



Montenegro
Agency for Prevention of Corruption

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Pursuant to Articles 78 and 79 of the Law on Prevention of Corruption ("Official Gazette of Montenegro", no. 53/14 and 42/17) and Article 10 of the Statute of the Agency for Prevention of Corruption, acting ex officio, the Agency for Prevention of Corruption adopts:

**OPINION ON THE PROPOSAL OF THE LAW ON AMENDMENTS TO THE LAW ON
ELECTRONIC COMMUNICATIONS**

As the Law on Electronic Communications recognized the regulation of the electronic communications sector as an activity of public interest, and the Agency for Electronic Communications and Postal Services as an independent regulatory body that, in the exercise of public powers in the field of electronic communications, performs regulatory and other tasks established by law, and that in the performance of the aforementioned tasks, it may not receive or ask for instructions from state and other authorities and organizations or other persons, the Agency for Prevention of Corruption recognized the importance of carrying out the procedure and reviewing the provisions of the Proposal of the Law on ex officio Amendments to the Law on Electronic Communications, which was submitted to the Parliament of Montenegro by a group of MPs on March 6, 2023 (classification number: 10-1/23-1 EPA: 712 XXVII).

In this regard, we specifically analyzed the provisions of the Proposal of the Law, which regulating the issues such as: the Agency's bodies, conditions for the appointment and termination of office of the president and members of the Council, the appointment and termination of office of the director of the Agency, as well as the labor-based rights and obligations of employees in the Agency, and the rights of members of the Council upon termination of office.

RATIONALE

I PROCEDURE

The Law on Prevention of Corruption ("Official Gazette of Montenegro", no. 53/14 and 42/17) prescribes the competence of the Agency for Prevention of Corruption (hereinafter referred to as the APC/Agency) which, in accordance with Article 78 paragraph 1 of the Law:

- "...shall take the initiative to amend laws, other regulations and general acts, in order to eliminate the possible risks of corruption or to bring them in line with international standards in the field of anti-corruption;
- shall give opinions on draft laws and other regulations and general acts for the purpose of their alignment with international standards in the field of anti-corruption;"

Article 79 of the same Law establishes that the Agency can, on its own initiative or at the request of a government body, company, legal entity, entrepreneur or natural person, issue opinions for the purpose of improving the prevention of corruption, reducing corruption risks and strengthening of ethics and integrity in the authorities and other legal entities, which includes an analysis of corruption risks, measures to eliminate corruption risks and prevent corruption.

Bearing in mind that the Agency, in accordance with its legal competences, prescribed by Articles 78 and 79 of the Law on Prevention of Corruption ("Official Gazette of Montenegro" no. 53/14, 42/17) aims to eliminate any arbitrariness in the interpretation and implementation of regulations through analysis, as part of its regular activities, it monitors legislative activities in the areas that carry a special risk in terms of preventing corruption.

Article 2 of the Law on Electronic Communications ("Official Gazette of Montenegro", no. 40/13, 56/13, 2/19 and 49/19) states that the activity of electronic communications and the management and use of limited resources represent the activities of public interest, and according to Article 8 of the same law, the Agency for Electronic Communications and Postal Services (hereinafter referred to as the Agency/EKIP) is an independent regulatory body that, in the exercise of public authority in the area of electronic communications, performs regulatory and other duties established by the law, and that in the performance of its duties it may not receive nor seek instructions from state and other authorities and organizations or other persons.

Bearing in mind the above, and in the context of the provisions of the Proposal of the Law on Amendments to the Law on Electronic Communications submitted to the Parliament of Montenegro by a group of deputies on March 6, 2023 (classification number: 10-1/23-1 EPA: 712 XXVII), and proposing amendments to the provisions of the aforementioned Law in the part that regulates the issues including: Agency's bodies, composition, conditions for appointment and termination of office of the President and members of the Council, the competencies of the Agency's director, his/her appointment and termination of office, as well as labor-based rights and obligations upon termination of office, the APC recognized the importance of carrying out the *ex officio* procedure, to review the proposed amendments, and with its recommendations to contribute to the improvement of the quality of future legal solutions in this area.

II CORRUPTION RISK ASSESSMENT AND ANALYSIS OF THE PROPOSAL OF THE LAW ON AMENDMENTS TO THE LAW ON ELECTRONIC COMMUNICATIONS

Article 2 of the Law on Electronic Communications ("Official Gazette of Montenegro", No. 40/13, 56/13, 2/17 and 49/19) states that the activity of electronic communications and the management and use of limited resources are activities of public interest, and in

accordance with Article 8 of the law, the Agency for Electronic Communications and Postal Services is defined as an independent regulatory authority that, in the exercise of public authority in the field of electronic communications, performs regulatory and other tasks established by the law, and also sets forth that in the performance of those tasks, it may not receive or request instructions from state and other authorities and organizations or other persons.

