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REGIONAL ANTI-CORRUPTION INITIATIVE

REGIONAL ACTIVITY: DEVELOPMENT OF NATIONAL METHODOLOGIES ON ANTI-CORRUPTION
ASSESSMENT OF LAWS

**Methodology for Corruption Proofing
in Montenegro**

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The views expressed in this document are solely those of the author and do not necessarily reflect the views of the Regional Anti-Corruption Initiative (RAI) or its member States, or of the Austrian Development Cooperation.

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Part 1: Checklist of regulatory corruption risks

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Part 2: Explanation of Regulatory Corruption Risks

Regulatory corruption **risks** are defined for the purpose of this methodology as follows:

“Regulatory corruption risks are existing or missing features in a law that can contribute to corruption, no matter whether the risk was intended or not”.

Corruption includes all forms as targeted by Article 2 of the Law on Prevention of Corruption: criminal acts (bribery), trading in influence, abuse of function, embezzlement, violating provisions concerning conflict of interest, favouritism and improper party financing.

As for the statutes, bylaws and all other different levels of legal instruments, this methodology will use the uniform expression “**laws**”, if not indicated otherwise. It refers comprehensively to the “system of rules which a particular country or community recognises as regulating the actions of its members and which it may enforce by the imposition of penalties”.¹

1 Risk Category I: Ambiguity

The word “ambiguous” means: capable of being understood in more senses than one.² Ambiguity in regulations comes either from bad language or from bad legal technique. In both cases, the reader of a law is left to wonder what the correct interpretation of the law is. Corrupt readers of the law will easily jump on this opportunity and exploit it to their advantage.

All guidance on the use of clear language and uniform legal technique when **drafting manuals** or laws on normative acts has but one aim and that is to avoid ambiguity. In other words, to make what the law means as clear as possible to the reader.

1.1 Language

Roughly, there are two different types of ambiguous language: **word** choice and **sentence** construction.³ The construction of different languages in particular entails different risks

¹ <<http://www.oxforddictionaries.com/definition/english/law?q=law>>.

² Sanford Schane, “Ambiguity and Misunderstanding in the Law”, 26 Thomas Jefferson Law Review, 2002 167 <<http://idiom.ucsd.edu/~schane/law/ambiguity.pdf>>.

³ For reasons of didactical simplicity, fine print of linguistic science is left out in this context; for further detail see, for example, Stefan Höfler and Alexandra Bünzli, “Controlling the Language of Statutes and Regulations for Semantic Processing, Presentation”, <<https://files.ifi.uzh.ch/hoefler/hoeflerbuenzli2010splet.pdf>>; Stefan Höfler, “Legislative Drafting Guidelines: How Different are they from Controlled Language Rules for Technical Writing?”, in Tobias Kuhn, Norbert E. Fuchs, “Controlled Natural Language”, Third International Workshop 2012, Berlin/Heidelberg, pages 138-151 <<http://dx.doi.org/10.5167/uzh-63553>>.

in the detail. Slavic (Croatian, Serbian, etc.), Indo-European (Albanian) or Romanic (Romanian) languages have different rules and freedoms on the use of articles, adverbs, word order, plurals and participles. However, the following general rules of good legal writing apply for all languages:⁴

- use short sentences (one thought one sentence);
- key points at the beginning;
- only one main clause and no more than one subordinate clause (if possible);
- main ideas in the main clause;
- prefer verbs and avoid nouns;
- avoid attribute chains, especially extensive participles, use relative clauses instead;
- avoid passive voice and use active voice;
- say it shorter (erase filler words - use short words).

There are countless schemes for making language unclear; however, in terms of corruption risks, the common main principles outlined below apply. See in this regard also Part II of the “Legal and Technical Rules for Legal Drafting”.

1.1.1 Words

General and legal expressions can have more than one meaning. Therefore, for each word must represent either a commonly shared understanding or a clear legal definition.

Example: Jurisdiction will be determined by the place of the citizens’ residence.

Problem: What does residence mean concretely – actual or registered place of living?

*Solution: Jurisdiction will be determined by the place where the citizen is **actually living** at that time.*

*Jurisdiction will be determined by the place of residence of the citizen, which means the **registered** legal domicile.*

*Jurisdiction will be determined by the place of residence of the citizen. Residence is defined under **Statute X**.*

One should not use words that are not widely in use or understood or that have not found general acceptance in the language:

- archaic words;

⁴ “German Guide to the Form of Legal Acts”, third edition, 2008 <http://hdr.bmj.de/page_b.1.html#an_62> (German; an English translation is currently in preparation by the German Federal Ministry of Justice).

- neologisms (newly coined words, such as “to Photoshop”);
- foreign words and phrases;
- abbreviations.

Where it proves difficult to adopt this advice, one should consider defining the word. One word should have only **one meaning** in a law. See also No. 2.7 of the “Legal and Technical Rules for Legal Drafting”.

The use of **singular and plural** can also be a source of ambiguity.

Example: The Minister shall establish procedures for the types of appeal specified in this article.

Problem: Must the Minister establish a different procedure for each type of appeal or one single procedure for all, or can the Minister choose between both options?

*Solution: The Minister shall establish **a** procedure for **each** type of appeal specified in this article.*

1.1.2 Phrases

The main forms of ambiguity related to the construction of a sentence (syntax) are the described below.

It is unclear as to which part of a sentence a word is **attached** (attachment ambiguity).

Example: The applicant submits the application with a confirmation by the director.

Problem: “Submits upon confirmation by the director” or “application accompanied by a confirmation by the director”?

