Montenegro
Agency for Prevention of Corruption

Number: Date:

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 DRAFT LAW ON AMENDMENTS TO THE LAW ON PREVENTION OF CORRUPTION

Since the prevention and suppression of corruption is one of the key policies for the development of the areas on which every democratic state is based, and the Law on Prevention of Corruption is the umbrella law in this area, the aforementioned entails the obligation of the legislator to, in the process of preparing amendments to the law in question, ensure that the entire process of drafting of the said act is characterized by full transparency and inclusiveness, in such a way as to ensure the participation of representatives of relevant institutions and experts who will legally formulate the deficiencies detected in the seven-year long period of implementation of the aforementioned regulation in such a way that the final result will be an improved legal framework that will give the Agency even more significant space for the implementation of its competences, eliminate perceived deficiencies and comply with international standards in the field of corruption prevention, primarily with Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (Directive on the protection of whistleblowers) and GRECO recommendations from the Fifth Round Evaluation Report on Montenegro, which deals with preventing corruption and promoting integrity in central governments (*top executive functions*) and law enforcement agencies *(which was adopted by the Government of Montenegro on October 25, 2022*).

In this regard, the Agency ex officio reviewed the provisions of the Draft Law on Amendments to the Law on Prevention of Corruption, which was submitted by the Anti-Corruption Committee.

Special attention, and shortcomings and deficiencies are recognized in the provisions related to:

- expanding the definition of public officials
- definition of "related person"
- definition of gift
- the definition of lifestyle monitoring and the initiation of proceedings ex officio in relation to the lifestyle of a public official
- expanding the provisions regulating the conflict of interest in the exercise of public function

- prohibition of contracting severance pay in case of termination of public office
- way of reporting changes in the assets of a public official
- obligation to submit reports for members of permanent and temporary working bodies
- access to bank and other financial institution accounts of public officials
- issuing a warning if the Agency establishes minor deviations of the reported assets and income from the actual situation
- introducing a second-instance institute to the work of the Agency, i.e., predicting the actions of the Council following an appeal against decisions of the Agency
- predicting the competence of the Parliament, or the competent committee to initiate the dismissal of individual members or all members individually of the Council of the Agency in cases of negative statements on all types of reports that need to be submitted
- predicting the termination of the term of the members of the Council and the Director of the Agency without first questioning their abilities in procedures established by law and
- Lack of assessment of the fiscal impact of regulations.

Recommendations for improving the aforementioned provisions are given both in the analysis itself, which is an integral part of the Opinion, and in the concluding assessments in chapter IV of the Opinion.

RATIONALE

I PROCEDURE

The Law on Prevention of Corruption ("Official Gazette of Montenegro", no. 53/14 and 42/17) regulates the responsibilities of the Agency for Prevention of Corruption (hereinafter referred to as the Agency) to, in accordance with Article 78 paragraph 1 of the Law:
- "…take the initiative to amend the laws, other regulations and general acts, in order to eliminate the possible risk of corruption or to bring them in line with international standards in the field of anti-corruption;
- 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; …"

Also, Article 79 of the same Law establishes that the Agency may, at its own initiative or at the request of an authority, company, legal person, entrepreneur or natural person, give an opinion for the purpose of improving the prevention of corruption, reducing the risk of corruption and strengthening of ethics and integrity in authorities and other legal persons, which includes an analysis of the risk of corruption, measures to eliminate the risk of corruption and corruption prevention.

Bearing in mind that the Agency for Prevention of Corruption of Montenegro, in accordance with the implementation of legal competences, prescribed by the provisions of 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 and flexibility in the interpretation and application of regulations through analysis, as part of its regular

activities, it monitors legislative activities in fields that carry a special risk in terms of preventing corruption.

As on April 21, 2023, the Anti-corruption Committee of the Parliament of Montenegro sent an invitation to the director of the Agency for Prevention of Corruption to attend the session on April 26, 2023 at which the Draft Law on Amendments to the Law on Prevention of Corruption will be considered, simultaneously submitting the Draft Law on Amendments to the Law on Prevention of Corruption as working material, the Agency recognized the need to ex officio review its provisions from the point of view of transparency and the existence of criteria in terms of preventing corruption risks in the norm, and to contribute to the improvement of the text of the Draft Law with recommendations.

II GENERAL COMMENTS REGARDING THE DRAFT LAW ON PREVENTION OF CORRUPTION

Since the prevention and suppression of corruption is one of the key policies for the development of the areas on which every democratic state is based, and the Law on Prevention of Corruption is the umbrella law in this area, which prescribes measures to prevent conflicts of public and private interests, regulates restrictions on the exercise of public functions, submission of reports on income and assets of public officials, acting on reports and protection of persons who report threats to public interest that indicate the existence of corruption, defines initiatives for amending laws, other regulations and general acts, in order to eliminate possible risks of corruption or bringing them in line with international standards in the field of anti-corruption, follows the adoption and implementation of integrity plans, as well as other issues of importance for the prevention of corruption, any change in the normative regulation of this area requires a studious, systematic and multidisciplinary approach.

The aforementioned entails the obligation of the legislator to, in the process of preparing amendments to the law in question, ensure that the entire process of drafting of the said act is characterized by full transparency, and to ensure the participation of representatives of relevant institutions and experts who will legally formulate the deficiencies detected in the seven-year long period of implementation of the aforementioned regulation in such a way that the final result will be an improved legal framework that will give the Agency even more significant space for the implementation of its competences, eliminate perceived deficiencies and comply with international standards in the field of corruption prevention, primarily with Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (Directive on the protection of whistleblowers) and GRECO recommendations from the Fifth Round Evaluation Report on Montenegro, which deals with preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies (which was adopted by the Government of Montenegro on October 25, 2022).

In this part of the Opinion, the Agency reminds of the Opinion on the Conclusion on the formation of a working group for the preparation of the Draft Law on Amendments to the

Law on Prevention of Corruption number: 00-32-4/22-104/9 dated January 24, 2023, which the Agency adopted on February 17, 2023[1].