The principles in the field of electronic communications, according to Article 3 of the Law, are based on objectivity, transparency, non-discrimination and proportionality; providing conditions for the even development of the electronic communications market on the territory of Montenegro; the predictability of the business environment and equal conditions for the operator's business; harmonizing the performance of electronic communications activities with Montenegrin and international standards; ensuring the availability of universal services to all citizens on the territory of Montenegro, while meeting the needs of special social groups, including persons with disabilities and socially vulnerable users...

When it comes to the Proposal of the Law on Amendments to the Law on Electronic Communications, the Rationale states that the reason for passing the law is the legal incompatibility of this law with the Law on State Administration, that the Council currently has three members, or, in other words, it functions on the edge of a quorum for decision-making, and that in the event of the termination of office of one of the Council members, the work of the Agency would be blocked, and that the Proposal of the Law offers solutions that would prevent the existing situation due to the provision of powers to the Government regarding the appointment and dismissal of the Council members.

The Law on State Administration ("Official Gazette of Montenegro", no. 78/18, 70/21 and 52/22) in article 43 paragraph 1 and 2 states that state agencies are established in order to carry out tasks of market regulation in the activities of public interest, that is, for the execution of the law in a specific area, only if there is a clear requirement for the body's functional and organizational independence arising from the law of the European Union or an international agreement and that the requirement cannot be provided if the body performs tasks in the status of a state administration body, that state agencies can have the status of a legal entity and that they are accountable to the Government for their work in accordance with this law and the law by which it was founded. Furthermore, Article 44 paragraph 1 and 3 prescribes that the council and the director are the bodies of the state agency, that the president and members of the council of the state agency are appointed and dismissed by the Government, and Article 45 paragraph 1 and 3 of the Law states that the sources of funding of the state agency are determined in a manner that the stable and predictable operation of the state agency is ensured, in accordance with the law, as well as that the state agency submits to the Government at least once a year a report on its work that contains an overview of the implementation of laws and other regulations, data on the achievement of goals from the state agency's work program, an assessment of the state and the measures taken to improve the situation and financial report.

When it comes to amendments to the Law on Electronic Communications, Article 1 proposes an amendment to Article 9 of the Law, which stipulates that the Agency for Electronic Communications and Postal Services has the status of a legal entity, the status of a state agency, and that it is accountable to the Government for its work. The APC is of the opinion that with this article of the law it would be good to keep the existing solution

given in Article 9 paragraph 6 of the Law on Electronic Communications, which states that the work of the Agency is public, and which is deleted in the Proposal of the Law, because it additionally emphasizes one of the principles of the law and underlines the importance of transparent work in the field of electronic communications.

In this article of the Proposal of the Law, it is proposed that for its work, the Agency is responsible to the Government, instead of the currently valid decision according to which it is responsible to the Parliament of Montenegro. On the basis of this amendment, amendments to the existing articles of the Law were also proposed:

- Article 13 (Article 4 of the Proposal of the Law), which refers to the fact that the Council is accountable to the Government for its work, instead of the Parliament, as is the currently valid legal solution.
- Article 24 paragraph 4 (Article 14 of the Proposal of the Law), which refers to the fact that the Work Plan with the financial plan of the Agency for the following year is adopted by the Government, instead of the Parliament, as is currently the valid legal solution.
- Article 26 paragraph 5 (Article 15 of the Proposal of the Law), which refers to the fact that the Work Report with the financial report is considered and adopted by the Government, instead of the Parliament, as is now the valid legal solution.

If the proposed approach were to be followed, according to which in the future the Agency would be accountable for its work to the Government, instead of the currently valid solution according to which it is accountable to the Parliament of Montenegro, it is necessary to introduce changes line-by-line in several articles of the Law regulating the competence of the Parliament in the control of the work of the Agency, such as Article 5 paragraph 1 item 3 of the Law, which stipulates that the Government in the field of electronic communications gives opinions to the Parliament on the work plan with the financial plan and on the financial report of the Agency. In this sense, Article 14 paragraph 2 of the Law should also be amended, stipulating that the Council submits work report with a financial report to the Parliament, as well as a work plan with the Agency's financial plan. Additionally, for the same reason, it is necessary to propose, in relation to the proposed changes, harmonization of Article 124, paragraph 5, where it is said that the Parliament, by adopting the financial plan of the Agency, approves the amount of the total annual costs of management and supervision of the use of the radio-frequency spectrum for the following calendar year, on the basis of which the Agency determines the monetary value of the point from paragraph 3 of this article, as well as article 138 paragraph 4, which refers to the fact that the Parliament, by adopting the financial plan of the Agency, approves the amount of the total annual costs of monitoring and managing numbers and/or addresses for the following calendar year, on the basis of which the Agency determines the monetary value of the point from paragraph 2 of this article.

