



Montenegro
Agency for Prevention of Corruption

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

**OPINION ON THE CONCLUSION ON THE FORMATION OF THE 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**

Considering the process related to the preparation of the Draft Law on Amendments to the Law on Prevention of Corruption, and especially the Conclusion on the Formation of the Working Group for the preparation of the Draft Law on Amendments to the Law on Prevention of Corruption from the point of view of transparency and the existence of criteria, the Agency for Prevention of Corruption concluded that random selection of members of the Working Group for the preparation of the Draft Law on Amendments to the Law on Prevention of Corruption, the application of wide discretionary powers of the President of the Parliament of Montenegro and some MPs, members of the Parliamentary Anti-Corruption Committee, the 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 work of the working group, and the non-transparent and unclear procedures in the formation and way of working of this working group leave room for various types of abuse and thus create a suitable ground for the development of various types of corruption risks and their application.

The abovementioned 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 interests, regulates restrictions in exercising public functions, submission of statements on income and assets of public officials, acting upon reports and protection of persons who report threats to the public interest that point to the existence of corruption, defines initiatives for amending laws, other regulations and general acts, in order to eliminate possible risks of corruption or bring them in line with international standards in the field of anti-corruption, and it monitors the adoption and implementation of integrity plans, as well as other issues of importance for the prevention and suppression of corruption.

Bearing in mind the importance and scope of the aforementioned law in the field of prevention and suppression of corruption, seven years of practice in the application of the law in question, as well as numerous activities that have been carried out on the national and international level with the aim of preparing the detailed analysis necessary for entering the process of amending the legal framework in question (such as the Peer

Review mission of the European Commission, expert support of the Council of Europe and GRECO recommendations), the Agency is of the opinion that the process of amending the law in question should be a multidisciplinary process, which will critically and analytically look at the relevant available documents, as well as the shortcomings observed in its application, so that the solutions resulting from that process are fundamental and systemic, and so that 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.

RATIONALE

I PROCEDURE

The Law on Prevention of Corruption (“Official Gazette of Montenegro”, no. 53/14 and 42/17) regulates the competence of the Agency for Prevention of Corruption (hereinafter referred to as the Agency) which, in accordance with Article 78 paragraph 1 of the Law: - “...shall take the initiative to amend laws, other regulations and general acts, in order to eliminate the possible risks of corruption or to bring them in line with international standards in the field of anti-corruption; - shall give opinions on draft laws and other regulations and general acts for the purpose of their alignment with international standards in the field of anti-corruption;”

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

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 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.

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

The above implies the obligation of the legislator in the process of preparing amendments to the law in question to ensure that the entire process of drafting 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 implementation of the said regulation in such a way that the final outcome will be an improved legal framework, which will give the Agency even more significant space in the implementation of its competences.

In this regard, the Agency has recognized the need to ex officio review the process related to the preparation of the Draft Law on Amendments to the Law on Prevention of Corruption, with special reference to the Conclusion on the Formation of the Working Group for the Preparation of the Draft Law on Amendments to the Law on Prevention of Corruption, from the point of view of transparency and the existence of criteria in terms of corruption risks and contribute to the improvement of this procedure with recommendations.

II CORRUPTION RISK ASSESSMENT AND ANALYSIS OF THE CONCLUSION ON THE FORMATION OF THE 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

The Collegium of the President of the Parliament of Montenegro, at the session held on December 27, 2022, adopted a Conclusion on the Formation of the 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 of January 24, 2023).

Thus, this working group was established in accordance with Article 26 paragraph item 1 of the Rules of Procedure of the Parliament of Montenegro ("Official Gazette of the Republic of Montenegro", No. 51/06, 66/06 and "Official Gazette of Montenegro", No. 88/09, 80/10, 39/11, 25/12, 49/13, 32/14, 42/15, 52/17, 17/18, 47/19 and 112/20, 129/20, 65/21 and 104/21), which reads that the Collegium of the President of the Parliament shall consider issues of organization and work of the Parliament and the Committee and shall agree on taking measures to improve that work.

