that would be in charge of checking whether the civil servant and/or state employee has **reported** the conflict of interest, and to specify in which way the existence of conflict of interest is monitored and established.

Prohibition on abuse of work in government body and use of property

Article 71

Civil servants and/or State Employees must not use their work in the government body to influence achievement of the private interest or the interest of another natural or legal person associated with them.

Civil servants and/or State Employees must not for the purpose of exercising private interest or the interest of another natural or legal person associated with them, use government property and data available to him/her in the course of work.

Paragraph 1 of the Article 71 also refers to conflict of interest elaborated in Articles 8 and 69, elaborating further on it, so that it is required to harmonise given Articles to avoid redundant repetition.

Prohibition on receiving gifts

Article 72

Civil servants and/or State Employees must not receive money, securities or precious metals, regardless of their value.

Civil servants and/or State Employees must not receive gifts, except for protocol or appropriate gifts of small value.

A gift of up to 50Euro is considered to be an appropriate gift from Paragraph 2 of this Article. Civil servants and/or State Employees are obliged to report to the government body where she/he works the received gift identified in Paragraph 3 of this Article, using an appropriate form.

Government body needs to keep records on the gifts identified in Paragraph 4 of this Article.

The content and method of keeping the records from Paragraph 5 of this Article is to be regulated by the Ministry.

Refusing gifts

Article 73

Civil servants and/or State Employees who are offered gifts which they cannot receive are obliged to refuse the offer.

If the Civil servants and/or State Employees could not refuse the gift, or return it to those who gave them the gift, they are obliged to hand it over to the government body where they work.

Prohibition on receiving gifts, i.e. gifts identified in Articles 72 and 73 of the Law on civil servants and state employees, failed to regulate control and monitoring. The question that

emerges is who and in which manner shall supervise and establish irregularities in cases when civil servants and/or state employees fail to report the received gift to the government body where they work, using prescribed form, i.e. if they receive gifts in value greater than allowed or fails to hand over the gift to the government body where they work, in case they could not refuse the gift which there were not allowed to receive.

Also, in line with Article 16 of the Law on prevention of corruption, it is necessary to establish total value of appropriate gifts at the annual level from the same or different givers, to avoid situations which would facilitate receiving a larger number of presents in the amount of 50 Euro.

Additional work

Article 74

Civil servants and/or State Employees may perform work or provide services to natural or legal persons outside the working hours, with previously obtained permission from the supervisor of the government body in writing, only if such work or activities are not supervised by the government body where they work, or if such work is not prohibited by separate legislation and does not constitute conflict of interest or obstacle to regular execution of regular tasks and duties, i.e. does not damage the reputation of the government body.

Civil servants and/or State Employees may, having previously informed the supervisor of the government body, work on research, educational, humanitarian and sports activities, and also public professional papers and teach at expert seminars and workshops.

Article 74 of the Law on civil servants and state employees did not specify who and in which way should supervise and establish whether the civil servant and/or state employee performs additional work without previously obtained permission by the supervisor; it also does not specify which sanctions are provided for violation of the provisions of this article.

Prohibition of establishment of enterprises

Article 75

Civil servants and/or State Employees must not establish an enterprise or be engaged in entrepreneurship.

Article 75 of the Law on civil servants and state employees does not specify who and in which manner shall conduct supervision, keep records and establish whether the civil servants and/or state employees have established enterprise, or engaged in entrepreneurship, or which sanctions are provided for this.

In addition, the Agency will sent for review changes to the given article in view of the fact that limitations are too strict in terms of prohibition for civil servants and/or state employees to establish enterprise, or engage in entrepreneurship. The question that emerges is why are criteria for civil servants and/or state employees stricter than in case of public officials. Namely, in the Law on prevention of corruption there is no prohibition for public officials to establish enterprises; only Article 10 mentions transfer of management rights in enterprises and Article 11 talks about prohibition on performing management and other functions in enterprises (unlike Article 33 of the Law on agency for fight against corruption of the Republic of Serbia (Official Gazette of the Republic of Serbia, no. 97/ 08, 53/10)).

