



Montenegro
Agency for Prevention of Corruption

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Pursuant to Articles 78 and 79 of the Law on Prevention of Corruption (Official Gazette of Montenegro, Nos. 53/14 and 42/17) and Article 10 of the Statute of the Agency for the Prevention of Corruption, acting ex officio, the Agency for the Prevention of Corruption issues the following:

OPINION ON THE DRAFT LAW ON HIGHER EDUCATION

The Draft Law on Higher Education contains shortcomings, imprecise formulations and normative corruption risks, which primarily relate to the lack of criteria for proposing and appointing members of management and governing bodies within the higher education system, giving them wide discretionary powers, and leaving it to the competent Ministry i.e. the University to regulate important issues by its acts, although it is necessary that these issues be regulated by legal provisions.

These findings primarily relate to the establishment of the Council for Higher Education (Article 11 of the Draft Law), the establishment of the Agency for Control and Quality Assurance of Higher Education (Articles 12 to 19 of the Draft Law), the Board, as the governing body of the University (Article 57 of the Draft Law), then the procedure for electing the Rector of the University (Article 61 of the Draft Law), conditions for election to the title of Dean, i. e. Director, as well as other issues related to the powers of the Dean, i. e. Director, as well as duration and number of mandates (Article 64 of the Draft Law).

Although it is clear that not all questions that may be important in terms of prevention of corruption can be expected to be regulated by the Draft Law, the Agency for Prevention of Corruption calls on the relevant Ministry to regulate these issues adequately and sufficiently at the legal level, in synergy with preventive mechanisms to combat corruption in the Law itself, all with the aim of creating an adequate legal framework as a condition for meeting the objectives proclaimed in the relevant strategic documents in the field of higher education. Due to the role of higher education in laying the foundations of a strong society and building the integrity of future academic citizens, the Draft Law must contain clear, transparent and predetermined objective criteria, in order to be a premise

for developing an effective and quality higher education system that will promote social and economic development, and enable individuals the opportunity to acquire qualifications relevant to the needs of the labor market.

RATIONALE

I PROCEDURE

The Law on Prevention of Corruption regulates the competence of the Agency for the Prevention of Corruption (hereinafter the Agency) to, pursuant to Article 78 paragraph 1 of the Law on Prevention of Corruption:

- "... gives initiatives for the amendment of Laws, other regulations and general acts, in order to eliminate possible risks for the development of corruption or their harmonization with international standards in the field of anti-corruption;
- gives an opinion on Draft Laws and other regulations and general acts in order to harmonize with international standards in the field of anti-corruption; ... "

Also, Article 79 of the same Law stipulates that the Agency may, on its own initiative or at the request of an authority, company, legal entity, entrepreneur or natural person, give an opinion to for the purpose of improving the prevention of corruption , reduce 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.

In its Opinions, the Agency may refer to the provisions of the Constitution and relevant Laws, but not in terms of assessing constitutionality and legality, but in terms of applying and achieving the purpose of Article 79 of the Law on Prevention of Corruption. Also, in order to strengthen the mechanisms for the prevention of corruption, which are recognized by international conventions and documents, the Agency in its opinions seeks to point them out and act on recommendations to introduce and strengthen institutions for the prevention of corruption in Montenegrin legislation.

Article 6, paragraph 1, item 1 of the Law on Prevention of Corruption states that the public interest is the material and intangible interest for the good and prosperity of all citizens under equal conditions.

The Operational Document for Prevention of Corruption in Areas of Special Risk, as an Annex to the Action Plan for Chapter 23 - Justice and Fundamental Rights,

in addition to privatization, public procurement, urbanism, local government and health, recognizes education as one of the areas of special risk of corruption. Also, in the Report of the European Commission for Montenegro for 2021, the field of education is still recognized as an area that is susceptible to corruption.

In addition, the Agency for the Prevention of Corruption is involved in the project of the Regional Anti-Corruption Initiative (hereinafter: RAI) entitled "Southeast Europe - Together Against Corruption" (SEE-TAC), which covers the region of Southeast Europe, with a special focus on Albania, Bosnia and Herzegovina, Montenegro, Kosovo, Moldova, Northern Macedonia and Serbia. The overall goal of the project is to contribute to strengthening the resilience of Southeast European societies to corruption, strengthening the capacity of governments, NGOs, the private sector and the media to prevent and combat corruption. As part of this project, and after conducting research and organizing bilateral meetings of RAI representatives with representatives of all relevant institutions of the beneficiary countries in July this year, two sectors vulnerable to corruption were mapped: the higher education sector and the public enterprise sector, which, through further analysis and implementation of corruption risk assessment mechanisms in institutions and corruption risk assessment mechanisms in Laws, will be the subject of further corruption risk assessment.

