



Montenegro
Agency for Prevention of Corruption

No: 03-04-1834/3

Date: June 6, 2024

PARLIAMENT OF MONTNEGRO
Andrija Mandić, President

SUBJECT: Initiative on the need for amending the Proposal of the Law on Prevention of Corruption No. 23-2/24-5, submitted by the Government of Montenegro to the Parliament of Montenegro on May 30, 2024

Dear Mr Mandić,

Given the text of the Proposal of the Law on the Prevention of Corruption No. 23-2/24-5 (hereinafter: the Proposal), which was submitted by the Government of Montenegro to the Parliament of Montenegro on May 30, 2024, the Agency for Prevention of Corruption takes this opportunity to point out the shortcomings and deficiencies of certain legal solutions, all with the aim of adopting a law that will be a powerful tool in the prevention and suppression of corruption, as one of the key policies for the development of areas on which every democratically organized state is based.

In commenting the Proposal, the Agency has been guided not only by its experience in the application of the current law in this field but also by international standards in the area of corruption prevention. Foremost among those are the United Nations Convention against Corruption¹, Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law (*Whistleblower Protection Directive*), and the GRECO recommendations from the Report on Montenegro within the Fifth Evaluation Round concerning "Preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies" (*adopted by the Government of Montenegro on October 25, 2022*).

In this regard, the Agency draws attention to Articles 26, 47, and 101 of the Proposal, as future legal solutions that will not serve to improve the legal framework, which should give the Agency a more significant role in carrying out its responsibilities.

¹ Law on Ratification of the United Nations Convention against Corruption "Official Gazette of the FRY - International Treaties", No. 11/2005

Regarding Article 26, Paragraph 2 of the Proposal, it is stipulated that for the purpose of verifying data from the Report, the Agency may access information on the bank accounts of public officials and members of their households, as defined in Article 25, Paragraph 1 of this Law, with credit institutions and other financial institutions, in accordance with the law governing the operations of credit institutions. Furthermore, Paragraph 5 of the same article of the Proposal stipulates that the detailed manner of accessing information on bank accounts of public officials and members of their shared household, as defined in Article 25, Paragraph 1 of this law, at credit institutions and other financial institutions, shall be prescribed by the Ministry.

Given the experience in the application of the law in this area, as well as relevant recommendations from Council of Europe experts, the Agency believes that Article 26 of the Proposal needs to be reformulated to enable the Agency to access the accounts of credit institutions and other financial institutions. This can be achieved by requiring public officials to provide consent for account access to the Agency when submitting their income and asset reports. This approach would eliminate the need to amend the law governing the operations of credit institutions and would achieve the purpose of the law, which is to promote transparency and accountability of public officials.

The Agency has also paid special attention to Article 47 of the Proposal, which stipulates a kind of categorization among public officials. It states that for those public officials who do not directly make decisions, do not participate in decision-making, or make decisions that only apply to a certain number of individuals in specific areas, the obligations and restrictions prescribed by this law shall be applied depending on the category of public officials. Furthermore, the categorization of public officials, in accordance with Paragraph 1 of this article, along with a review of their obligations and restrictions, is prescribed by the Ministry.

Given that Article 3 of the Proposal provides a definition of a public official, and Articles 25-29 of the Proposal prescribe the obligations of public officials concerning the Report on Income and Assets of Public Officials, as well as the restrictions on performing public functions as prescribed in Articles 11 to 17 of the Proposal, the Agency is of the opinion that the law should not foresee any categorization of any kind, especially one that would potentially relate to the obligations or restrictions of public officials, being carried out based on a subordinate act of the Ministry.

It is necessary to specify and elaborate on this in the law itself within the definition of a public official, to ensure that this provision systematically reflects the legislator's intent. This approach will eliminate the possibility of discretionary decision-making on this issue and remove the potential for various types of abuses, which can serve as fertile ground for various corruption risks.

When it comes to Article 101, Paragraph 2 of the Proposal, which stipulates that employees of the Agency may be entitled to a monthly supplemental pay to their basic salary of up to 30%, in accordance with the law regulating salaries of employees in the public sector, several elements must be taken into account. The Agency for Prevention of Corruption, as the central anti-corruption body, conducts activities in accordance with the Law on Prevention of Corruption. These activities include preventing conflicts of interest between public and private interests, restrictions on the exercise of public functions, verifying reports on the income and assets of public officials, handling whistleblower reports, protecting whistleblowers, and other tasks in accordance with this law, as well as overseeing lobbying activities and monitoring the financing of political entities and election campaigns in accordance with specific laws. Employees of the Agency often carry out these responsibilities under significant public pressure, along with various social factors at play.

In performing these duties, employees must adhere to the principles of utmost integrity, impartiality, and accountability, especially considering their involvement in handling cases related to all three branches of government. These cases include preventing conflicts of interest between public and private interests, handling whistleblower reports, protecting whistleblowers, as well as overseeing lobbying activities and monitoring the financing of political entities and election campaigns in accordance with specific laws.