The Agency would also like to highlight Article 32 (Prohibition on establishing crafts or establishment of legal entity) of the Croatia's Law on civil servants¹ which reads that civil servants are not allowed to establish enterprises, i.e. another legal entity, only in case of business activity that is linked to activities from under the scope of work of government body where they work.

Limiting membership in bodies of enterprises

Article 76

Civil servants and/or State Employees may not be chairpersons or members of the management body or supervisory body in an enterprise.

Civil servants and/or State Employees may be chairpersons or members of the management body or supervisory body in a public enterprise, public institution or other legal entity where state, i.e. municipality, is the owner, as well as of management body and supervisory body of the research, humanitarian and sports associations.

Article 76, Paragraph 1 of the Law on civil servants and state employees did not specify who and which manner should conduct supervision, keep records and establish whether the civil servants and/or state employees are chairpersons or members of management or supervisory bodies of any enterprise.

Paragraph 2 of this Article did not specify definition of the public enterprise, in terms of defining what should be the percentage of public ownership, in line with Paragraph 2 of the Article 3 of the Law on prevention of corruption.

Limitations after termination of employment

Article 77

Over the period of two year after termination of employment in the government body, Civil servants and/or State Employees may not:

- *Establish employment relationship as a director, manager or consultant in an enterprise or another legal entity over which the government body where the civil servants and/or state employees worked carries out auditing or supervisory activities;*
- *Enter into contractual relations or other form of business cooperation with a government body where they were employed;*
- *Use, for personal benefit or benefit of another associated person, information and insights obtained while employed in the government body.*

Again, the question is who conducts supervision, keeps records and establishes whether civil servants and/or state employees have violated provisions from this article and which sanctions are provided for in cases of such violations.

CONCLUSION AND RECOMMENDATIONS:

The Agency analysed provisions of the Article 8 and Articles 69-78 of the Law on civil servants and state employees related to conflict of interest, prohibition of receiving gifts, additional work, prohibition to establish enterprises, limitations to membership in bodies of enterprises upon termination of employment for civil servants and state employees.

¹ Law on civil servants of Croatia OG 92/05, 142/06, 77/07, 107/07, 27/08, 34/11, 49/11, 150/11, 34/12, 49/12, 37/13, 38/13, 01/15, 138/15

Based on the analysed material, the Agency would like to make the following recommendations:

- Identified provision of the Law on civil servants and state employees are not specific enough, are not specific enough, which allows for the possibility of jeopardising public interest and may impact undermining of integrity, equality and transparency of procedures used to decide on the rights and obligations of the civil servants and/or state employees from Article 2 and 3 of the Law.
- The obligation of avoiding conflict of interest for civil servants and/or state employees given at the level of principle in Articles 8 and 69 and in Article 71, Paragraph 1 of the Law should be collated into one principle with more specific definition of the term “benefit” from Article 6 as benefit for oneself or another, as identified in Article 2 of the Law on prevention of corruption.
- With regards to Articles 70-71, it needs to be specified who supervises and establishes violations of the obligations of civil servants and/or state employees from the given articles, in case they fail to do it themselves. Otherwise, the current norms could in certain situations allow for selective application, activation of discretionary powers of the supervisor in the government body deciding on given obligations, which may cause undermining of integrity in terms of lack transparency in given procedures.
- With regards to Articles 72-73, supervision and monitoring have not been regulated, i.e. it is unclear who supervises and in which manner to establish violation of the obligations identified in the given articles. With regards to appropriate gifts, it is necessary to establish their total value at an annual level or by the same or different givers.
- With regards to Article 74, the Agency would like to highlight lack of supervision for the additional work category, in case of failure to obtain approval of the supervisor from the government body, as well as lack to sanctions provided for in case of violation of this article.
- With regards to Articles 75-77, it is also required to specify who supervises, keeps records and establishes whether civil servant and/or state employees has violated provisions from the given articles, and which sanctions are provided for these violations.
- With regards to Article 75, the Agency would like to stress that prohibitions for civil servants are disproportionate to those provided for public officials, while article 76 indicates the need to specify state, i.e. municipal ownership in enterprises.