When it comes to the composition of the working group, which was formed by the Conclusion of the Collegium of the President of the Parliament, the first paragraph of the Conclusion reads that it consists of:

- Dragan Bojović, representative of the parliamentary majority,
- Momo Koprivica, representative of the parliamentary majority,
- _____, representative of the parliamentary opposition,
- _____, representative of the parliamentary opposition,
- Vanja Čalović Marković, representative of the Network for the Affirmation of the Non-Governmental Sector and
- Ana Đurnić, representative of the Alternative Institute.

A working group with a composition that has not been determined in advance, where two members of the working group have not been determined, determining the composition

of the working group on the principle of an “open list”, assuming that it was formed in this way in order to ensure a quorum, which would create the appearance of legitimacy or that the remaining positions could subsequently be filled, speaks first of all about the lack of any criteria for the formation of this working group. The work in the working group, which could have six members by May 1, when the deadline for the completion of the work task is scheduled, instead of the four members that have been determined now, makes the specific contribution to the fulfillment of the work task by the remaining two members of the working group, who can apply later, questionable, and calls into question the entire process of the preparation of the Draft Law in question.

The thing that is unquestionable at this moment is that the working group consists of two representatives of the parliamentary majority and two representatives of non-governmental organizations. While for the selection of the first two members there is at least a general criterion that they are representatives of the parliamentary majority, without specifying the professional qualifications and professional training of the selected MPs, the criteria on the basis of which these two representatives of non-governmental organizations were selected to this working group is unknown, ignoring at the same time, other non-governmental organizations interested in participating in the work of this working group, expressed through attendance at the sessions of the Anti-corruption Committee. The formation of the working group using the broad discretionary powers of the President of the Parliament of Montenegro and some MPs, members of the Anti-Corruption Committee of the Parliament, lack of transparency, and without predetermined conditions and criteria, is an unequivocal corruption risk that brings into question the future work and legitimacy of this working group.

The establishment of a working group, in accordance with Article 26 paragraph 1 item 1 of the Rules of Procedure of the Parliament of Montenegro, leads to the formation of a working group, without adequate legal foundation, which, although it gathers some of the representatives of the parliament and some representatives of civil society, due to the absence of criteria and transparency, does not give confirmation, or legitimacy of the entire process of drafting the law in question. From a legal-theoretical point of view, it would make more sense if the working group in question was formed by a special decision of the Parliament in accordance with Article 33 of the Rules of Procedure, namely as a temporary committee for considering draft acts, proposing acts, parliamentary control and carrying out other tasks within its competence, and that, in accordance with Article 67 paragraph 4 of the Rules of Procedure the participation of Government representatives, representatives of scientific and professional institutions, other legal entities and non-governmental organizations is ensured, as well as individual professional and scientific workers, without the right to decide, as the mentioned provisions give meager criteria, at least in terms of the way of working and the participation of other interested parties. In this way, corruption risks would be avoided, and transparency, inclusivity and legitimacy would be ensured, with the creation of predetermined conditions and criteria for the selection of representatives of scientific and professional institutions, other legal entities and non-governmental organizations, as well as individual experts, scientific workers and other possibly interested parties and/or organizations.

It should be mentioned that the composition of the working group was practically determined by the conclusion of the Parliament of Montenegro number: 00-72/22-5/4

regarding the consideration of the 2021 Work Report of the Agency for Prevention of Corruption, which states that it is necessary that The Collegium of the President of the Parliament forms a working group which, as a rule, would consist of two representatives of the parliamentary majority, two representatives of the parliamentary opposition and two representatives of the civil sector, and that the Collegium of the Parliament will turn to the Ministry of Justice and the EU Delegation in Montenegro with a request to decide in what form they will participate in the work of the working group.