*Solution: **Upon** confirmation by the director, the applicant submits the application.*

A phrase or word refers to something **previously mentioned**, but there is more than one possibility (anaphoric ambiguity).

Example: The agency representative and the applicant agree on the modalities of the procedure; subsequently, he/she confirms the agreement in writing.

Problem: Who is “he/she”?

Solution: The agency representative and the applicant agree on the modalities of the procedure; subsequently, the agency representative confirms the agreement in writing.

Due to the free **word order**, it can be unclear which noun phrase is the subject and which is the direct object of a sentence (functional ambiguity).

Example: Special procedures apply for business applicants in writing.

Problem: Procedures or applicants in writing?

*Solution: Special procedures **in writing** apply for business applicants.*

The relation can be unclear in possessive phrases such as “the inspection of the agency” (relational ambiguity).

Example: The inspection of the agency opens the procedure.

Problem: “Inspection of the agency” or “inspection by the agency”?

*Solution: The inspection **by** the agency opens the procedure.*

The use of **past** or future **tense** can give cause to ambiguity. Normally a law should use the present tense.

Example: Every captain will have to submit the following documents to the director before entering a port.

Problem: Will this obligation be only in the future?

Solution: Every captain submits the following documents to the director before entering a port.

Adverbs clarify the **discourse structure** of a sentence. The distinction between “and” and “or” is particularly relevant with lists of conditions (“**and/or**” ambiguity).

Example: The application is admissible if

- *the applicant is at least 14 years old,*
- *the parents give their consent, or*
- *another legal guardian gives his/her consent.*

Problem: If the applicant is 14 years old, is consent by parents or a legal guardian additionally necessary?

Solutions: The application is admissible if

- *the applicant is at least 14 years old, **or***
- *the parents give their consent, or*
- *another legal guardian gives his/her consent.*

The application is admissible if

- *the applicant is at least 14 years old, **and***

- *the parents or another legal guardian give their consent.*

One needs to pay attention to other similar adverbs: “insofar”, “whereas”, “unless”, “such as” and “in particular”. Under **legal doctrine**, these adverbs usually mark the relation between abstract rules and concrete examples, between extending and limiting statements or between enumerative statements.

A law should not connect phrases with “and/or” or “respectively” as these are ambiguous. The law should make it explicitly clear if it does not matter whether conditions are met alternatively or cumulatively.

Example: The following incidents led to the closure of the business: lack of hygiene and/or lack of health certificate for the cook.

Problem: Are both incidents necessary to close the business?

*Solution: The following incidents, **alternatively or cumulatively**, led to the closure of the business: lack of hygiene and/or lack of health certificate for the cook.*

Wordiness is not only a question of bad style but can also be a cause of ambiguity.

Example: The regulations in Articles 10 and 12 apply accordingly.

Problem: What is the difference between the regulations in Articles 10 and 12 and the Articles themselves?

Solution: Articles 10 and 12 apply accordingly.

Similar to wordiness, **non-normative statements** are also sources of ambiguity as it will not be clear as to what extent they constitute rights and obligations (declarative statements such as descriptions, explanations, justifications, background information or pleas). Statements of purpose are also problematic, unless they occur in a special article at the beginning of the text or if they are necessary for the interpretation of a provision.

1.2 Legal Coherence

Legal coherence refers to the logical and orderly relationship of different provisions in the same law or of different laws with each other. Whenever the relationship is not clear, this ambiguity can constitute a corruption risk. It is the main task of the Secretariat of Legislation to review whether legislation complies with all formal requirements. However, all legal drafters also need to keep compliance with formal requirements in mind when drafting a law.

1.2.1 Conflicting Provisions

Two or more legal provisions can conflict with each other. Conflicts can appear within one and the same law (internal conflict) or between different laws (external conflict). External conflicts can occur in the hierarchy of norms on the same level or between different levels (decree versus statute, constitution or international law). Theoretically, the norm on the higher level supersedes lower level norms; however, a conflict can create ambiguity.

Example: Article 10 Decree on Asylum Procedures: "Once all statutory requirements for the political status of the refugee are fulfilled, the agency may grant asylum."

Article 15 Constitution: "Political refugees have a right to asylum."

Problem: Article 10 Decree reads as if the agency has discretion, contradicting the clear right in the Constitution.

*Solution: Article 10 Decree on Asylum Procedures: "Once all statutory requirements for the political status of the refugee are fulfilled, the agency **must** grant asylum."*

1.2.2 Inconsistent Terminology

Terminology must not only be consistent within one law (see Section 1.1.1 above) but also between different laws. One word should have only **one meaning** not only in one law but also in the entire legal framework of a country. If this is not possible, then the deviation needs clear indication.

Example: The applicant is liable for the submission of the following documents.

Problem: "Liable" is an expression used in tort and criminal law, indicating different legal consequences.

*Solution: The applicant is **obliged** to submit the following documents.*

Consistent use of terminology is also important for general words with a defined sense in **legal doctrine**, such as:

- "can", "shall", "must";
- "is presumed" versus "is considered";
- "always" versus "in principle".

1.2.3 Unclear References

Provisions referring to other provisions of the same or other laws must have a clear and sensible meaning. Examples of bad practice are: "in compliance with the legislation in force", "under the law", "in the prescribed manner", "according to the legal provisions",

“following the rules/procedure/term set by the Ministry/another authority”, “other exceptions/conditions/acts established by law”, etc.