Taking into account the principles of transparency and the existence of criteria, when it comes to the method of formation of this Working Group, in the Opinion in question, the Agency stated that the arbitrary selection of the members of the Working Group by applying the broad discretionary powers of the President of the Parliament of Montenegro and some of the MPs, members of the Parliamentary Anti-Corruption Committee, with a lack of transparency, and without predetermined conditions and criteria, casts a shadow on the way of formation and the work itself, i.e., the results of the Working Group.

In addition, non-transparent and unclear procedures in the formation and way of working of this working group leave room for various types of abuses and thus create a suitable ground for various types of corruption risks.

As concluded in the Opinion itself, the aforementioned leaves the impression of a non-transparent, "ad hoc" approach, which is not an adequate way to amend the Law on Prevention of Corruption, which, as an umbrella law, prescribes measures to prevent conflicts of public and private interest, regulates restrictions on the exercise of public functions, submission of reports on income and assets of public officials, acting on reports and protection of persons who report threats to public interest that indicate the existence of corruption, defines initiatives for amending laws, other regulations and general acts in order to eliminate possible risks of corruption or bringing them in line with international standards in the field of anti-corruption, follows the adoption and implementation of integrity plans, as well as other issues of importance for the prevention of corruption.

Furthermore, on that occasion, and repeatedly commenting on the process of amending this law, the Agency's leadership stated that the process of amending the law in question must be a multidisciplinary process, which will critically and analytically review the relevant available documents, as well as the shortcomings observed in its application, so that the solutions resulting from that process would be fundamental and systemic, and the application of future solutions would further strengthen the Agency in the implementation of anti-corruption mechanisms, with the aim of creating a society that is as intolerant as possible to all forms of corruption.

Also, the legislative chamber was repeatedly asked to take into account the importance and scope of the aforementioned law in the field of prevention and suppression of corruption, as well as the fact that in the previous period the Agency particularly recognized the importance of amending the existing Law on Prevention of Corruption, through the elimination of the shortcomings of the existing legal framework, recognized through seven years of practice. On that occasion, it was stated that, in order to approach this normative activity in a systematic and responsible manner, numerous activities were carried out on the national and international level with the aim of preparing a detailed analysis necessary for entering the process of changing the legal framework in question.

[1] https://www.antikorupcija.me/media/documents/Mi%C5%A1ljenje_na_Zaklju%C4%8Dak_Skupstine_o_formiranju_RG_za_izradu_Nacrta_zakona.pdf

Thus, the legislative and institutional framework in the field of corruption prevention, the Agency's capacities, its performance, work methods and achieved results, especially in the basic areas of its mandate, were the subject of analysis by a fundamental Peer Review mission organized by the European Commission, which was held on the topic of the functioning of the Agency in April 2021. On that occasion, through the Report (*of Expert Mission to Assess the Functioning of the Agency for Prevention of Corruption*), a number of specific recommendations were given with the aim of improving this area, which will ultimately contribute to the Agency enjoying stability regardless of the political majority in the Parliament and that the appointment procedures and terminations are carried out only in strict compliance with legal provisions. During the mission, the work in all the competences of the Agency was analyzed in depth and Montenegro's progress so far in the field of corruption prevention was comprehensively assessed, and most of the experts' recommendations related to the need for further improvement of the legal texts of the Law on Prevention of Corruption and the Law on Financing of Political Entities and Election Campaigns, as well as strengthening personnel capacities in terms of increasing the number of employees for certain areas of the Agency's work.

In addition, during 2022, the Agency for Prevention of Corruption, in cooperation with the Council of Europe, and as part of the II phase of the Horizontal Facility for the Western Balkans and Turkey (Action against Economic Crime in Montenegro), began a comprehensive analysis of the Law on Prevention of Corruption, which is carried out in three phases.

The first phase of this project, which relates to the functional independence of the Agency, was completed by creating the Technical Document - Analysis of the Parts of the Law on Prevention of Corruption that regulates the establishment and operation of the Agency for Prevention of Corruption. The second phase resulted in the creation of the Technical Document - Analysis of the Parts of the Law on Prevention of Corruption that regulates conflict of interest, limitations on the exercise of public functions (an incompatibility of functions), income and assets statements, gifts, donations, and sponsorships. In the third phase, started as part of the III phase of the Horizontal Facility for the Western Balkans and Turkey (*Action against Economic Crime in Montenegro*), which is currently being implemented, the parts of the law related to whistleblowers, integrity, administrative and misdemeanor procedures were analyzed with special reference to the definition of guidelines for the development of a special Whistleblower Protection Law in accordance with EU Directive (on the protection of persons who report breaches of Union law) 2019/1937 (Directive on the protection of whistleblowers).

Additionally, the Law on Prevention of Corruption was the subject of analysis in the V Round Evaluation Report of GRECO[2] on Montenegro for 2022 on the topic of Preventing corruption and promoting integrity in central governments (*top executive functions*) and law enforcement agencies. GRECO represents the most significant mechanism for assessing the application of anti-corruption standards of the Council of Europe, and the recommendations from their Report relate to the assessment of the effectiveness of anti-corruption mechanisms concerning the Government of Montenegro and the Police

[2] The Group of States against Corruption (GRECO) monitors the compliance of its member states with the anti-corruption instruments of the Council of Europe

Administration in preventing conflicts of interest, limitations on the exercise of public functions, income and asset control, development of the whistleblower institute, integrity policies, transparency, ethical principles, as well as educational activities. In addition to a series of specific recommendations, the report recognizes the improved performance of the Agency for Prevention of Corruption with the recommendation that, "in order to ensure its full operational independence, the administrative capacity, independence and effectiveness of the Agency for Prevention of Corruption (APC) be further strengthened by providing independent merit-based recruitment procedures that provide for integrity testing of new staff, and to ensure that the number of permanent employees in APC be increased to a level that is in accordance with its rules and the expected scope of work" and the need for the comprehensive and joint approach of all relevant institutions and social actors and their proactivity, in order to more effectively prevent corruption.