As there is no "rule" which stipulates in advance that the working groups formed by the Parliament should gather two representatives each of the parliamentary majority and the opposition and the civil sector, the same states that the number of members and the composition of the working group was determined arbitrarily, and the absence of criteria and conditions that the aforementioned members of the working group should satisfy, as well as the principle of transparency, expressed for example through a public invitation to interested competent representatives, caused the objectivity, impartiality, expertise, and intention to be doubted, which is necessary in order to amend a regulation.

Although it does not bind the Parliament in its implementation, a good example of the elaborated criteria for the selection of representatives of non-governmental organizations is certainly the Decree on the Election of Representatives of Non-Governmental Organizations into the Working Bodies of the State Administration Bodies and Conducting Public Consultation in Preparation of Laws and Strategies (" Official Gazette of Montenegro", No: 41/18). Its provisions envisage a public invitation for the nomination of a representative of a non-governmental organization to the working body, with pre-established basic criteria, thus enabling all interested organizations to apply, participate and contribute to work on a specific issue.

Thus, the formation of a working body by a special decision of the Parliament in accordance with Article 33 of the Rules of Procedure as a temporary committee for reviewing proposed acts, proposing acts... as well as issuing a public invitation to nominate a representative of a non-governmental organization to the working body or ensuring the participation of representatives of the Government, representatives of scientific and professional institutions, other legal entities and non-governmental organizations, as well as individual professional and scientific workers, without the right to decide in accordance with Article 67 paragraph 4 of the Rules of Procedure of the Parliament of Montenegro, provides partial criteria that would give greater legitimacy to the work of both this and other working groups that are established in accordance with the conclusions of the Collegium of the Parliament of Montenegro.

Arbitrary selection, i.e. the selection of members of the working group for the drafting of the Draft Law on Amendments to the Law on Prevention of Corruption, the application of broad discretionary powers of the President of the Parliament of Montenegro, and some deputies, members of the Parliamentary Anti-Corruption Committee, lack of transparency, lack of predetermined conditions and criteria, casts a shadow on the way of formation and the work itself, i.e., the results of the work of the working group, and the 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 the development of various types of corruption risks and their application.

The above 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, governs restrictions on the performance of public functions, submission of reports on income and assets of public officials, acting upon applications and protection of persons who report threats to the public interest that point to the existence of corruption, defines initiatives for amendments to laws, other regulations and general acts, in order to eliminate possible risks of corruption, or their harmonization with international standards in the field of anti-corruption, monitors the adoption and implementation of integrity plans as well as other issues of importance for the prevention of corruption.

Bearing in mind the importance and scope of the aforementioned law in the field of prevention and suppression of corruption, it is expected that any change in the normative regulation of this field will be implemented studiously and systematically. In this regard, this process should include a broader consensus that ensures the required level of transparency and participation in the legislative procedure, thereby creating conditions in which the interested professional public can contribute to the quality of regulations, and determine proposed solutions based on the public interest, while simultaneously reducing the space for favoring individual interests, which is hard to expect if one takes into account that the working group in question is composed of two representatives of the parliamentary majority and two representatives of non-governmental organizations who were elected without predetermined criteria in a procedure that was not accompanied by transparency.

The Agency reminds that in the seven-year implementation of this regulation, several analyzes and recommendations were made to strengthen the legislative framework in this area, which would contribute to the effectiveness of the application of the law itself, and reinforce the independence of the Agency, as the central anti-corruption body in this system.

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 in April 2021 on the topic of the functioning of the Agency. On that occasion, through the Report (*Expert Mission on the Functioning of the Agency for Prevention of Corruption*), several concrete recommendations were given to improve this area, which will ultimately contribute to the Agency enjoying stability regardless of the political majority in the Parliament, and to the appointment and dismissal procedures being carried out only with 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 the Financing of Political Entities and Election Campaigns, as well as the strengthening of personnel capacities in terms of increasing the number of officers for certain areas of the Agency's work.