Example: The agency renders the decision subject to timelines as prescribed by law.
Problem: It is unclear whether timelines are prescribed by this law or another (which) law?
Solution: The agency renders the decision subject to timelines as prescribed **in Article 10 of the Law on Administrative Procedures.**

1.2.4 Regulatory Gaps

Regulatory gaps are defined as follows: “The situation in which existing legal rules lack sufficient grounds for providing a conclusive answer in a legal case [...]. No available correct answer guides the decision.”⁵

A gap can occur if there are conflicting rules (for this alternative see 1.2.1 above) or because the law is open-textured.

Example: Article 10 – “Invalidity of local elections” – Election Law: Elections are invalid if any of the following conditions is met: ...
Problem: There is no provision to regulate the exercising of local governance after local elections have been quashed.
Solutions: Elections are invalid if any of the following conditions is met: ...
The previously elected local government continues until elections are repeated.

See also No. 1.4 of the “Legal and Technical Rules for Legal Drafting”.

2 Risk Category II: Prevention Gaps

A prevention gap is the lack of a mechanism in a regulation that would **incentivise** against or **deter** the occurrence of corruption.

Example: Article 2 Conflicts of Interest Law: In case of a violation of conflict of interest provisions in Articles 1-9, the disciplinary commission can administer the following sanction: written warning.
Problem: The lack of any other sanction than a written warning will probably not **deter** unfaithful public officials from violating rules.
Solution: Article 2 Conflict of Interest Law: In case of a violation of conflicts of interest provisions in Articles 1-9, the disciplinary commission **must administer one of**

⁵ The Blackwell Dictionary of Western Philosophy 2004, “Legal gap”
<http://www.blackwellreference.com/public/tocnode?id=g9781405106795_chunk_g978140510679513_ss1-19>

*the following sanctions: written warning, **reduction of salary, demotion or dismissal.***

Example: Article 1 para. 2 Conflict of Interest Law: A public official has to abstain from any conflict of interest situation as described in para. 1.

*Problem: The law depicts conflict of interest situations as a taboo, not as something the public official and his/her superiors have to deal with in a reasonable and transparent way. Thus, the law even lacks an **incentive** for a public official to report conflict of interest situations.*

*Solution: Article 1 para. 2 Conflicts of Interest Law: A public official has to **report** any conflict of interest situation as described in para. 1 to **his/her superior**. **The following rules apply for managing the conflict of interest: [...]***

Of course, **ambiguity** can make any weak prevention mechanism even weaker. Therefore, ambiguous language or legal technique on the one hand and prevention gaps on the other often interrelate.

Example: Article 2 Conflict of Interest Law: In case of a violation of conflict of interest provisions in Articles 1-9, the disciplinary commission can administer the sanctions as prescribed by law: written warning.

Problem: If, for example, the code on disciplinary offences foresees further sanctions the above law would be ambiguous – is a written warning the only sanction, or are there other “sanctions as prescribed” by the code on disciplinary offences?

*Solution: Article 2 Conflict of Interest Law: In case of a violation of conflict of interest provisions in Articles 1-9, the disciplinary commission can administer the sanctions as foreseen in **Article 12 of the Code on Disciplinary Offences (Law No. 456)**.*

Yet ambiguity and prevention gaps are both **distinct** corruption risks: Even the clearest law without any ambiguity can still lack mechanisms for preventing corruption.

Example: Article 2 Conflict of Interest Law: In case of a violation of conflict of interest provisions in Articles 1-9, the disciplinary commission can administer the following sanction: written warning.

*Problem: The law is not ambiguous at all; still, the lack of any sanction other than a written warning will probably not **deter** unfaithful public officials from violating rules.*

2.1 Competencies

Unidentified competency

This prevention gap often occurs when the drafters of a law want to show action, but without really meaning it: a full set of regulations is put in place yet there is no authority for implementing the law. This prevention gap often coincides with ambiguous legal language or technique, only vaguely hinting at the body in charge for implementing the law.

Example: Article 10: This law is implemented by the competent ministry/agency.

Problem: Is there another rule clearly determining which ministry is competent? Would all users of the law know about this rule?

*Solution: Article 10: This law is implemented by the competent ministry/agency, **as defined in Annex 1 of the Law No. 401 On Government.***
*Article 10: This law is implemented by the **agency for environmental protection.** [more concrete and thus a better solution]*

Unidentified scope

Competency requires definition in such a way that it comprises all aspects of a law.

Example: Article 10 Code of Disciplinary Offences: The agency for the civil service is responsible for investigating all disciplinary offences.

Problem: Who is responsible for administering sanctions?

*Solution: Article 10 Code of Disciplinary Offences: The agency for the civil service is responsible for investigating all disciplinary offences **and administering sanctions.***

Delayed identification

The legislator might delegate the identification to an executive body; however, the danger of this approach is that the identification of the competent body for implementation might never take place.

Example: Article 8 Energy Law: The Ministry of Energy will determine the competent body by decree.

Problem: Why can the legislator not define the competent body itself? Until when would the Ministry come up with a decision? What are the criteria for this decision?

*Solution: Article 8 Energy Law: **The Environmental Agency is the competent body for implementing this law.***

Delayed setting-up

The competent body for implementation might not exist at the time of adoption of the draft law. This entails the risk that delays in the implementation of the law might prompt the legislator to delegate the identification to an executive body. The danger of this approach is that the identification of the competent body for implementation might never take place.

Example: Article 8 Energy Law: The Environmental Agency is the competent body for implementing this law.

Problem: In case the Agency does not exist yet and for more time to come, which body is in charge intermittently?

Solution: Article 8 Energy Law: The Environmental Agency is the competent body for implementing this law; until it is set up, the Ministry of Energy is the intermittent competent body.

See in this regard No. 2.24-2.25 of the “Legal and Technical Rules for Legal Drafting”.