In addition, the Medium-Term Work Program of the Government of Montenegro envisages the establishment of the Law on Amendments to the Law on Prevention of Corruption in the second quarter of 2024, and the National Action Plan for the Implementation of the Initiative of Partnership for Open Administration in Montenegro 2023-2024 additionally elaborates all relevant elements and the deadline for the implementation itself.[3]

Bearing in mind the above, it is clear that the Agency has recognized the importance of implementing legislative amendments in this area, but is of the opinion that the process of amending the law in question must be a multidisciplinary process, which will critically and analytically review the relevant available documents, as well as the shortcomings observed in its a seven-year long practical application so that the solutions resulting from that process would be fundamental and systemic, and so that the application of future solutions would further strengthen the Agency in the implementation of anti-corruption mechanisms, eliminate perceived shortcomings, while harmonizing with international standards in the field of corruption prevention, all with the aim of creating a society that is as intolerant as possible to all forms of corruption.

III CORRUPTION RISK ASSESSMENT AND ANALYSIS OF THE DRAFT LAW ON AMENDMENTS TO THE LAW ON PREVENTION OF CORRUPTION

When it comes to the Draft Law on Amendments to the Law on Prevention of Corruption, Article 1 foresees an amendment to the existing Article 3 in terms of expanding the definition of public officials through two new paragraphs.

In this regard, the definition of a public official was expanded to include notaries, public executors, bankruptcy trustees and members of commissions that carry out procedures for: public procurement, privatization, public-private partnerships and awarding concessions in procedures whose estimated value is greater than 100,000 euros.

[3] Microsoft Word - NAP Final.docx (opengovpartnership.org)

When it comes to the proposed amendment, the definition of “public official” given in Article 2 paragraph 1 of the United Nations Convention against Corruption (hereinafter: UNCAC) [4] must be taken into account, which reads:
“Public official” shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;

In addition, the recommendations of the Peer Review mission organized by the European Commission, which was held on the topic of the functioning of the Agency in April 2021, should be taken into account and they state: “it is important for Montenegro to review the definition of “public official” and enable the creation of special regime in relation to the specific position that they occupy. [5] The new definition should be clear and predictable for all those who would be affected by it, in order to be able to harmonize it. The Agency should carefully issue guidelines on this topic and avoid contradictions in its opinions" (page 16 of the Expert Mission Report).

Also, when it comes to the recommendation related to the definition of a public official, which resulted from the Second Phase of the project, which is implemented in partnership with the Council of Europe, and which resulted in the preparation of the Technical Document of Analysis of the parts of the Law on Prevention of Corruption that regulate conflicts of interest, limitations on the exercise of public functions (*an incompatibility of functions*), reports on income and assets, gifts, donations, and sponsorships, it reads: “The definition of a public official who is bound by the rules of managing conflict of interest is broad enough, however, it should be clearer and more specific because the existing definitions allow different interpretations. LPC should be changed either:

a) by a simpler definition...
b) or by specifying each function...”

From the above, it is obvious that Article 1 of the Draft Law only expanded the circle of persons that the Law should classify as public officials, but there was no essential specification of other persons that are already covered by the existing definition of “public official” from Article 3 of the Law. In this part, it is necessary to specify the relevant definition and possibly foresee the categories of public officials, who then, according to the Law, have partially different obligations, which would enable the Agency to focus its work on those persons whose positions carry a greater risk of corruption and are involved

[4] Law on Ratification of the United Nations Convention against Corruption “Official Gazette of Serbia and Montenegro - International Agreements”, no.11/2005
[5] For example, the Slovenian Law on Integrity and Prevention of Corruption differentiates between public officials as experts and politicians

in decision-making processes that can have consequences for the public interest at different levels. In addition, the legal solution in question should also be followed by the obligation to adopt guidelines, that is, registers of public officials, which would contribute to better and more efficient work of the Agency in this area, and remove all ambiguities observed in the application of regulations.

In addition, when it comes to the circle of persons who are considered public officials in accordance with Article 1 paragraph 2 of the Draft Law, it is necessary to take care that the data on the said persons, i.e., the decisions on the formation and composition of the commissions, are submitted to the Agency in a timely manner, with prescribed misdemeanor provisions for situations when the competent authority fails to notify the Agency about these persons, with a threatened penalty that would call for the authorities' special attention to this obligation.

When it comes to Article 2 of the Draft Law, the term “related person” has been specified and additionally elaborated. However, in the part that refers to the “donor” as a related person, it is too broad because it includes not only donors who give a public official a gift, right, thing or service worth more than 1,000 euros, but also those persons who provide the same “service” to a member of his family. In this way, and due to the extent of the proposed definition, a potentially large circle of persons is included, which can lead to a reduced focus on those relationships that the relevant Law regulates, and the focus should be on the public official and the definition of his “private interest” through which all other relevant relationships related to the public official will be recognized.

It is also important to establish authoritative criteria that the Agency would use in its work, so that it could conscientiously and objectively assess the value of gifts, rights, things or services that are greater than 1,000 euros, and on the basis of which it could implement this legal norm or envisage the possibility of engaging relevant evaluators who would conduct credible assessments. The financial aspect of this norm should also be taken into account, as the engagement of this type of evaluator would incur additional costs in the application of the relevant Law.

When it comes to the definition of a gift, which is expanded in Article 2 of the Draft Law, the Agency welcomes the proposed change, bearing in mind recommendation xi from the Fifth Round Evaluation Report of GRECO[6] for Montenegro for 2022, which states that the rules on gifts and other benefits should be more specific, especially by clarifying the definition of “protocol and appropriate gifts”. It was also stated that through Article 8 of the Draft Law, the prohibition of accepting gifts from Article 16 of the Law on Prevention of Corruption was further elaborated, as well as that it was proposed to adopt “guidelines with examples of good practice and international standards regarding what types of hospitality are considered normal and acceptable, and which public officials are obliged to comply with".