In addition, the Agency for Prevention of Corruption, within the phase II of the Horizontal Facility for the Western Balkans and Turkey (Action against economic crime in Montenegro), in 2022, in cooperation with the Council of Europe, began a comprehensive analysis of the Law on Prevention of Corruption, which is being 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 property reports, gifts, donations, and sponsorships." In the third phase, which is scheduled for the first quarter of 2023, parts of the law that relate to whistleblowers, integrity, and misdemeanor provisions will be analyzed, with a special focus on defining guidelines for the creation of a special Whistleblower Protection Law in accordance with EU Directive (*on the protection of persons who report breaches of Union law*) 2019/1937.

Additionally, the Law on Prevention of Corruption was the subject of analysis in the V Evaluation Round GRECO¹ report for 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 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 concrete recommendations, the report recognizes the improved performance of the Agency for Prevention of Corruption and notes that "the functioning is moving towards greater independence, efficiency and a more proactive approach", but also recognizes the importance of further strengthening the capacities and functional independence of the Agency and the comprehensive and joint approach of all relevant institutions and social actors and their proactivity, in order to more effectively prevent corruption.

Considering the seven-year practice in the implementation of the relevant Law, as well as numerous activities that have been implemented at the national and international level in order to prepare a detailed analysis necessary to initiate the process of amending the relevant legal framework, the Agency believes that the process of amending the Law must be a multidisciplinary process that will critically and analytically examine relevant available documents, as well as shortcomings identified in its practical application, for the solutions that arise from this process to be fundamental and systematic, and so that the application of future solutions would further strengthen the Agency in the implementation of anti-

¹ The Group of States against Corruption (GRECO) monitors the compliance of its member states with the anti-corruption instruments of the Council of Europe

corruption mechanisms to create a society that is as intolerant as possible to all emerging forms of corruption.

III FINAL ASSESSMENTS

Taking into account the process related to the drafting of the Draft Law on Amendments to the Law on Prevention of Corruption, and in particular the Conclusion on the formation of the Working Group for drafting the Draft Law on Amendments to the Law on Prevention of Corruption from the perspective of transparency and the existence of criteria, the Agency for Prevention of Corruption has noted that the arbitrary selection of members of the Working Group for drafting the Draft Law on Amendments to the Law on Prevention of Corruption, using the broad discretionary powers of the President of the Parliament of Montenegro and part of the deputies, members of the Parliamentary Anti-Corruption Committee, lack of transparency, and lack of predetermined criteria, casts a shadow on the way of formation and the work itself, i.e., the results of the work of the working group, and the non-transparent and unclear procedures for the development and functioning of this Working Group leave room for various types of abuses and thus create a conducive environment for the development of different types of corruptive risks and their application.

The above 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, governs restrictions on the performance of public functions, submission of reports on income and assets of public officials, acting upon applications and protection of persons who report threats to the public interest that point to the existence of corruption, defines initiatives for amendments to laws, other regulations and general acts, in order to eliminate possible corruption risks, or their harmonization with international standards in the field of anti-corruption, monitors the adoption and implementation of integrity plans as well as other issues of importance for the prevention of corruption.

Considering the importance and scope of the mentioned Law in the field of corruption prevention and suppression, the seven-year practice in implementing the Law, as well as numerous activities that have been implemented at national and international level in order to prepare a detailed analysis necessary for the process of amending the legal framework in question (*such as the Peer Review mission of the European Commission, expert support of the Council of Europe, and GRECO recommendations*), the Agency believes that the process of amending the Law must be a multidisciplinary process, which will critically and analytically examine all relevant available documents, as well as shortcomings observed in its practical application in order for the solutions that emerge from the process itself to be fundamental and systematic, and not arbitrary and based on individual interests, although the application of future solutions would 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.

DIRECTOR
Jelena Perović