Considering the specificity of the responsibilities of this legal entity, the mandate of the Agency, the necessary degree of its autonomy, the scope of legal powers that employees have in carrying out assigned tasks, and the level of expertise required to perform these complex tasks, the current Law on Prevention of Corruption in Article 96, Paragraph 2 provides for a monthly supplemental pay of 30% for employees of the Agency. In this regard, the provision of Article 101, Paragraph 2 of the Proposal, which stipulates that employees of the Agency may be entitled to a monthly supplemental pay to their basic salary of up to 30%, effectively proposes the abolition of the specific position of Agency employees, as recognized by the existing legal provision in Article 96, Paragraph 2 of the Law. Additionally, this proposed norm leaves wide discretionary powers to the competent authority to determine the category of employees eligible for the 30% supplemental pay, without pre-established conditions and criteria, thereby

leaving room for arbitrary and potentially arbitrary decision-making by the competent authority, which is conducive to various forms of abuse.

When it comes to the provisions of the the Proposal regulating integrity plans, the Agency proposes introducing a new paragraph into Article 78, following paragraph 2: "An authority is obligated to, upon request by the Agency, provide a decision on appointing an integrity manager, in the manner and within the deadline determined by the Agency." Additionally, the corresponding provision on offenses, i.e., Article 108, paragraph 1, point 25, should be amended to read: "25) fails to provide the decision on appointing an integrity manager to the Agency, in the manner and within the deadline determined by the Agency (Article 78, paragraph 3)", in order to better reflect the essence of the legal text.

In addition to the above, the Agency points out the need for clarification of Article 108, paragraph 1, point 27. Therefore, we propose amending this point to ensure consistent application of the law. It should be revised to read as follows: "fails to adopt a new integrity plan every other year and submit it to the Agency within eight days of its adoption, in accordance with the assessment of the effectiveness and efficiency of the integrity plan (Article 80, paragraph 3)."

Additionally, the Agency has devoted special attention to the provisions of the the Proposal that regulate the issue of acting upon whistleblower reports and whistleblower protection. The Agency believes that the the Proposal does not fully and adequately implement the EU Directive 2019/1937 on the protection of persons who report breaches of Union law (Whistleblower Protection Directive). The transposition of the Directive into national legislation was the goal and recommendation of Council of Europe experts, as outlined in the Technical Document - Overview of Montenegro's Legislative Framework on Whistleblower Protection, prepared in April 2023 under the Horizontal Programme for the Western Balkans and Turkey III of the European Union and the Council of Europe.

The main area of implementation of the EU Directive 2019/1937 is establishing standards that set out rules and procedures for handling whistleblower reports and procedures for protecting whistleblowers, as individuals who report information they have acquired in the context of their work.

At the same time, the Directive allows for the European Union member states to expand the scope of application and protection of whistleblowers to a greater extent than that provided for in this directive within their national laws.

The scope of application of this Directive coincides with the scope of Chapter III of the Draft Law on the Prevention of Corruption (Article 48 to Article 74).

The definition of a whistleblower provided in Article 5 of the The Proposal differs from the definition of a whistleblower given in Article 4 of the Directive. Specifically, Article 5, paragraph 1 of the Proposal states that a whistleblower is a natural person employed in the private or public sector who has acquired information about irregularities in their work environment and who reports these irregularities. Paragraph 2 of the same article specifies what constitutes employment. This definition of a whistleblower is significantly narrower than the definition provided in the Directive, which states that the directive also applies to individuals who report or publicly disclose information about breaches they have acquired in the course of their former employment (Article 4, paragraph 2 of the Directive), as well as to individuals whose employment is about to begin, in cases where that individual has acquired information about breaches that occurred during the hiring process or during pre-contract negotiations (Article 4, paragraph 3 of the Directive).

The narrowing of the whistleblower definition compared to the definition provided in the current Law on Prevention of Corruption ("Official Gazette of Montenegro", No. 53/14 and No. 42/2017), especially in relation to Article 4, paragraphs 2 and 3 of the Directive, which prevents individuals who were employed or are about to enter into employment from filing a report in accordance with the Proposal on Prevention of Corruption, will have numerous negative implications in practice. This is particularly relevant in cases where a candidate for a specific job position may not be able to file a report regarding irregularities related to the specific job competition, nor will they be considered whistleblowers within the scope of the Proposal of the Law on Prevention of Corruption. This also applies to individuals whose employment has ended, as they will be unable to file a report related to the performance of their former job, nor will they be considered whistleblowers within the scope of the Draft Law on the Prevention of Corruption.

As a reminder, in 2023, the Agency for Prevention of Corruption received 190 whistleblower reports, out of which nearly 40% were related to irregularities in the field of labor relations.

Moreover, considering that the Proposal stipulates that a whistleblower can only be a natural person employed in the private or public sector who has acquired information about irregularities in their work environment, it is justified to question how this condition could be examined in the case of anonymous reporting, either by the person responsible for handling internal reports or by the Agency.

