

Montenegro  
Agency for Prevention of Corruption

Reference number: 01-1845/2

3 May 2017, Podgorica

MINISTRY OF LABOUR AND SOCIAL WELFARE  
**Minister Kemal Purišić**

Dear Sir/Madam,

Pursuant to Article 78 of the Law on Prevention of Corruption (Official Gazette, no. 53/2014), Agency for Prevention of Corruption is, alter alia, competent to initiate changes and amendments to laws, other regulations and general acts, in order to remove possible corruption risks or to harmonise them with international anti-corruption standards.

In line with Article 79 of the above noted law, the Agency can - upon its own initiative or upon request from the government body, enterprise, legal entity, entrepreneur or a natural person - provide an opinion for the purpose of improving corruption prevention, eliminating corruption risks and strengthening ethics and integrity in government bodies and other legal entities. The opinion also includes corruption risk analysis, measures for elimination of the corruption risks and corruption prevention.

Implementing procedure ex-officio, in line with Article 79 of the Law on Prevention of Corruption, the Agency analysed provisions of the Labour Law and the Law on Employment and Exercising the Right of Unemployment Insurance, in part that refers to advertising vacancies and employment procedures. After completing procedure, the Agency drafted the Opinion which also includes recommendations for changes to the laws.

In view of the fact that work programme of the Government of Montenegro for 2017 (IV quarter) provides for amendments to Labour Law and the Law on Employment and Exercising the Right of Unemployment Insurance, please find enclosed the above mentioned Opinion.

In addition, would you please inform us if the recommendations were taken into consideration in drafting the above mentioned laws.

Sincerely,

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Agency for Prevention of Corruption

Reference number: 01-1845

28 April 2017, Podgorica

Pursuant to Articles 78 and 79 of the Law on Prevention of Corruption (Montenegro Official Gazette, no. 52/14) and Article 10 of the Statute of the Agency for Prevention of Corruption, the Agency for Prevention of Corruption, acting ex-officio, has passed:

**THE OPINION**

Lack of precision and ambiguity of the legal norms of the general labour regulations related to the employment procedure in the public sector open door to possible jeopardising of the public interest and undermining integrity, equality and transparency of the employment procedure.

**RATIONALE**

Implementing ex-officio procedure, in line with Article 79 of the Law on prevention of corruption enabling the Agency to provide opinions for the purpose of improving corruption prevention, eliminating corruption risks and strengthening ethics and integrity in government bodies and other legal entities, the Agency has analysed provisions of the Labour law and Law on employment and exercising the right of unemployment insurance, related to advertising of vacancies and employment procedure. The procedure established the following:

**The Constitution of Montenegro** guarantees and protects the inviolable rights and freedoms (Article 6). The Constitution prohibits any direct or indirect discrimination, on any grounds (Article 8, Paragraph 1). Furthermore, it guarantees equal protection of rights and freedoms (Article 47, Paragraph 1) and in Article 62 guarantees the right to work:

*“Everyone has the right to work, right to free choice of occupation and employment, fair and human working conditions and protection during the unemployment period.”* – Article 62

**Labour law (Montenegro Official Gazette, no. 49/2008, 26/2009, 59/2011, 66/2012, 31/2014) stipulates:**

*“Direct or indirect discrimination of the persons seeking employment, as well as employed persons, on the grounds of gender, birth, language, race, religion, colour of skin, age, pregnancy, health condition, or disability, nationality, marital status, family responsibilities, sexual orientation, political or other beliefs, social background, financial status, membership in political and trade union organisations or any other personal feature, shall be prohibited.”*  
– Article 5

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*“(1) Direct discrimination, pursuant to this Law, shall include any treatment based on any of the grounds referred to in Article 5 of this Law whereby a **person seeking employment and an employed person is placed in a less favourable position in comparison to other persons in the same or similar situation.***

*“(2) Indirect discrimination, pursuant to this Law, exists when a certain provision, criterion or practice places or would place a person seeking employment and an employed person in a less favourable position in comparison to other persons on the basis of his or her particular characteristic, status, orientation or belief.” – Article 6*

*“Discrimination referred to in Articles 5 and 6 of this Law shall be prohibited in relation to **employment requirements and selection of candidates for the performance a particular job.**” – Article 7, Paragraph 1, Item 1*

*Article 3 of this Law, providing the definition of employment relations, reads: “**Employment relationship is a relationship based on employment between an employee and an employer that is established by a contract of employment, in accordance with the law and collective agreement.**”*

*Part of the Law on vacancy announcements refers to stipulations of a special law: “An employer shall announce vacancies in the manner and according to the procedure established by a special law.” – Article 36*

**Law on employment and exercising rights with respect to unemployment insurance (Montenegro Official Gazette, no. 14/2010, 45/2012, 61/2013, 20/2015 and 52/2016) stipulates:**