Furthermore, Article 4 of the Proposal of the Law, which is proposed to amend Article 13 of the Law, which refers to the fact that the Council is appointed and dismissed by the Government, instead of the existing solution according to which the Parliament is responsible for this issue, was the subject of a special analysis by the APC.

Specifically, the Proposal of the Law proposed several changes in this part, which relate to: the amendment of the above-mentioned Article 13, deletion of Article 15, which regulates the procedure for appointing the president and members of the Council, amendment of Article 16, in the part of adapting the provision to the intention of the

proponent that the appointment procedure is carried out by the Government with minor changes to the conditions for appointing Council members in the part that refers to the reduction of the required work experience from five to three years, with the proposal to delete paragraph 3 of article 16, which foresees that with the application to the public competition from article 15 paragraph 1 of this law, the candidate submits a statement in which, in case of appointment as president or member of the Council, he/she undertakes that, within 30 days from the date of appointment, he/she will remove the reasons for a possible conflict of interest.

What is lacking in such a system for electing the president and members of the Council of the Agency of one regulatory body is the provision of the appointment of the Council by the Government without pre-established criteria for evaluating candidates, as well as without the obligation to publish the appropriate candidate documentation on the basis of which the candidate evaluation procedure was carried out.

The transparency of the selection procedure of the Agency's bodies is imperative in order to reduce the scope for arbitrary and potentially random decisions of the Government in this case, as a suitable ground for various types of abuse, which conditions the emergence of trading in influence, which ultimately affects the very credibility of the members of the Council. The same "complaint" also applies to the process of dismissing members of the Council, which must also be transparent, in order to reduce the possibility of arbitrary and discretionary influence of the executive power, in such a way as to exert political pressure on the members of the Council of an independent regulatory body through personnel changes.

Also, the requirement of the United Nations Convention against Corruption (hereinafter: UNCAC)¹ from Article 7 paragraph 1 items a and b, paragraph 2 and 4 is that in the public sector the system of recruitment, hiring... is based on the principles of efficiency, transparency and objective criteria ... which include the appropriate selection and training procedures for individuals for public positions that are considered especially vulnerable to corruption, and precisely states:

"Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavor to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:

(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;

(b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions; ...

2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office...

¹ Law on Ratification of the United Nations Convention against Corruption "Official Gazette of Serbia and Montenegro - International Treaties", no. 11/2005

4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavor to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.”

The principle of transparency in a specific area is recognized through Directive (EU) 2018/1972 of the European Parliament and of the Council of December 11, 2018² in which Article 7, paragraph 1, regarding the appointment and dismissal of members of national regulatory bodies, states that the head of the national regulatory body or, where applicable, members of the collegiate body performing that function within the national regulatory body or their deputies will be appointed for a term of at least three years from individuals of recognized reputation and professional experience, based on merits, skills, knowledge, and experience and through an open and transparent selection process.

In this regard, APC emphasizes that, for the sake of transparency in the selection process of the Council members, it is necessary for the process to be conducted through a public competition. The evaluation of submitted applications in the competition will be assessed according to pre-established criteria, and the relevant documentation of the candidates, based on which the evaluation process was conducted, will be disclosed and published.

Furthermore, APC is of the opinion that the provision from Article 16, paragraph 3, of the current Law, stating that along with the application for the public competition from Article 15, paragraph 1 of this law, the candidate submits a statement committing, in case of appointment as the president or member of the Council, to eliminate any conflicts of interest within 30 days of the appointment, is a sound provision, and that it should be retained in future legal frameworks in this field.

Particular caution should be exercised with Article 10 of the Proposal of the Law, which proposes to amend the existing Article 21 of the Law, in the part of appointing the Director of the Agency, bearing in mind the importance of the position of the Director of the Agency.