In Article 6 of the Law, in the Definition of terms section, a new item related to “lifestyle monitoring” was added, and it is defined as the competence of the Agency, which provides

[6] The Group of States against Corruption (GRECO) monitors the compliance of its member states with the anti-corruption instruments of the Council of Europe

the basis for further elaboration of this competence of the Agency. This part is specially commented on in the continuation of the opinion, in relation to the relevant provisions in which it is elaborated.

When it comes to the conflict of interest in the exercise of public function (Article 7 paragraph 2), which is expanded in Article 3 of the Draft Law in such a way as to determine not only the existence of a private interest of a public official, but also of persons related to him, and it implies too broad circle of persons that is difficult to apply in practice, especially considering the nature of the existing provision, which focuses on the public official and private interests that affect or may affect his impartiality in exercising public office.

In Article 4 of the Draft Law, in relation to the provisions related to the performance of other public affairs, a new paragraph is added, although it was stated that two new paragraphs were added, so a "technical" correction is needed in that part.

When it comes to Article 7 of the Draft Law, it envisages the addition of a new Article 15a of the Law, which reads:
"Contracting severance pay in the event of termination of the public office of the president and member of the management body of a state-owned company shall not be allowed." (*For the protection of public interest, the retroactive effect of this norm should be prescribed*).

The Agency is of the opinion that the mentioned norm should not be in the Law on Prevention of Corruption, but that this topic certainly deserves great attention from the legislator and an adequate, systemic normative solution. Specifically, bearing in mind the fact that the Law on Public Enterprises in Montenegro ceased to be valid in 2010, and that several important issues in this area are regulated by secondary legislations, primarily by the statutes of public enterprises, which are often subject to dynamic changes, and relieved of the "strict" controls to which changes in legal texts are subject, all of the above was enough of an alarm for the Agency to analyze the legal arrangement of the area of work of state-owned public enterprises, i.e., those enterprises which, in terms of the Law on Prevention of Corruption, have state or municipal participation in the company in the amount of at least 33%.

The aforementioned preliminary analysis, which sublimated the results of the work of several sections, and which refers to giving opinions on individual requests in order to determine a possible conflict of interest, acting on whistleblower reports to determine the existence of a threat to the public interest that indicates the existence of corruption, led to the drafting of an initiative to the president of the Government of Montenegro for the unification of the legal framework that regulates the most important issues of management, supervision, real and potential conflicts of interest and transparency of the work of the management bodies of public enterprises, on July 19, 2022. [7]

On this occasion, the Agency had in mind the OECD guidelines on fighting corruption and strengthening integrity in state-owned enterprises, as a universal standard for promoting

[7] https://www.antikorupcija.me/media/documents/inicijativa_3.pdf

integrity and fighting corruption in these enterprises, as well as the results of the three-year project of Southeastern Europe - Together against corruption (SEE-TAC) implemented by the Regional Anti-Corruption Initiative (RAI), in partnership with the United Nations Office on Drugs and Crime (UNODC) [8], which is implemented with the aim of creating sectoral corruption risk assessments in legislation with checklists in the areas of higher education and public companies.

In this document, the following issues are identified as particularly urgent:

- professionalization of the management of public companies, through the provision of clear criteria and guidelines for the selection of members of the management boards and directors of these companies;
- provision of clear control mechanisms of management's work and their collective and individual responsibility for work and work results;
- increasing the transparency of the work of public companies;
- the introduction of criteria that establishes the upper limits for the monthly remuneration for the management of public companies, as well as the amount of their severance pay and
- regulating issues of potential and actual conflicts of interest in decision-making processes.

When it comes to Article 10 of the Draft Law, it changed paragraph 5 from the existing Article 23 of the Law on Prevention of Corruption in terms of the time period when a public official whose office has ceased is required to submit a statement upon the termination of office, but the norm has not been fundamentally changed, so its deficiency, which the Agency detected during the seven-year implementation of this norm, remains. Specifically, when a public function of an official is terminated, he is no longer a public official, so according to Article 103, paragraph 1, he is not recognized by the misdemeanor provisions, which state that a public official will be punished for a misdemeanor if he does not report accurate and complete income data to the Agency. Due to the above, if there is no misdemeanor provision accompanying the provision of the Law, its efficiency and effectiveness in application is lacking.

It is also stated that the public official is obliged to report changes within 30 days from the occurrence of the change, that is, from the day of concluding a legally valid contract before the competent authority, notary or court. The aforementioned provision cannot be relevant in the work of the Agency, taking into account, for example, that a person in accordance with Article 24 of the Law reports data on the right of ownership of immovable property in the Statement to the Agency, and the ownership is acquired on the day of registration in the cadaster, and not on the day of conclusion of a legally valid contract...

Furthermore, in Article 10 of the Draft Law, it is foreseen to add a new paragraph which reads:
“The obligation to submit a statement does not apply to a member of permanent and temporary working bodies formed by the authority, who does not make decisions or does not participate in decision-making.”

[8] The project covers the region of Southeast Europe, that is, Albania, Bosnia and Herzegovina, Montenegro, Kosovo*, Moldova, North Macedonia and Serbia.

The aforementioned norm cannot be introduced into the law in this way, bearing in mind that public officials are defined in Article 3 of the Law, and it is not possible to grade the obligation to submit statements within a single category of persons in this way, but if, according to the Agency's suggestions, there is a classification of public officials, and they are classified into certain categories according to the influences and decision-making processes in which they are involved by function, then it would be possible to predict that some of those categories do not have the obligation to submit reports on income and assets in the manner prescribed by law.

When it comes to Article 11 of the Draft Law, it proposes to amend Article 24 paragraph 2 to read as follows:
“In order to check the data from the Statement, the Agency has access to the data on the accounts of banking and other financial institutions of public officials, as well as persons related to them, in accordance with the Law on Credit Institutions, Article 204, paragraph 3, item 18.”