As knowledge is one of the key resources of the state, and as the quality of education is directly related to it, all strategic documents, as well as the normative framework governing the field of education and higher education, are the premise for developing an effective and quality higher education system, promote social and economic development, and give individuals the opportunity to acquire qualifications relevant to the needs of the labor market.

As the Ministry of Education, Science, Culture and Sports put the Draft Law on Higher Education up for public discussion on December 3, 2021. Having in mind the importance of the mentioned area from the point of view of corruption prevention, and the Agency's involvement in the above-mentioned RAI project that directly deals with this area, the Agency recognized the interest to conduct ex officio proceedings under Articles 78 and 79 of the Law on Prevention of Corruption, and considers the provisions of the Draft Law on Higher Education.

II ANALYSIS OF THE DRAFT LAW ON HIGHER EDUCATION

Ensuring the quality of higher education is regulated by the Law on Higher Education ("Official Gazette of Montenegro", No. 44/14, 52/14, 47/15, 40/16, 42/17, 71/17, 55/18, 3/19, 17/19 - Second Law, 47/19, 72/19, 74/20 and 104/21), and it was the subject of consideration by the Ministry of Education, Science, Culture and Sports, which drafted the Law on Higher Education and put to a public hearing on December 3, 2021.

Article 3 of the Draft Law on Higher Education recognizes higher education as an activity of public interest. Article 5 of the Draft Law stipulates the obligation to adopt the Code of Ethics of Higher Education Institutions, which defines the basic and general principles of values based on ethical rights and obligations in higher education and protect the highest values of higher education through the implementation of appropriate norms governing academic relations within the academic community. What is recognized as a shortcoming in the part of the Draft Law defining the principles is the principle of academic integrity, which is regulated as a special area by a special Law, but which due to the importance of preserving academic integrity and dignity of the profession, should be defined in this Law. In addition to the above, the Agency believes that it is necessary to consider defining the principle of openness to the public and citizens, which should establish the highest degree of transparency in the work of the Higher Education Council, the Agency for Quality Control and Quality Assurance and higher education institutions.

As for the Council for Higher Education, it is regulated by Article 11 of the Draft Law. In relation to the current Law, which defines the competence, composition and appointment of Council members in Articles 11 and 12, the current Draft Law significantly deviates from precise legal formulations, which directly causes non-transparency, inconsistency and arbitrariness in decision-making and opens the possibility of abuse, and potential risks from endangering the public interest.

Namely, Article 11 of the Draft Law states:

"Competence of the Council for Higher Education - Article 11

In order to consider and improve issues in the field of higher education, the Council for Higher Education (hereinafter: the Council) is established as an advisory body to the Minister responsible for education.

The members of the Council referred to in paragraph 1 of this Article shall be appointed from among prominent experts in the field of higher education, science, art, students and the field of economy, non-governmental sector and other relevant fields.

The Council acts on the appeals of institutions against the decision on the outcome of the external evaluation. The act on the formation of the Council regulates in more detail the composition, number, jobs, compensation for work in the Council, as well as other issues of importance."

The article in question of the Draft Law is "incomplete" for several reasons. First of all, in this way the existing status of the Council is collapsing, which according to the current regulation is appointed and dismissed by the Parliament of Montenegro, at the proposal of the Government and it is envisaged that this body will be an advisory body to the Ministry of Education. In addition to the above, the Council is empowered to, as an advisory body of the Ministry, decide on appeals of institutions against the decision on the outcome of external evaluation, which is the responsibility of the Agency for Quality Control and Quality Assurance, established by the Government, which opens space for various types of abuse, pressure and trade in influence, bearing in mind that the body formed by the Minister should decide in relation to the decisions of the body formed by the Government.

In addition, it is planned to delete paragraph 2 from Article 11 of the Law, which explains the competencies of the Council, as well as Article 12 of the Law, which determines the composition of the Council, number of Council members, duration of their mandate and manner of work, while the Draft Law proposes that these questions be regulated by the Education Act.

In this regard, the Agency is of the opinion that due to the importance of the Council for Higher Education, the existing solution should be retained, according to which the members of the Council are appointed and dismissed by the Assembly on the proposal of the Government, in order to avoid concentrating the power of one body to all authorities that monitor and regulate this area. In addition, the Agency considers that it is necessary to clearly envisage the criteria for electing members of the Council, the manner of their appointment, conditions for dismissal, duration of mandate, number of mandates, and clearly elaborate the competencies of this authority in the Law, and that other questions may be the subject of an act on the formation of the Council.