Namely, in Article 20 paragraph 2 of the Law on Electronic Communications it is said that the Executive Director represents and acts on behalf of the Agency; is responsible for the legality of the Agency's work and organizes the work of the Agency's professional services; decides on the rights, obligations and responsibilities of the employees of the Agency; submits a request for initiation of misdemeanor proceedings before the competent court; proposes a work plan with a financial plan, a work report with a financial report and other general and individual acts and executes the decisions of the Council; takes care of ensuring the publicity of the work of the Agency and performs other tasks in accordance with this law and the statute of the Agency. Additionally, in Article 44, paragraph 4, of the Law on State Administration, it is stated that the director of a state agency represents, leads, and organizes the work within the state agency, is responsible for the legality and quality of its operations, proposes the statute, annual work program, financial plan, report on activities, and financial report, as well as other decisions to the council of the state agency, executes the decisions of the council, manages human and financial resources, ensures the transparency of the state agency's work, and performs other tasks specified by law.

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02018L1972-20181217>

From the above, it is clear that the mentioned position carries significant responsibilities. Therefore, APC maintains the stance that the public competition for this position should also be conducted with a high application of transparency principles and pre-established criteria for evaluating submitted applications. The competition documentation and the scoring list should be published to open the entire procedure to the "court of the public opinion". Moreover, instead of referring to the consistent application of the law regulating the rights and obligations of civil servants and state employees as proposed in Article 11 of the Proposal of the Law, the question of the termination of the director's mandate and the question of dismissal should be elaborated within the law itself, and the criteria and elements determining these two grounds for the termination of the director's function should be clearly outlined in order to minimize susceptibility to external or political pressures.

The procedures for the appointment and dismissal of members of the Agency's bodies, namely the president and members of the Agency's Council, as well as the director of the Agency, must be transparent. The rules governing these procedures should be well-known in advance and detailed within the law, since this is the only way to contribute to the elimination of undue influence on the selection of members of the Agency's bodies and to safeguard the respective positions from potentially selective, non-objective, and biased decision-making by the competent authority, in this case, the Government.

Additionally, the dismissal procedure must be preceded by a procedure of determining responsibility for clearly defined "shortcomings" in performance, conducted by a body pre-identified by law. This approach ensures a healthy personnel development based on the capabilities and qualities of individuals leading the independent regulatory body, without political interference from the executive authority.

Here, consideration must also be given to Article 6, paragraph 2, of *Directive (EU) 2018/1972 of the European Parliament and of the Council*, which emphasizes about the need of the member state to ensure that national regulatory and other competent authorities exercise their powers impartially, transparently and in a timely manner, as well as the need to ensure that these entities have adequate technical, financial and human resources to carry out the tasks assigned to them.

The above is significant, bearing in mind the specific staff necessary to fulfill the responsibilities of the Agency for Electronic Communications and Postal Services, and the same must be accompanied by financial independence, i.e. autonomy in financial planning and budget execution, along with mechanisms for controlling the legality and transparency of the disposal of the same.

When it comes to the set of provisions regulating the salaries of employees in the Agency, as well as compensation for the work of Council members and provisions for compensation upon cessation of function for Council members, it may not be necessary to regulate these issues as proposed in Articles 4, 12, and 13 of the Proposal of the Law. Instead, a single provision could be sufficient to govern the corresponding application of regulations that determine salaries in the public sector.

Furthermore, the proposed amendment through Article 16, which pertains to Articles 201a, 201b, and 201c, establishes the obligation to appoint the Council of the Agency and the director of the Agency within 30 days of the entry into force of this law, while according to the current law, Article 201, paragraph 2, states that the president and members of the Council and the executive director of the Agency continue to work until the expiration of the term for which they were appointed.

In this regard, APC observes a collision between Article 201 and the proposed legal solutions through the amendments in Article 16 (201a, 201b, and 201c). The legal solution in Article 16 of the Proposal of the Law is additionally deficient, as it indicates the intention of the proposer to, through transitional and final provisions, resolve the existing members of the Agency's bodies, the president and members of the Council, and the executive director of the Agency within 30 days from the entry into force of the proposed amendments, without questioning their qualifications in legally established procedures. This deprives them, among other things, of the opportunity to challenge the termination of their mandate before the competent courts, risking a form of institutional memory, an important element for the sustainability of this system, which encompasses specific work processes and knowledge.