Competency of further regulation

Often laws delegate the power to regulate further details of a procedure or of the criteria for a decision to an executive body. The executive body might either intentionally exploit this power to facilitate corruption opportunities or inadvertently draft faulty bylaws.

Example: Article 13 Procurement Law: The Procurement Agency regulates further details of the tender procedure.

Problem: The law does not provide any guidance as to what those details are. The legislator itself should define key parameters.

*Solution: Article 13 Procurement Law: The Procurement Agency **defines templates for submitting tenders.***

There is obviously a need for delegating law making to executive bodies. Key points of legislation, in terms of corruption risks, are often embodied in such bylaws, such as timelines for procedures, fees or formal requirements for applications. Therefore, corruption proofing needs to extent to bylaws. See also No. 1.2 of the “Legal and Technical Rules for Legal Drafting”.

Overlapping competencies

There might be more than one body competent for the implementation of the same task. This can lead to a lack of implementation or to abuse of citizens through repeated

(overlapping) administrative inspections. Such a regulatory fault is a case of ambiguity (see Section 1.2.1 above).

Split competencies

Sometimes, several bodies are each competent for a different aspect of a law. Such split competencies can entail the risk of a lack of implementation, as each body might point to the other when it comes to delicate situations.

For example, GRECO noted in one of its evaluations: “The multiplicity of bodies has adverse effects in so far as it prevents a single body from assuming effective responsibility for the process. As a result, each body depends on the others and awaits their reports or findings. The outcome is that none of the bodies seems to have a comprehensive global picture [...]”⁶

Conflict of interest

A conflict of interest involves a conflict between the public duty and private interests of a public official, wherein the official’s private capacity interest could improperly influence the performance of his/her official duties and responsibilities.⁷ Usually, conflict of interest is subject to special legislation. However, even with such legislation in force, conflicts of interests are a standard challenge for any public law.

Example: Article 12 Procurement Law: Bidders with a criminal record and family members of public officials working at the procuring entity are excluded from bidding.

Problem: Family members are only a fraction of those persons with whom a conflict of interest could arise. One could think of the public officials themselves, their close friends or their business partners.

*Solution: Article 12 Procurement Law: Bidders with a criminal record and those **with conflict of interest, as defined in Article 12 of the Public Service Law**, are excluded from bidding.*

2.2 Powers and Resources

It is important that a public body have all powers and resources necessary for carrying out its tasks.

Example: Article 5 Law on State-owned Companies: The Ministry of Economics has the following powers for exercising oversight on state-owned companies: 1) reviewing annual reports, 2) attending board meetings and 3) requesting the

⁶ Third Evaluation Round, Evaluation Report on Moldova, “Transparency of Party Funding” (Theme II), GRECO Eval III Rep (2010) 8E, Strasbourg, 1 April 2011, at No. 73 <http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/ReportsRound3_en.asp>.

⁷ OECD, “Managing Conflict of Interest in the Public Service – A Toolkit”, 2005, page 13 <www.oecd.org/gov/ethics/49107986.pdf>.

convening of extraordinary board meetings.

Problem: The Ministry has no right to request any other information than what is contained in the annual reports.

*Solution: Article 5 Law on State-owned Companies: The Ministry of Economics has the following powers for exercising oversight over state owned companies: 1) the right to review annual reports, 2) attend board meetings, 3) request the convening of extraordinary board meetings, 4) **request any information on the company from the board of directors**, 5) **conduct special audits of the company and 6) nominate or dismiss members of the board.***

2.3 Procedures

Certain procedures apply to any decision under public law. Whenever a public authority can exercise too much discretion, corruption risks occur.

Undefined steps

The steps of any procedure must be clear.

Example: Article 5 Law on Construction: The agency issues a decision on the building permit once it is has processed the application.

Problem: What does “processed” entail? Can the agency ask for further documentation? Does the agency consult with other state bodies? Etc.

*Solution: Article 5 Law on Construction: The agency issues a decision on the building permit once it is has processed the application, **including one or all of the following steps: [...]***

Undefined timelines

There need to be clear timelines, otherwise public officials can delay procedures and citizens are incentivised to pay speed payments.

Example: Article 5 Law on Construction: The agency issues a decision on the building permit once it is has processed the application.

Problem: Is there a maximum time for the process?

*Solution: Article 5 Law on Construction: The agency issues a decision on the building permit once it is has processed the application **within the maximum time of three months.***

Undefined fees

There needs to be a clear set of fees.

Example: Article 5 Law on Passports: The agency issues the passport for a fee between €10 and €100 depending inter alia on the urgency of the issuance.

Problem: It is unclear what fee corresponds to which case.

Solution: Article 5 Law on Passports: The agency issues the passport for a fee of €10 in regular cases, €50 in case of issuance within 3 days and €100 for issuance within 24 hours.

Repetition of inspections

The threat of abusively repeated inspections is a common tool to extort bribes from citizens. Conversely, citizen might also want to bribe their way out of an inspection. Thus, there needs to be a clear set of criteria on how often, whom and how thoroughly to inspect a business or person.

Example: Article 14 Tax Code: The tax administration can carry out regular inspections.

Problem: Is there a maximum number for the inspections per period? How are the targets of these inspections selected?

*Solution: Article 14 Tax Code: The tax administration can carry out regular inspections. **A regular inspection can occur only once every three years. The inspected tax subjects are selected as follows: [...]***

Multi-stop procedures

Citizens often have to interact with several agencies and this renders procedures not only cumbersome but multiplies corruption risks.

Example: Article 9 Law on Business Registries: The applicant needs to submit documentation by the following authorities: civil registry, tax authorities, criminal conduct registry, and bankruptcy registry.