With regard to the Agency for Quality Control and Assurance in Higher Education, the competencies, manner of establishment, bodies, competencies of Directors and supervision of the work of the Agency are regulated by Articles 12 to 19 of the Draft Law. There are several imprecise formulations in the mentioned articles that leave room for the implementation of wide discretionary powers, which represents a significant corruption risk. First of all, it is necessary to envisage in Article 14 the conditions for the election of the President and the planned four members of the Management Board of the Agency, as well as the conditions for their dismissal. As it is envisaged that the mandate of the members of the Management Board lasts 4 years, in the same paragraph it is necessary to envisage the maximum number of mandates for a member of the Management Board. It is also necessary to consider the possibility for the Council to give an opinion on the decision on the election of members who are representatives of the founders, appointed and dismissed by the competent Ministry, in order to decentralize the mechanism for electing members of the Management Board, as the body that has important competences in terms of ensuring and improving quality of higher education.

Also, in Article 15 it is necessary to envisage the conditions for the Director of the Agency on the basis of which the public competition is announced, as well as possible restrictions in the number of mandates, and in Article 17 to specify whether employment in the Agency is regulated in accordance with regulations on civil servants and employees or general labor regulations.

In addition, it is necessary in the appropriate places in the Law, in relation to the competencies of the Agency for Control and Quality Assurance of Higher Education from Article 12 paragraph 1 item 1-3 of the Draft, which relate to the issuance of accreditation certificates, certificates of reaccreditation of higher education institutions, as well as the certificate on accreditation of the lifelong learning program, envisage deadlines within which the Agency is obliged to act in relation to specific requirements of institutions, bearing in mind that one of the conditions for establishing and performing activities of the institution from Article 29 of the Draft Law is the study program accreditation certificate. It is important to note that undefined time frames for action can lead to unnecessary delays in the procedure, which creates a suitable ground for finding various ways to speed up the procedure, and a clear time frame in which the competent authority should act in a particular case eliminates inequality remove the basis for inequalities of any kind and the possible arbitrariness and selectivity of the authorities in those cases.

With regard to higher education institutions, which are in accordance with the Draft Law, Article 21 paragraph 1 University, Faculty, Art Academy and College in the part related to the management and administration of State Universities, the Agency recognizes the absence of clear, objective, transparent and predetermined criteria for several articles of the Draft Law. Specifically, when it comes to Article 57 of the Draft Law, the number of members of the Governing Board, as the governing body of the University, the period for which the Board members are elected, but it is envisaged that the competence, election and dismissal, as well as committees are more closely regulated by a bylaw, the Statute of the University, although some of these issues need to be resolved in the Law itself. In the first place, the Agency is of the opinion that it is necessary to provide minimum conditions for the election of Board members, as it brings together representatives of academic staff, non-academic staff, students and founders, to specify who are Board members, at least in the manner in which the share of the founding representatives in the Board is envisaged, as well as the basic competencies, and the elaboration of the same, as well as the manner of work of the Governing Board to be regulated with bylaws or University Statute regulations.

The election of the Rector of the University is regulated by Article 61 of the Draft Law, which stipulates that the Rector is elected on the basis of a public competition for a period of three years on the basis of a public competition and the submitted University development program, to be elected in direct elections, from among full professors of the State University with at least 15 years of work experience at the State University, number of mandates, and that the voting right has academic staff employed at the State University, as well as students in accordance with the Statute of the institution. In relation to the mentioned article, it is necessary to envisage who is responsible for organizing direct elections, to envisage the formation of an expert commission that will determine the list of candidates who meet the conditions for selection, the criteria for selecting the best candidate, and to consider the public announcement of the documentation of all candidates who have met the conditions for participation in the direct elections for the position of Rector.

With regard to Article 64 of the Draft Law, which refers to Deans, i. e. Directors, as the governing body of the organizational unit of the State University in the mentioned article of the Draft Law, it is necessary to provide conditions for election to the title of Dean, i. e. Director, as well as other issues relating to the powers of the Dean or Director, and the duration and number of terms.

In addition, the Agency recommends that, when it comes to members of the Council for Higher Education, members of the Board and Director of the Agency for Quality Control and Quality Assurance, members of the Board of the State University, Rector and Deans, or Directors of organizational units of the State University, a kind of anti-corruption clause or measures to manage conflicts of interest be envisaged, in order to act as a preventive measure in situations where the private interest of the above-mentioned holders of authority could be in conflict with the duties established by the Law in question.