Due to the importance of the area regulated by the relevant law, the APC calls on the Parliament of Montenegro to consider specific legal solutions, such as the Law on Electronic Communications, which is important in the context of the criteria for closing Chapter 10 - Information society and media, as products of the relevant ministry, regulator, as well as relevant representatives of the executive and legislative branches of government and the professional public, so that the adopted legal solutions not only formally, but also essentially ensure functional and financial independence, which is imperative for the work of an independent regulator and the requirement of relevant international instances. Finally, especially considering the principles stated in the preamble of Directive (EU) 2018/1972 of the European Parliament and of the Council (point 34), which states, "In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory and other competent authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 345 TFEU. National regulatory and other competent authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks."³

³ [EUR-Lex - 32018L1972 - EN - EUR-Lex \(europa.eu\)](#)

III FINAL ASSESSMENTS

Considering the importance of electronic communications activities and the management and use of limited resources, as well as the role of the Agency for Electronic Communications and Postal Services, which, as an independent regulatory body, performs activities of public interest, and the significance of this issue in the context of meeting the criteria for closing Chapter 10 - Information Society and Media, the Agency for Prevention of Corruption has recognized the importance of initiating proceedings ex officio and examining the provisions of the Proposal of the Law on Amendments to the Law on Electronic Communications submitted to the Parliament of Montenegro by a group of MPs on March 6, 2023 (classification number: 10-1/23-1 EPA: 712 XXVII)

In this regard, the subject of a special analysis by the APC was Article 4 of the Proposal of the Law, introducing an amendment to Article 13 of the Law, which pertains to the Council's appointment and dismissal by the Government instead of the existing provision where the Parliament is competent for this matter. The analysis covered multiple provisions of the Law related to this article of the Proposal of the Law, indicating the anticipation of a system for appointing the President and members of the Council of the Agency by the Government without pre-established criteria for evaluating candidates, as well as without an obligation to disclose the relevant documentation of candidates based on which the evaluation process was conducted.

Also, the provisions of Article 10 of the Proposal of the Law proposing to amend the existing Article 21 of the Law, in the part of the appointment of the Director of the Agency, were analyzed, bearing in mind the importance of the function of the Director of the Agency, and the deficiencies detected in the norm itself, which relate to the non-transparency of the competition procedure itself, which should be implemented with a high application of the principle of transparency and previously known criteria for the evaluation of submitted applications, and the competition documentation and score list should be published in order to open the entire procedure to the "court of the public opinion".

Additionally, Article 11 of the Proposal of the Law has been analyzed, which refers to the corresponding application of the law regulating the rights and obligations of civil servants and state employees regarding the termination of the director's mandate at the Agency.

When it comes to the procedures for appointing and dismissing members of the Agency's bodies, i.e. the president and members of the Agency's Council, as well as the Agency's director, the APC concluded that they must be transparent, and the rules by which they are implemented must be known in advance and elaborated in law, as it is the only way to contribute to the elimination of inappropriate influence on the selection of members of the Agency's bodies, all in order to preserve the relevant positions from potentially selective, non-objective and biased decision-making by the competent body, in this case the Government. Additionally, the dismissal procedure must be preceded by a procedure of determining responsibility for clearly defined "shortcomings" in performance, conducted by a body pre-identified by law. This approach ensures a healthy personnel development based on the capabilities and qualities of individuals leading the independent regulatory body, without political interference from the executive authority.

The transparency of the selection procedure of the Agency's bodies is imperative in order to reduce the space for arbitrary and potentially capricious decision-making by the Government in this case, as a suitable ground for various types of abuse, which conditions the appearance of influence peddling, which ultimately affects the very credibility of the members of the Council and their independence in performing the duties entrusted to them by law. Among other things, the requirement and standard recognized in *Directive (EU) 2018/1972 of the European Parliament and the Council of December 11, 2018*⁴, which in Article 7 paragraph 1 particularly emphasizes the appointment and dismissal of members of national regulatory bodies according to an open and transparent selection procedure.

Regarding the proposed amendment through Article 16, which pertains to Articles 201a, 201b, and 201c, the APC identifies a certain conflict between Article 201 and the legal solutions proposed by these amendments in Article 16 (201a, 201b, and 201c). Additionally, a specific deficiency in this legislative solution is noted in the intention of the law proposer to, through transitional and final provisions, resolve the positions of existing members of the Agency's bodies, the president and members of the Council, and the executive director of the Agency within 30 days of the proposed amendments coming into force. This is done without questioning their capabilities through legally established procedures. Among other things, this deprives them of the opportunity to challenge the termination of their mandates before the competent courts, risking a form of institutional memory—an essential element of the sustainability of this system that encompasses specific work processes and knowledge.

Due to the importance of the area regulated by the relevant law, the APC calls on the Parliament of Montenegro to consider specific legal solutions, such as the Law on Electronic Communications, which is important in the context of the criteria for closing Chapter 10 - Information society and media, as products of the relevant ministry, regulator, as well as relevant representatives of the executive and legislative branches of government and the professional public, so that the adopted legal solutions not only formally, but also essentially ensure functional and financial independence, which is imperative for the work of an independent regulator and the requirement of relevant international instances.

DIRECTOR

Jelena Perović, sgd.

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02018L1972-20181217>