Problem: For each procedure, there is a corruption risk.

*Solution: Article 9 Law on Business Registries: **The business registry will obtain all documentation from the following authorities: civil registry, tax authorities, criminal conduct registry, and bankruptcy registry.***

Competition for limited state resources

When the state distributes resources it often meets a higher demand than it can offer. This concerns the procurement of services, job vacancies or subsidies. In such cases, it is important to have transparent procedures with objective criteria for distribution. The

sources outlined below provide information on preventing corruption in competitive procedures.

2.4 Decisions

Public law obliges or entitles private or public entities; therefore, the criteria for these obligations and rights need to be clearly formulated in order to limit discretion.

Example: Article 12 Construction Law: A building not compliant with this law can be demolished.

Problem: Does any violation of the law, even a small formality, entail this risk?

*Solution: Article 12 Construction Law: A building can be deconstructed **if not compliant with the following provisions of this law: [...]***

2.5 Oversight

Any public body requires oversight or supervision by a body of higher authority, if only by the general public. Any public law thus needs to ensure that there is sufficient executive, parliamentary or civil society oversight. Judicial oversight is an additional preventive mechanism (see 2.7 below).

Transparency and civil society oversight

Oversight by civil society is often subject to special laws, in particular laws on public consultation and laws on freedom of information.

Example: Article 12 Telecommunications Law: The Regulatory Agency is an independent body of law.

Problem: What does “independent” mean? Is there no oversight by a public entity? What is the relation to the public?

*Solution: Article 12 Telecommunications Law: The Regulatory Agency is a body of law independent from other executive bodies, **but reports to Parliament as follows: [...]** The Regulatory Agency also reports bi-annually to the public including the following information: [...]. All its decisions are subject to disclosure under the Freedom of Information Act. Its Oversight Council includes representatives from civil society as defined by Article 8 of the Law on Public Consultation.*

Separation of tasks

If all decision-making power is concentrated in one place then there are no horizontal checks or balances amongst public officials.

Example: Article 12 Procurement Law: The planning, award and accounting of a public

contract should be implemented by the same public official.

Problem: The rule makes it relatively easy for a public official to manipulate the tender to favour a certain party and to hide any procurement fraud.

*Solution: Article 12 Procurement Law: When public contracts are awarded, the planning and description of requirements shall **be kept separate** in organisational terms from both the implementation of the award process and from the subsequent accounting.*

Rotation

An effective means to deal with the danger of corruption is staff rotation. This personnel management tool should be used extensively in areas especially vulnerable to corruption. Doing so requires that staff are willing to take on different functions at regular intervals – as a rule, the period of assignment should not exceed a few years – even if this usually results in more work (time needed to familiarise oneself with new tasks).

Example: Article 19 Procurement Law: The planning, award and accounting of a public contract should be implemented by a dedicated procurement unit in each state body.

Problem: The rule lacks any provision on job rotation, thus allowing potentially corruptive relationships to evolve.

Solution: Article 19 Procurement Law: The planning, award and accounting of a public contract should be implemented by a dedicated procurement unit in each state body. The staff in this unit should rotate to a new function outside the unit at least every five years.

2.6 Sanctions

Sanctions can be a problem in different directions:

- undefined or **excessive** sanctions can help public officials to extort bribes from citizens;
- weak or missing sanctions (for **citizens**) can facilitate corruption by citizens;
- weak or missing sanctions (for **public officials**) can facilitate corruption by public officials.

Example: Article 12 Trade Law: Maintaining a business in violation of registry requirements is punishable by a fee of up to 5 annual turnovers of the business.

Problem: What does “violation of registry requirements” mean – any formal violation? Which “annual turnovers” are meant – current ones, past ones or projected ones? 5 annual turnovers as a fee would normally kill any business.

*Solution: Article 12 Trade Law: Maintaining a business in violation of registry requirements in Article 8 para. 1 is punishable by a fee of up to **0.5 annual turnover of the year in which the offence occurred, determined by the following factors: [...]***

Good legal drafting guidelines normally contain detailed instructions on how to draft provisions on sanctions.⁸ See in this regard No. 2.13-2.16 of the “Legal and Technical Rules for Legal Drafting”.

2.7 Judicial Review

Judicial appeal by a citizen in court against any state action) is important as a safeguard against arbitrariness of the executive power. A comprehensive scope of judicial review and clear modalities are important.

Example: Article 12 Construction Law: Refusal to issue a building permit is subject to full legal review.

Problem: What if the agency issues a building permit that is insufficient? What if the agency fails to take any action? What if the agency issues other decisions, such as one for the demolition of an “illegal” building? What does “legal review” mean and, in particular, which court is competent?

*Solution: Article 12 Construction Law: A violation **of any right under this law is subject to legal appeal through the administrative courts.***

*Article 12 Construction Law: All decisions under **Articles 4-9 are subject to legal appeal through the administrative courts.***

2.8 Sector Specific Safeguards

The above list of prevention gaps shows some of the main categories yet it is not an exhaustive list. Each sector works with different rules and practices. For example, for a teacher and a doctor some corruption risks are similar and some different. Similarly, public financial management and public procurement each require a multitude of specific safeguards to be corruption proof. There are sources of information for each sector. See the following references for more detail and examples:

- Regional Anti-corruption Initiative, “Corruption Risk Assessment in Public Institutions” (2014);⁹
- UNODC, “UN Anti-corruption Toolkit” (third edition) (2004);¹⁰

⁸ See, for example, the two page “Annex 2” to the “German Guide to the Form of Legal Acts”, third edition, 2008 <http://hdr.bmj.de/anhang_2.htm> (German; an English translation is currently in preparation by the German Federal Ministry of Justice).