Furthermore, when it comes to Article 100 of the Draft Law, which refers to the types of diplomas and duration of studies, the choice of study model is important for improving the quality of higher education and creating competitive staff, as well as aligning education with labor market needs. Due to the above, it is important in Article 100, paragraph 1, item 3 (which states that: "diploma of academic undergraduate studies, after completing an academic study program, 240 ECTS, for regulated professions") to specify the legal basis for determining regulated professions in order to remove inaccuracies from the specific wording that may lead to legal uncertainty.

V FINAL ASSESSMENTS

The Draft Law on Higher Education contains shortcomings, imprecise formulations and normative corruption risks, which primarily relate to the lack of criteria for proposing and appointing members of management and governing bodies within the higher education system, giving them wide discretionary powers, and leaving it to the competent Ministry i.e. the University to regulate important issues by its acts, although it is necessary that these issues be regulated by legal provisions.

These findings primarily relate to the establishment of the Council for Higher Education (Article 11 of the Draft Law), the establishment of the Agency for Control and Quality Assurance of Higher Education (Articles 12 to 19 of the Draft Law), the Board, as the governing body of the University (Article 57 of the Draft Law), then the procedure for electing the Rector of the University (Article 61 of the Draft Law), conditions for election to the title of Dean, i. e. Director, as well as other issues related to the powers of the Dean, i. e. Director, and duration and number of mandates (Article 64 of the Draft Law).

Having in mind the essential role of the Council for Higher Education, the Agency considers that the proposed Article 11 of the Draft Law, which envisages that the Council for Higher Education will be an advisory body of the Ministry in charge of education, seriously jeopardizes the current status of the Council which according to the valid regulation is appointed and dismissed by the Parliament of Montenegro on the proposal of the Government. In addition to the above, the Draft Law empowers the Council, as an advisory body of the Ministry, to decide on appeals of institutions against the decision on the outcome of external evaluation, which is the responsibility of the Agency for Quality Control and Quality Assurance, established by the Government, which opens space for various types of abuse, pressure and trade in influence, bearing in mind that the body formed by the Minister should decide in relation to the decisions of the body formed by the Government.

In this regard, the Agency is of the opinion that due to the importance of the Council for Higher Education, the existing solution should be retained, according to which the members of the Council are appointed and dismissed by the Assembly on the proposal of the Government, in order to avoid concentration of the power of one organ on all authorities that monitor and regulate this area. In addition, the Agency considers that it is necessary to clearly envisage the criteria for electing members of the Council, the manner of their appointment, conditions

for dismissal, duration of mandate, number of mandates, and clearly elaborate the competencies of this body in the law, and that other issues may be the subject of an act on the formation of the Council.

The Agency for the Prevention of Corruption is of the opinion that when it comes to the Agency for Control and Quality Assurance of Higher Education, beside the conditions for election and dismissal of the President and four planned members of the Agency's Management Board, the maximum number of mandates as well as the conditions on the basis of which the public competition for the Director of the Agency from Articles 12 to 19 of the Draft Law is announced, the competent Ministry should consider envisaging deadlines within which the Agency is obliged to act in relation to specific requirements of institutions (issuance of accreditation certificate, certificate of reaccreditation of higher education as well as a certificate of accreditation of a lifelong learning program), bearing in mind that one of the conditions for establishing and performing the activities of the institution referred to in Article 29 of the Draft Law is the certificate of accreditation of the study program. This is mostly stated as undefined time frames for action, which can lead to unnecessary delays in the procedure, which creates a suitable ground for finding various ways to speed up the procedure, and a clear time frame in which the competent authority should act in a particular case removes inequalities of any kind and the eventual selectivity and arbitrariness of those in charge in those cases.

In addition, the Agency recommends that, when it comes to members of the Council for Higher Education, members of the Board and Director of the Agency for Control and Quality Assurance, members of the Board of the State University, Rector and Deans, or Directors of organizational units of the State University, envisage a kind of anti-corruption clause or measures for managing conflicts of interest, in order to act as a preventive measure in situations where the private interest of the above-mentioned holders of conflict could be in conflict with the duties established by the relevant law.

Although it is clear that not all issues that may be important in terms of prevention of corruption can be expected to be regulated by the Draft Law, the Agency for Prevention of Corruption calls on the relevant Ministry to regulate these issues adequately and sufficiently at the legal level, in synergy with preventive mechanisms to combat corruption in the text of the Law, all with the aim of creating an adequate legal framework as a condition for meeting the objectives proclaimed in the relevant strategic documents in the field of higher education. Due to the role of higher education in laying the foundations of a strong society and building the integrity of future academic citizens, the Draft Law

must contain clear, transparent and predetermined objective criteria, in order to be a premise for developing an effective and quality higher education system that will promote social and economic development, and give individuals the opportunity to acquire qualifications relevant to the needs of the labor market.


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