In the obligation of safeguarding the banking secrecy from Article 204, paragraph 3, item 18, it is said that, notwithstanding paragraph 1 of this article, this data can be made available to other persons in accordance with the law. When it comes to this legal solution, the Agency is of the opinion that, based on it, it will not have the authority to access this category of data in the way that the Draft Law assumes, and that the possibility of such disposal of data should be foreseen in the way that is done in Article 204, paragraph 3 item 1 of the Law on Credit Institutions for the Central Bank and the competent court, where these bodies are given access to all data and information that represent banking secrecy.

In this way, the Agency believes that it would have a legal basis to check data from the Statement even without the consent of a public official to access data on the accounts of banking and other financial institutions.

Additionally, in relation to this issue, the experts of the Council of Europe gave the recommendation through the implementation of the third phase of the project, the implementation of which is ongoing, where it is stated in the draft recommendation that it is necessary to “investigate legal possibilities to provide the Agency with access to complete data of banks and other financial institution to verify data on income and assets of public officials without the condition of consent.

In this way, Montenegro should consider two possibilities:

- that the LPC defines the exclusive right of the Agency to request and receive data from banks and other financial institutions, with the amendment of paragraph 2 of Article 35 as follows: “The authorized official shall ex officio obtain all data and information about the facts that are necessary for conducting the procedure and decision-making, official records of which are kept by competent state bodies, state administration bodies and municipalities, or public enterprises, companies, institutions or other legal and natural persons regardless of the provisions of other acts and regardless of the form and their personal, confidential or secret level.

  At the same time, paragraph 2 of Article 24 should be deleted.

- or b) to amend the law regulating the work of credit institutions in such a way that the Agency is defined as one of the bodies in Article 85 that can obtain data on banks.

When it comes to Article 15 of the Draft Law, which relates to the amendment of the existing Article 30 of the Law on Prevention of Corruption, which provides for the possibility of issuing a warning if the Agency determines minor deviations in the reported assets and income from the actual state, where a minor deviation in terms of assets is considered a deviation that does not mislead in terms of the value of assets and does not create obstacles to control, and a minor deviation in terms of income is considered a difference in the amount up to 100 euros, the Agency welcomes the provision of this possibility as useful in its work. It should be noted here whether it is a total difference of 100 euros or whether individual deviations in the part of the income can amount to up to 100 euros.

Additionally, in order to introduce the above as one of the actions of the Agency within the process of verifying data from reports, it is necessary to develop mechanisms and procedures that will contain determining elements that competent officials will follow when assessing the value of assets and criteria that will be used when assessing "minor deviations". Furthermore, as the Agency cannot issue warnings under the Law on Misdemeanors, the aforementioned amendment needs to be reformulated and give the Agency the possibility, before initiating any proceedings, either misdemeanor or administrative, to invite the party to correct the reported irregularities within a set deadline, after which the Agency could initiate proceedings if the irregularities are not corrected.

It is also necessary to keep in mind that the Agency cannot assess the value of movable and immovable property (*artwork, weapons, securities, etc*.) but the only difference it can observe within its proceedings is related to income as a monetary value entered in the report of the public official.

Regarding Article 16, it proposes the introduction of a new paragraph that relates to the Agency's ability to initiate proceedings ex officio if it becomes aware of or receives information that the lifestyle of a public official, their married and common-law spouse, and children is significantly more lavish than their reported income and assets, or if the consumer habits, place of residence, and property of the public official, their married and common-law spouse, and children are indicatively higher than the income and assets reported by the Agency.

Although "monitoring lifestyle" is defined in the Draft Law in Article 2 by adding item 7, and further elaborated in Article 16 of the Draft Law, it does not provide enough elements for the competent officials of the Agency to act in specific cases.

In order for the Agency to carry out the aforementioned procedure ex officio (and for it to result in justified findings), the procedure itself must be elaborated in the law in a way that contains enough provisions to which the act provided for in Article 20 of the Draft Law could be appended. This act prescribes a new competence of the Agency in Article

78, paragraph 1, where it is stated that the Agency monitors the lifestyle of the public official, their married and common-law spouse, and children, and prescribes a closer method of controlling their assets, spending habits, and place of residence in relation to their income.

Furthermore, it is important to consider the provisions of Article 30, paragraph 1 of the Law on Prevention of Corruption, which states that the Agency verifies the data from the reports by comparing them with the information collected about the assets and income of public officials from authorities and legal entities that possess such data. Additionally, paragraph 3 of the same article states that if the Agency determines, in the verification process, that the assets and income of the public official and their related persons are higher than their real income, the public official is obliged to provide detailed information about the basis of acquiring the assets and income upon request by the Agency within 30 days. This clearly defines the scope of work of the Agency, the way of collecting data, and their comparison with public databases and registers kept by competent authorities.

In order to implement the newly proposed competence regarding the monitoring of the lifestyle of public officials, their spouses and children, the Agency would need to have special authorizations to establish facts and conduct financial investigations (which is the exclusive competence of the prosecutor's office) that could lead to well-founded findings and results. Unfortunately, this proposed competence is contrary to positive regulations, and its introduction and implementation would require not only additional provisions in the law but also harmonization with several relevant regulations.

According to Article 18 of the Draft Law, the Agency's work is made two-tiered, i.e., the Council is given the authority to act on appeals against the decisions of the Agency. In relation to this novelty, Article 21 of the Draft Law provides that the Council has a professional service.

Given the complexity of the Agency's responsibilities, as well as the complexity of the procedures it conducts and decisions it makes, the Council must have a professional service in order to consider appeals against the Agency's decisions. In the Draft law, Article 21 must specify the minimum qualifications of the persons who will handle such appeals, as well as the method of decision-making in respect of appeals. The establishment of the service itself, a detailed elaboration of the working methods, as well as specific qualifications of employees and other details in the service's work, would be envisaged by a by-law. Given the scope of the Agency's responsibilities and the intensity and number of decisions it makes this service would need to have a sufficiently large number of highly qualified officials who would handle appeals in accordance with the deadlines prescribed by the law governing administrative proceedings (Article 27 of the Draft law). It should be noted here that the above procedure will further complicate the proceedings in terms of the duration of the administrative proceeding, as well as increase the costs of the proceeding, as opposed to the existing solution where the court itself is competent, qualified and professional to be the instance that gives a ruling in administrative disputes regarding the Agency's acts.