⁹ <<http://www.rai-see.org/publications.html>> (planned publication).

- UNODC, “Technical Guide to the UNCAC” (2009) (English and Russian);¹¹
- OSCE, “Best Practices in Combating Corruption” (2004) (English and Russian);¹²
- Transparency International, “Confronting Corruption: The Elements of a National Integrity System”, TI Source Book (2000) (English);¹³
- UNODC/UNCAC, “Self-assessment Checklist” (in English and Russian);¹⁴
- OECD, “Managing Conflict of Interest in the Public Service: A Toolkit” (2005); “Specialised Anti-corruption Institutions. Review of Models” (2006) (in English and Russian); “Lobbyists, Government and Public Trust” (2009); “Asset Declarations for Public Officials: A Tool to Prevent Corruption” (2011) (in English and Russian); “Bribery Awareness Handbook for Tax Examiners” (2009) etc;¹⁵
- USAID, “Corruption Assessment Handbook” (2006) Annex 3, page 94 - “Diagnostic Guides: Checklists of Corruption Risks for Different Sectors” (customs, health, political parties, etc);¹⁶
- U4 Anti-Corruption Resource Centre ;¹⁷
- Council of Europe Technical Paper, “Corruption Risk Assessment Methodology Guide” by Quentin Reed and Mark Philp for the PACA Project (December 2010), page 16/Annex 1;¹⁸
- Council of Europe, “Project Against Corruption, Money Laundering and Financing of Terrorism in the Republic of Moldova” (MOLICO) - English translation of the draft “Methodology of Corruption Risk Assessment in Public Institutions”;¹⁹
- PROVIDUS/CBSS Working Group on Democratic Institutions, “Corruption Prevention in Public Administration in the Countries of the Baltic Sea Region” (2008).²⁰

¹⁰ <www.unodc.org/documents/corruption/publications_toolkit_sep04.pdf>.

¹¹ <www.unodc.org/unodc/en/treaties/CAC/technical-guide.html>.

¹² <www.osce.org/eea/13738>.

¹³ <www.transparency.org/publications/sourcebook> .

¹⁴ <www.unodc.org/unodc/en/treaties/CAC/self-assessment.html>.

¹⁵ <www.oecd.org/corruption/keyoecdanti-corruptiondocuments.htm>.

¹⁶ <http://transition.usaid.gov/our_work/democracy_and_governance/technical_areas/anticorruption_handbook/index.html>.

¹⁷ <www.u4.no/>.

¹⁸ <www.coe.int/paca>.

¹⁹

<www.coe.int/t/dghl/cooperation/economiccrime/moneylaundering/projects/molico/AC/Output1.6/912%20MOLICO%20Nat%20%20Legisl%20_methodology%20of%20corruption%20risk%20assessment.pdf>.

²⁰ <http://www.mfa.gov.lv/data/file/petijumi/corruption_prevention.pdf>.

Not all of the specific risks listed in the above sources are relevant from a regulatory perspective, but many are.

There are also many standards available for each specific sector, such as procurement,:

- Business Anti-Corruption Portal;
- Public Procurement Due Diligence Tool;²¹
- OECD, “Enhancing Integrity in Public Procurement: A Checklist” (2008);²²
- Chr. Michelsen Institute, “The Basics of Integrity in Procurement: A Guidebook” (Version 3, 23 February 2010);²³
- UN/Global Compact, “Fighting Corruption in the Supply Chain: A Guide for Customers and Suppliers” (June 2010);²⁴
- Transparency International, “Handbook for Curbing Corruption in Public Procurement” (February 2006).²⁵

However, it would go beyond the scope of this Methodology to list such sources for each field of public law; however, they are available for research through the various anti-corruption platforms on the web.

Addendum: Corrupted Legislation

Risk categories I (Ambiguity) and II (Prevention gaps) are all about the facilitation of **future** incidents of **corruption**. Yet there is a third category, which does not concern the facilitation of future corruption but still relates to corruption. An example:

An industrial group provides a campaign donation to the governing political party. In exchange, the government passes an exemption in the tax law that grants the industrial group a tax favour.

The tax favour itself in this case would not represent corruption, because it does not constitute bribery, embezzlement or abuse of office. Any future tax favours granted based on the law in question would formally in fact be **fully legal**, even if the earlier political financial donation had been given in exchange for the tax exemption. Therefore, the regulation would not “contribute to corruption” like any future bribery or embezzlement. On the contrary, the corruption would normally have already fully taken

²¹ <<http://www.business-anti-corruption.com/tools/due-diligence-tools/public-procurement-tool.aspx>>.

²² <<http://www.oecd.org/gov/ethics/enhancingintegrityinpublicprocurementchecklist.htm>>.

²³ <www.cmi.no/file/?971>.

²⁴ <www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/Fighting_Corruption_Supply_Chain.pdf>.

²⁵ <http://www.transparency.org/whatwedo/pub/handbook_for_curbing_corruption_in_public_procurement>.

place before the regulation came into force (bribery of legislators, political finance violation, etc). Hence, (other than risk categories I and II) this case of corrupted legislation would:

- not set risks for any **future** corruption incidents;
- only follow a corrupt act in the **past**.

In other words, such “corrupted laws” represent the damage done by corruption rather than the corruption itself. Exactly because of this damage, corruption proofing should not blind itself to such incidents but point out any such indications. **Indicators** for such corrupted legislation can be found in particular in the below stated areas.