Furthermore, Article 6, paragraph 1 of the Proposal states, among other things, that the Agency is competent for handling whistleblower reports containing

information about irregularities that relate to endangering the public interest, indicating the existence of corruption.

The definition of irregularities provided in Article 4, paragraph 3 of the Proposal contains ambiguities and inaccuracies, posing the risk of causing numerous uncertainties in practice, particularly regarding the competencies of the Agency and other competent authorities responsible for handling whistleblower reports.

Namely, there seems to be an overlap between the definitions of irregularities provided in Article 4, paragraph 3 and paragraph 4 of the Proposal, as outlined by the proposer of the Law. According to the proposer, irregularities encompass "violations of regulations, as well as actions aimed at concealing such violations" (*paragraph 3*), while "endangering the public interest indicating the existence of corruption" entails "violations of regulations and ethical rules, or the breach of integrity or the possibility of such violation, as well as actions aimed at concealing such violations" (*paragraph 4*). Consequently, the proposer of the Law exclusively recognizes the determination of "endangering the public interest indicating the existence of corruption" as the competence of the Agency, while no competence for handling whistleblower reports and determining all other irregularities is defined for the Agency or any other authority.

Additionally, the proposer of the Law defines "endangering the public interest indicating the existence of corruption," thus introducing further confusion, considering that the definition of corruption is already provided in Article 3 of the Draft Law.

Having considered the aforementioned issues, the Agency is of the opinion that it is necessary to define "endangering the public interest" in the interpretation of terms (*Article 8 of the The Proposal*). Subsequently, in Article 4, paragraph 3, "endangering the public interest indicating the existence of corruption" should be listed as one of the irregularities. This will avoid overlapping definitions and potential problems in future implementation, especially regarding the competencies of authorities responsible for handling whistleblower reports.

Article 104 of the Proposal envisages "reviewing the procedures of the Agency", but only in the part which relates to the receipt and acting upon whistleblower reports, aimed at adjusting and improving those procedures. The intention of the proposer of the Law is not clear, considering that this provision reflects selectivity and places this area of the Agency's work in a stricter position, as it will be subject to review by the Agency itself. This raises the question of why periodic review of all procedures conducted by the Agency within its competencies is not provided for, or why this provision should not be removed from the Proposal.

In the section regarding monetary fines for offenses committed by individuals, as stipulated in Article 110 of the Proposal, paragraphs:

2) failure to protect the information obtained from the report and using or disclosing it for purposes other than those necessary for further action on the report (Article 52, paragraph 1);

3) causing harm to the whistleblower, whistleblower's helper, and associated individuals with the whistleblower by placing them in a disadvantageous position regarding the submission of the report or public disclosure of information, through direct or indirect actions, inactions, or omissions in the work environment (Article 66);

should be added to Article 108 of the Proposal and removed from the existing provisions. This is considering that only the legal entity, the body of state administration, the body of local self-government, and the responsible individual in these bodies can be held accountable for the unlawful actions of the legal entity, the body of state administration, the body of local self-government, and local self-government.

In conclusion, it is necessary to define the concept of "justified reason." Defining this term will eliminate the possibility of broad discretionary powers that the competent authority may have in its interpretation, as we have previously emphasized. The absence of this definition can be recognized as a normative risk of corruption within the Preliminary corruption-risk control check list. This could be identified as a lack of clarity or a flaw in the draft law that allows for multiple interpretations.

Given the above, the Agency remains committed to the process of drafting the Law on Prevention of Corruption, as the overarching regulation on which the work and competencies of the Agency for Prevention of Corruption are based. This commitment is especially pertinent given the practical experience accumulated during the eight and a half years of its implementation. Ultimately, the goal is to achieve a high-quality legislative text that alleviates corruption risks in norms, to the satisfaction of all involved parties.

Agencija calls on the proposer of the Law to draft a separate Whistleblower Protection Law in the upcoming period. This law should thoroughly and comprehensively define the standards guaranteed by EU Directive 2019/1937, establishing rules and procedures for handling whistleblower reports and protecting whistleblowers. Unlike the Proposal, this law should not narrow the category of these individuals, nor should the existence of corruption be a prerequisite for whistleblowing. Furthermore, the responsibilities of authorities handling whistleblower reports and protecting whistleblowers should be clearly defined.

The process of drafting a separate law on whistleblowers must be a multidisciplinary one, critically and analytically assessing past practices, relevant documents, and international standards, primarily those set forth in Directive (EU) 2019/1937 on the protection of individuals reporting breaches of Union law (*Whistleblower Directive*), as well as recommendations from the experts of the Council of Europe. The solutions emerging from this process should be based on the public interest, which directly reduces the space for favoring individual interests and eliminates the risks of incomplete transposition of the aforementioned Directive.

ASSISTANT DIRECTOR
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