Regarding Article 29 of the Draft Law, it amends the existing Article 98 of the Law on Prevention of Corruption by establishing the obligation of the Council to submit not only

annual, periodic, and special reports on its work, but also annual audit reports on its financial operations to the Parliament of Montenegro and the relevant parliamentary Anti-Corruption Committee for consideration and evaluation. It also provides for the obligation of the Council and the Director of the Agency to participate in the work of the session at the invitation of the Parliament, the relevant Anti-Corruption Committee, the Inquiry Committee, as well as parliamentary committees responsible for justice and security. Additionally, item 4 of this article provides that the Parliament or the relevant Committee has the possibility to initiate the procedure for dismissal of individual members or all members individually of the Council of the Agency, as well as to send other recommendations, opinions, and conclusions to the Agency.

When it comes to the mechanism of control by MPs over the work of the Agency, it must be taken into account that MPs, as public officials, are often parties to proceedings conducted by the Agency, that there is a fine line between control mechanisms and mechanisms of pressure on the work of an independent body with these competencies. The observations of the GRECO Evaluation Team should be taken into account, as they state in the above-mentioned report that "they learned from the interlocutors they met on the spot that the current active role of the APC sometimes faces resistance from the executive authorities. Obviously, it is essential that all public bodies, including the executive, proactively cooperate with the APC and recognize its central role in preventing corruption and fully take into account its decisions and opinions. The new composition of the APC, with a more independent director, is a step in the right direction. This should be accompanied by measures to ensure professionalism and independence of all APC employees. Furthermore, the current situation of staff shortage needs to be addressed as a priority in order for this body to fulfill all its functions. GRECO recommends that in order to ensure its full operational independence, the administrative capacity of the APC should be further strengthened by providing independent recruitment procedures based on merit that allow for testing the integrity of new staff, and ensuring that the number of permanent APC staff is increased to a level that is in line with its rules and expected workload. “

Also, in the Technical Document of the Council of Europe "Analysis of the parts of the Law on Prevention of Corruption that regulate the establishment and operation of the Agency for Prevention of Corruption," it is stated that "the Agency is an independent and autonomous state body of Montenegro and should, according to domestic and international legal standards and provisions, be free from inappropriate (political) pressures and influences. The Technical Document identifies several risky areas of a legal and practical nature that need to be supplemented and amended in order to establish, guarantee, and maintain effective and independent work of the Agency."

Furthermore, it is important to note the request of the "Peer Review" mission organized by the European Commission, which was held in April 2021 on the functioning of the Agency, which states: "It is important that the Agency's bodies enjoy stability regardless of the political majority in the Parliament, and that recall procedures are carried out only with strict respect for legal provisions.".

Additionally, the Draft Law provides that after considering and evaluating the reports referred to in paragraphs 1 and 2 of this Article, which are the annual report on the work of the Agency, as well as the annual report on the audit of the Agency's financial

operations, and periodic or special reports on its work, within the deadline set by the Parliament or the relevant committee, if the Parliament or the relevant committee expresses a negative opinion on the reports referred to in paragraphs 1 and 2 of this Article three times during the Council's term of office, the Parliament or the relevant committee may initiate the removal of individual members or all members of the Council individually, as well as provide other recommendations, opinions, and conclusions.

The above is an example of obvious inappropriate pressure and political influence on the work of the Agency, bearing in mind that not only annual reports are the subject of the Parliament's assessment, but also all other periodic reports that can be used as a pressure mechanism, bearing in mind that the dynamics of these are not determined in advance.

The provision which states that periodic or special reports on the work of the Agency are subject to evaluation that may result in the initiation of the removal of individual members or all members of the Council individually represents a serious deficiency, which creates room for political pressure in which inappropriate influence of politicians on the Agency's work could be enabled through the procedures for considering and evaluating reports. This creates a serious threat to the independence, autonomy, and impartiality of the Council member and the Agency director, despite the recommendations of all relevant international organizations to minimize political influence in the relationship between "the authorities" and the Agency.

When it comes to the proposed amendment, it is important to keep in mind the way in which the body or bodies for the prevention of corruption are established in Article 6 of the United Nations Convention against Corruption (hereinafter: UNCAC)[9], which states:

„1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;

(b) Increasing and disseminating knowledge about the prevention of corruption.

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

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

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

Furthermore, when it comes to Article 32 of the Draft Law, it provides for the termination of the mandate of the members of the Council and the director of the Agency on the day of the entry into force of this Law. Considering Article 82 of the Law which establishes the term of office of Council members for a period of four years, Article 87 of the Law which provides for the method of dismissing a Council member, as well as the provisions of Article 91 of the Law which provide for the method of election, special conditions for election, and the length of the director's term of office, which is set at five years, and the provisions of Article 93 which regulate the procedure for dismissing the director of the Agency, it is unfair to deprive holders of public office of their functions through transitional and final provisions of the Draft Law without questioning their abilities in legally established procedures, thereby denying them the opportunity to challenge the termination of their mandate before the competent courts. What must be a legal solution, especially considering that the conditions for their election to these positions have not changed, is that these individuals perform their functions in accordance with the terms of office to which they were elected, except in cases where the specified term of office must end due to established responsibility.

Last but not least, the Draft Law's rationale states that it is not necessary to provide additional funds in the budget of Montenegro when assessing the financial resources for implementing the law. Regarding the analysis of the fiscal impact of this particular Draft Law, it should be kept in mind that the proposal in the Draft Law refers to the introduction of a two-tiered system in the Agency's work, which assumes the establishment of a Service that would contribute to the conditions for the implementation of the specified competence, for the needs of the Council. Given the scope of the Agency's competences and the intensity and number of decisions it makes, this would imply the engagement of a sufficient number of highly qualified officials who would act upon appeals in accordance with the deadlines prescribed by the law governing administrative proceedings (Article 27 of the Draft Law), as well as providing space for their work. Additionally, the Draft Law envisages determining the salaries of the President and members of the Council in accordance with the Law on wages of public sector employees.