- Illegal activities:
 - o violation of the **lobbying** rules by interest groups (Law on Lobbying);
 - o violations of **political finance** rules by anybody profiting from a law (Law on political finance);
 - o procedural violations during the legislative process, in particular on **transparency** (Law on legislative process);
 - o **ethics** violations by legislators, such as the provisions on conflict of interest (Law on prevention of corruption);
 - o incidents of **bribery** (Criminal Code).
- Legal activities can still point to hidden corruption in the legislative process:
 - o suspicious **privileges** in the law for certain interest groups;
 - o large (but legal) **financial political** donations by anybody profiting from a law;
 - o extraordinary (legal) **lobbying** activities by interest groups;
 - o lack of **transparency** of the legislative process (even if formally within legal limits), such as hiding certain financial aspects of the impact of a draft law;
 - o **ethical** challenges (despite compliance with the rules) where prominent legislators with stakes in companies profiting from a law abstain from voting, but the question of their de facto influence remains;
 - o obvious disadvantage to or waste of **public funds**, such as
 - the allocation of public property to private owners below market value or

- the over-financing of public institutions with a known record of embezzlement or illicit enrichment (as stated in reports by the court of auditors for example).

Any stakeholder involved in corruption proofing (anti-corruption agency, NGO, etc.) should always look out for any of the above indicators and should list any such indicators in its **assessment report**. This would certainly not compel any conclusion, but it might lead to further examination by law enforcement bodies or civil society and could in the case of draft laws alert members of parliament. A stakeholder involved in corruption proofing normally would neither have the mandate nor the power to investigate such indicators any further, unless it happens to have law enforcement competencies.

At the same time, one should keep in mind that not every privilege or preferential treatment of an interest group is necessarily a sign of a corrupted legislative process. All laws of this world are an expression of what certain interest groups want. The democratic process is built on the assumption that particular interests prevail in the end. Only if there are indications that the legislative process has been (formally) corrupted should the corruption proofing stakeholder point this out. Anything else would represent interference with **general politics**.

Part 3: Procedural guidelines

1. Legal basis

Corruption proofing is based on Article 78 and 79 of the “Law on Prevention of Corruption”.

2. Scope

Corruption proofing of legislation will in principle cover all laws, whether statutes or bylaws, whether drafts or enacted laws.

3. Entity in charge

There are three entities in charge of corruption proofing in Montenegro:

- The Agency – through independent monitoring of drafted and enacted laws;
- Relevant ministries – through minimizing corruption risks at the drafting stage;
- Parliament – through overseeing the finalisation of laws.

This Methodology is available online to the general public at large. Thus, any citizen may use it for reviewing draft laws and submitting proposals during public consultations. The Secretariat for Legislation will contribute to corruption proofing within its mandate as further defined in its “Legal and Technical Rules for Legal Drafting”.

4. Prioritising Laws

The Agency selects laws based on risks if any of the below criteria are met.

1. General criteria:
 - a. legal areas typically **prone** to corruption, including procurement and political finance for all countries, and other sectors (depending on the country) such as law enforcement, health and education;
 - b. laws that include corruption prone **mechanisms**, such as the awarding of financial advantage or of licences and permits, or the collection of fees and taxes, irrespective of whether the legal area is typically prone to corruption;
 - c. areas with high levels of **perceived** or **actual** corruption according to national and/or international surveys;
 - d. areas that national anti-corruption **action plans** prioritise for reform.
2. Individual incidents:
 - a. **media** or civil society reports about corruption problems facilitated by a law or occurring in a legal area;

- b. notification by **other authorities** on corruption problems facilitated by a law or occurring in a legal area;
- c. large financial political **donations** by an interest group related to the legal sector (such as energy companies donating money to governing parties prior to the adoption of the law);
- d. a draft law subject to heavy **lobbying** by interest groups;
- e. stakeholders responsible for a draft law have a **conflict of interest** related to the law;
- f. **law enforcement** bodies or media reports provide intelligence on a certain law manipulated by suspects.

The body in charge for the selection of laws should at least investigate through simple research in order to ascertain whether there actually were any individual incidents. It is sufficient if it reacts to the knowledge of such incidents.

Private law should be subject to corruption proofing only in selected cases, whenever there is a regulatory corruption risk (see **Error! Reference source not found.** below), in particular:

- **accounting** and auditing rules for companies (which could be abused to hide bribery payments);
- substantive or procedural rules on the transfer of **property** (that could be abused to raid someone else's assets).

The agency documents the prioritisation of laws up for review in an annual plan.

5. Timing

Corruption proofing can be done at any stage of the legislative process:

- drafting process by ministries or other state bodies;
- adoption of a law by a state body;
- adoption by government;
- parliamentary process;
- after adoption.

6. Sources

Sources of information for corruption proofing

- Legal information:
 - o law/draft law;
 - o explanatory note;
 - o other laws related to the law in question;
 - o jurisprudence on the subject matter;
 - o law review articles on the subject matter;
 - o certain areas of law, such as procurement, can use international standards and guidance or a comparison with foreign examples as a valid benchmark on whether a law is corruption proof.
- Functional analysis:
 - o reports on corruption by anti-corruption bodies;
 - o reports by the court of auditors on problematic loss of public funds;
 - o results from mechanisms for citizens' feedback (hotlines etc);
 - o media reports;
 - o internet research;
 - o surveys;
 - o interviews with experts;
 - o interviews with the stakeholders applying the law, as either a public official or private citizen.

The functional analysis aims mainly to identify answers to the following question: How can public officials and/or citizens in practice abuse the law and what can be done to prevent such abuses?

It is more or less the same exercise as performed for any corruption risk assessment (see above Part 2).

7. Assessment

The corruption proofing review contains the steps listed below.

- Step 1: **Research** and compilation of material (see the previous section).
- Step 2: Identification of regulatory corruption **risks** (ambiguity and prevention gaps - see above Part 2).
- Step 3: Formulation of **recommendations** on how to avoid or mitigate the corruption risks (see the following section).

Step 4: Drafting and dissemination of the **report** (see the sections to follow).

Step 5: Follow-up on **compliance** with the recommendations (see Section 110).

8. Report

The assessment report consists mainly of three parts.

Key data

Key data includes the law and its objectives. For this part, the assessment report may simply refer to other documents such as the explanatory note.

Analysis

Analysis of regulatory corruption **risks** is structured mainly by the two main categories: “ambiguity” and “prevention gaps” (see sections 0 to 2 below). The analysis should give a brief explanation wherever it is not obvious how the fault in the regulation could lead to corruption. In addition, should there be indications of “corrupted legislation” the report should also point this out (see section 0 below).

Recommendations

Recommendations should include **alternative formulations** of the law in order to illustrate how one can mitigate the corruption risk. This would also facilitate acceptance of the recommendations, as the criticism would be constructive. In other words, it is easy to criticise but not always so easy to come up with a better proposal. However, any proposal needs to be formulated only as an example – corruption proofing only provides suggestions, it does not replace the legislator’s powers.

Abstract recommendations such as “enhance the accountability of public officials” or “include provisions on a more concretely defined procedure” are insufficient. In principle, neither the alternative formulations nor any other part of the recommendation is **binding**. If this were the case then the corruption proofing body would supersede the prerogative of the law drafting or setting state body. It cannot be that one state entity reviewing a (draft) law alone dominates the entire legislative process (which would be a corruption risk itself). There can be exceptions for sub-statutory laws if under constitutional principles it is possible for one state entity to hold legal oversight over another entity (such as a ministry of local government has over laws set by local government).

One should always keep in mind that corruption risks do not stem from regulation alone but also from causes outside regulation. Conversely, one cannot and should not try to fight corruption through recommendations on regulation alone, but rather keep in mind other components that prevent corruption (e.g. fostering a culture of ethics, incentivising public officials to comply with regulations, raising public awareness, etc).

Timeline

There should be a standardised **timeline** for assessment reports, for draft laws in particular, so that the legislative process can continue. At the same time, there needs to be sufficient time for drafting an anti-corruption expertise. Such time limits need to reflect the resources and timelines of the legislative processes in individual countries. A maximum time of 15 days should be sufficient in general. In case there is a real need to pass **urgent legislation** within a matter of a few days, an example being cases of imminent financial crisis. In such cases, a thorough report can be elaborated and submitted after the adoption of an urgent law. If there are substantial shortcomings then parliament could consider modifying the adopted “fast” version of the law.

Structure

The reports usually follow the same structure as follows:

- I. **Headline/topic:** The headline indicates in one line maximum the general direction of the topic (e.g. “Law on health care: appointment of directors etc.”)
- II. **Procedure** (shortly indicating the legal basis of the opinion and what triggered it – request or ex officio selection based on risk priority or similar)
- III. **Sources of the opinion** (laws, policies, reports, and others)
- IV. **Rationale** (this chapter is subdivided into subchapters, one for each risk or complex of risks)
- V. **Conclusion** (a short summary of the main corruption risks)
- VI. **Recommendations** (they are numbered for ease of distinction and reference)

9. Dissemination

The assessment reports are made available online through the agency’s website, so any interested stakeholder can access it.

10. Compliance

As recommendations from corruption proofing reports are not binding, mechanisms for achieving compliance are important.

Responsible entity

The reports will indicate who is responsible for implementing the recommendations. This should be parliament in the case of legislation and the law setting body in the case of bylaws or other regulations (ministries, municipalities). Obviously, any entity handling a draft before it reaches parliament or the law setting body can and should try to take the recommendations into account.

Duty to consider

The law setting body has a duty to consider the recommendations. In case it does not want to comply with the recommendations, it should indicate so explicitly and provide a brief explanation why.

Compliance feedback

In all cases, the responsible entity should provide feedback to the Agency on the level of compliance with each recommendation. The assessment report will have a standardised feedback sheet attached to it to facilitate compliance feedback by the law setting body.

The Agency will set a timeline for the law setting body to provide feedback. For **draft** laws, feedback should be given shortly after adoption of the law at the latest. Naturally, for **enacted** laws the timeline will be more generous but still fixed in order to ensure that the enacted law is actually being reviewed.

Compliance review

The Agency will review, whether it concurs with the self-assessment of the law setting body.

11. Online Publicity

The Agency makes the following documents available online:

- **Methodology:** Publicity on the methodology allows everybody from the public or private sphere to understand what corruption proofing concerns and to apply it.
- **Selection** of laws: Annual working plans of the Agency indicate laws in case it is already known that they will be subject to corruption proofing.

- **Assessment** reports: These allow the public at large to know what the recommendations comprise and this publicity can put a certain amount of pressure on the law setting body to comply with the recommendations.
- Compliance **feedback**: The Agency will publish the feedback that the law setting body provided on complying with the recommendations.

In addition, the Agency will include an **annual summary** of corruption proofing activities in its annual report including **statistical information** on the quantitative performance and – possibly – on the damage prevented by corruption proofing.

12. Civil society

The Agency will consult with civil society stakeholders and experts whenever beneficial to the corruption proofing process. It will in particular consider submissions by civil society stakeholders on regulatory corruption risks. It may give credit to civil society efforts by mentioning particular efforts in the corruption proofing reports or by publishing submissions of civil society stakeholders.