In this regard, the mere establishment of the Council's Service from Article 21 of the Draft Law and the provision of salaries for the President and members of the Council from Article 28 of the Draft Law will surely create the need for additional financial resources. Therefore, the Agency appeals in this opinion, as well as in all previous ones, that the law-making procedure must include a fiscal impact analysis, which should be an integral part of the procedure for adopting this law. Additionally, the Agency recognizes the need to harmonize the relevant regulation with the legal-technical rules for drafting regulations in order to align it with the legal system of Montenegro.

IV FINAL ASSESSMENTS

When it comes to the Law on Prevention of Corruption, the Agency believes that the Parliament of Montenegro must consider the significance and scope of the mentioned law in the field of prevention and suppression of corruption, as well as the fact that the Agency has recognized the importance of amending the existing Law on Prevention of Corruption in the previous period, and that, in order to achieve a systematic and responsible approach, numerous activities have been implemented at the national and international level to prepare detailed analyses necessary for the process of amending the relevant legal framework.

Considering the content of the opinion, it is clear that the process of amending the relevant law must be a multidisciplinary process that critically and analytically examines relevant available documents, as well as the shortcomings observed in its seven-year practical application. This is necessary to ensure that the solutions resulting from this process are fundamental and systemic, and to further strengthen the Agency in implementing anti-corruption mechanisms in order to create a society that is as intolerant as possible to all forms of corruption, i.e. to eliminate identified shortcomings and harmonize the text of the law with international standards in the field of corruption prevention, primarily with the United Nations Convention against Corruption[10], Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (Whistleblower Directive) and GRECO recommendations from the Evaluation Report for Montenegro within the Fifth Evaluation Round on Preventing corruption and promoting integrity in central governments (top executive functions) and Law Enforcement Agencies (which the Government of Montenegro adopted on October 25, 2022)... In this regard, the Agency has, ex officio, examined the provisions of the Draft Law on Amendments to the Law on Prevention of Corruption, submitted by the Anti-Corruption Committee, and identified corruption risks and deficiencies in the norms themselves that make them impractical, taking into account the Agency's experience in the previous application of the Law on Prevention of Corruption.

Considering the expansion of the scope of the definition of public officials, it has been noted that only the circle of individuals that the Law should classify as public officials has been expanded, but essential clarification of other individuals already covered by the existing definition of "public official" in Article 3 of the Law is lacking. In this regard, it is necessary to specify the subject definition and possibly predict categories of public officials, using recommendations from international experts who have worked on this topic, thereby giving the Agency the space to focus its work on those individuals whose positions carry a higher risk of corruption and who are involved in decision-making processes that can have significant consequences for the public interest at different levels.

Furthermore, regarding Article 2 of the Draft Law, the meaning of the term "related person" has been clarified and further elaborated. However, the definition of "gift-giver"

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

as a related person is too broad, and due to the broadness of the proposed definition, it includes a potentially large circle of persons. This may lead to a decreased focus on those relationships that the Law aims to regulate, and the focus should be on the public official and defining their "private interest," through which all other relevant relationships related to the public official will be recognized.

The second novelty from Article 2, which relates to "lifestyle monitoring," as well as its further elaboration through Article 16 of the Draft Law, does not provide sufficient grounds for the actions of the competent officials of the Agency in a specific case.

In order for the aforementioned procedure to be conducted by the Agency ex officio, and for it to result in well-founded and relevant findings, the procedure itself must be elaborated in the law in a way that contains sufficient provisions to which the act envisaged in Article 20 of the Draft Law could be added, which prescribes a new competence of the Agency in Article 78 paragraph 1, which states that the Agency monitors the lifestyle of public officials, their spouses and unmarried partners, and children, and prescribes a more detailed way of controlling their assets, spending habits, and places of residence in relation to income. Furthermore, this procedure must be in accordance with Article 30 of the Law on Prevention of Corruption, which clearly defines the scope of the Agency's work, the method of obtaining data, and their comparison with public databases and registers maintained by competent authorities. In order to implement the newly proposed competence, which relates to monitoring the lifestyle of public officials, their spouses and unmarried partners, and children, the Agency would need special powers to establish facts and conduct financial investigations (which are the exclusive jurisdiction of the prosecutor's office) that could lead to well-founded findings and results. Unfortunately, this proposed competence is contrary to positive regulations, and its introduction and implementation would require further development in the law and alignment with several relevant regulations.

Furthermore, regarding the conflict of interest in the performance of public functions (Article 7 paragraph 2), which is expanded in Article 3 of the Draft Law to determine not only the existence of a private interest of a public official but also related persons, the Agency believes that this implies too broad a circle of persons that is difficult to apply in practice, especially given the nature of the existing provision that focuses on public officials and private interests that affect or may affect their impartiality in the performance of public functions.

Regarding Article 7 of the Draft Law, it provides for the addition of a new Article 15a which stipulates that it is not allowed to contract a severance payment for the termination of public functions of the president and members of the management board of a state-owned company, and the possible retroactive effect of this provision. The Agency is of the opinion that this provision does not belong in the Law on Prevention of Corruption, but that this issue certainly deserves the attention of the legislator and an adequate, systemic normative solution, which is why, among other things, it sent an initiative to the Prime Minister of Montenegro for the unification of the legal framework that regulates the most important issues of management, supervision, real and potential conflicts of interest, and transparency of the work of management bodies of public enterprises on July 19, 2022.

Among other particularly urgent issues, it recognizes the introduction of criteria that provide upper limits for monthly compensation for the work of management of public enterprises, as well as the amount of their severance payments.

Regarding Article 10 of the Draft Law, it changes paragraph 5 of the existing Article 23 of the Law on Prevention of Corruption with regard to the time period within which a public official whose function has ended is required to submit a report after the end of their function. However, the substance of the norm remains unchanged, so the Agency's detected deficiency in the seven years of the application of this norm remains, given that when a public official's function ends, they are no longer a public official and are therefore not recognized by the misdemeanor provisions under Article 103, paragraph 1, which states that a public official will be punished for a misdemeanor if they do not report accurate and complete income data to the Agency. Due to the above, if there is no misdemeanor provision accompanying the provision of the Law, its efficiency and effectiveness in application is lacking.

Also, it is stated that a public official is obligated to report changes within 30 days from the occurrence of the change, or from the day of the conclusion of a legally valid agreement before the competent authority, notary or court. The aforementioned provision cannot be relevant in the work of the Agency, considering for example that according to Article 24 of the Law, a person reports to the Agency information on the right of ownership of immovable property, which is acquired on the day of registration in the land register, and not on the day of conclusion of a legally valid agreement…

Furthermore, Article 10 of the Draft Law provides for the addition of a new paragraph which reads: "The obligation to submit a report does not apply to members of permanent and occasional working bodies established by the authority who do not make decisions or do not participate in decision-making." The Agency's opinion is that it is not possible to introduce this norm into the law in this way, considering that public officials are defined in Article 3 of the Law, and it is not possible to grade the obligation to submit a report within a single category of individuals in this way. However, if, in accordance with the Agency's suggestions, public officials were classified and categorized based on the influence and decision-making processes involved in their function, it would be possible to foresee that one of those categories does not have an obligation to submit a report on income and assets as provided by the law.

Regarding Article 11 of the Draft Law, which proposes an amendment to Article 24, paragraph 2, to read: "For the purpose of verifying data from the Report, the Agency has access to data on the accounts of public officials in banks and other financial institutions, as well as related parties, in accordance with the Law on Credit Institutions, Article 204, paragraph 3, item 18", the Agency's position is that it will not have the authority to access this category of data in the manner that the Draft Law assumes. Therefore, it should be envisaged the possibility of handling such data in the same way as in Article 204, paragraph 3, item 1 of the Law on Credit Institutions, which provides for the Central Bank and the competent court to have access to all data and information that constitute banking secrecy.

Regarding Article 15 of the Draft Law, which proposes an amendment to the existing Article 30 of the Law on Prevention of Corruption and envisages the possibility of issuing a warning if the Agency finds minor deviations between the declared assets and income and the actual state, where a minor deviation in terms of assets is considered a deviation that does not mislead in terms of the value of assets and does not create obstacles for control, and a minor deviation in terms of income is a difference of up to 100 euros, the Agency welcomes the introduction of this possibility as useful in its work. In addition, the Agency has provided several comments aimed at improving the provision in question, and it is important to note that, in accordance with the Law on Misdemeanors, the Agency cannot issue warnings. Therefore, the proposed amendment needs to be reformulated to give the Agency the opportunity to invite the party and set a deadline for rectifying any irregularities before initiating any proceedings, whether misdemeanor or administrative, after which the Agency could initiate proceedings if the irregularities are not corrected. It is also important to keep in mind that the Agency cannot assess the value of movable and immovable property (*artworks, weapons, securities, etc*.), but can only observe differences in income as a monetary value reported by the public official.

When it comes to the two-tier system defined in Article 18 of the Draft law, i.e. the Council's handling of appeals against decisions of the Agency and the establishment of a professional service for the Council, as provided for in Article 21 of the Draft law, the Agency believes that the complexity of the Agency's responsibilities and the complexity of the procedures it conducts and decisions it makes must be taken into account, given the level of qualifications that the staff of the service in question must have, as well as the level of qualifications of the Council members to carry out such complex responsibilities. It should also be noted that the proposed procedure will further complicate the process in terms of the length of the administrative procedure and will increase the costs of the procedure, in contrast to the existing solution in which the court itself is competent, qualified and expert to be the instance that adjudicates on the Agency's acts in administrative proceedings.

Regarding Article 29 of the Draft Law, it amends the existing Article 98 of the Law on Prevention of Corruption and provides that after considering and evaluating the reports from paragraphs 1 and 2 of this article, which are the annual report on the Agency's work, as well as the annual report on the audit of the Agency's financial operations, as well as periodic or special reports on their work, within the deadline determined by the Parliament or the competent committee, if the Parliament or the competent committee expresses a negative opinion on the reports from paragraphs 1 and 2 of this article three times during the term of the Council, the Parliament or the competent committee may initiate the dismissal of individual members or all members of the Council individually, as well as provide other recommendations, opinions, and conclusions.

Considering the thin line between control mechanisms and mechanisms of pressure on the work of an independent body with these responsibilities, the above represents an example of clear inappropriate pressure and political influence on the work of the Agency. This is because not only annual reports are subject to evaluation by the Parliament, but also all other periodic reports which can be used as a mechanism of pressure, given that their dynamics are not predetermined. This creates a serious threat to the independence, autonomy, and impartiality of the Council member and the Agency director, despite the

recommendations of all relevant international organizations to minimize political influence in the relationship between "the authorities" and the Agency.

Furthermore, when it comes to Article 32 of the Draft Law, it provides for the termination of the term of office of the members of the Council and the Director of the Agency on the day of entry into force of this law, without questioning their qualifications in accordance with the procedures established by law, thereby depriving them of the possibility to challenge the termination of their term of office before competent courts. What must be a legal solution, particularly given that the conditions for their appointment to the relevant positions have not changed, is that these individuals perform their function in accordance with the term of office to which they were appointed, except in cases where their term of office must end due to established responsibility.

Last but not least, in the rationale of the Draft Law regarding the assessment of financial resources for the implementation of the law, it is stated that it is not necessary to provide additional funds in the budget of Montenegro, although it is obvious that only the establishment of the Council Service from Article 21 of the Draft Law, and the provision of salaries for the President and members of the Council from Article 28 of the Draft Law, will surely generate the need for additional financial resources. Therefore, the Agency appeals in this opinion, as well as in all previous ones, that the procedure for adopting the law must include an analysis of the fiscal impact, which should be an integral part of the procedure for adopting this law.

Additionally, the Agency recognizes the need to harmonize the relevant regulation with legal-technical rules for drafting regulations in order to align it with the legal system of Montenegro.

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