*“Exercising rights of unemployment insurance is based on the principles of:*

- 1) freedom of choice of occupation and work;*
- 2) prohibition of discrimination;*
- 3) gender equality;*
- 4) affirmative action directed towards hard-to-employ persons;*
- 5) impartiality on the part of the persons conducting employment activities;*
- 6) provision of employment services free of charge.” – Article 5*

*“The Employer is obliged to report vacancies to the Employment Bureau, for the purpose of monitoring the vacancies on the labour market.” Article 26, Paragraph 1*

*“Employment Bureau is obliged to post the employer’s vacancy on the bulletin board and on the Bureau’s website and in media, within two working days from the day of reporting the vacancy.” – Article 27, Paragraph 1*

*“Through providing information on employment opportunities and requirements persons conducting employment activities share with jobseekers, employers and other persons information on: reported vacancies, employment requirements, opportunities for*

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*professional orientation, terms, manners and procedure for obtaining national professional qualification, mediation in employment and other measures identified by this law.” – Article 32*

**Law on prevention of corruption (Montenegro Official Gazette, no. 53/2014) stipulates:**

*“Public interest is the material and non-material interest for the wellbeing and prosperity of all citizens under equal terms” – Article 6, Paragraph 1, Item 1*

*“For the purpose of this Law, jeopardising of the public interest shall mean a violation of regulations, ethical rules or the possibility of such a violation, which caused, causes or threatens to cause danger to life, health and safety of people and the environment, violation of human rights or material and non-material damage to the state or a legal or natural person, as well as an activity aimed at concealing such a violation.” – Article 44, Paragraph 2*

**Law on prohibition of discrimination (Montenegro Official Gazette, no. 46/2010 and 18/2014) stipulates:**

*“Any form of discrimination, on any ground, shall be prohibited.*

*Discrimination is any unjustified, legal or actual, direct or indirect distinction or unequal treatment, or failure to treat a person or a group of persons in comparison to other persons, as well as exclusion, restriction or preferential treatment of a person in comparison to other persons, based on race, colour of skin, national affiliation, social or ethnic origin, affiliation to the minority nation or minority national community, language, religion or belief, political or other opinion, gender, gender identity, sexual orientation, health conditions, disability, age, material status, marital or family status, membership in a group or assumed membership in a group, political party or other organisation as well as other personal characteristics.*

*Direct discrimination exists if a person or a group of persons, in the same or similar situation in respect to other person or group of persons, is brought or were brought, or may be brought in an unequal position by an act, action or failure to act, on any ground referred to in paragraph 2 of this Article.*

*Indirect discrimination exists if apparently neutral provision of a regulation or general act, criterion or practice is bringing or can bring a person or a group of persons into unequal position in respect to other person or group of persons, on any ground referred to in paragraph 2 of this Article, unless the provision, criterion or practice are objectively and reasonably justified by a legitimate purpose and achievable with the means appropriate and necessary to use for achieving that purpose, and when they are acceptable and proportionate in relation to the purpose to be achieved.*

*Inciting, helping, giving instructions as well as announced intent to discriminate specific person or group of persons on any ground referred to in paragraph 2 of this Article, shall be as well considered to be discrimination.” – Article 2*

*The right on protection from discrimination belongs to all natural and legal persons to which the Montenegrin legislation is applicable, if they are discriminated against on any ground referred to in Article 2, paragraph 2 of this Law.*

*This Law shall apply to public and private sector.” – Article 3*

*"No one shall suffer adverse consequences for reporting the case of discrimination, giving deposition before a competent authority or offering evidence in the proceedings investigating a case of discrimination.*

*Persons are protected from any adverse treatment or effect as a reaction to reporting or a proceeding conducted for violation of the principle of non-discrimination." – Article 4*

In this Opinion, the Agency calls upon stipulations in the Constitution and relevant laws, not in the light of assessing their constitutionality and legality, but in the light of application of Article 79 of the Law on prevention of corruption.

Provisions of the Labour law (Article 36) and Law on employment and exercising the rights of unemployment insurance (Articles 26 and 27) leave room for violation of constitutional principles and principles stipulated in the Labour law related to protection of unemployed persons, equal treatment in the employment procedure and access to labour market under equal terms, which opens door to possible jeopardising of the public interest.

Namely, the provisions of the Law on employment and exercising the rights of unemployment insurance stipulate obligation of the employer to report to the Employment Bureau, **vacancies for the purpose of monitoring the vacancies on the labour market** (Article 26), as well as obligation of the Bureau to post the vacancies on the bulletin board and the Bureau's website and in the media (Article 27). **However, those provisions do not identify for how long the vacancy announcements should be advertised.** Lack of timeframe for advertisement of the vacancies, among other things, can lead to violation of constitutionally guaranteed rights, namely, discrimination of candidates via limitation of access to labour market, as well as to limiting of the free competition and encouraging unequal position for the candidates in (labour) market. In addition, such provisions in the law allows the employer to formally fulfil the legal obligation to publish vacancy announcements, while at the same time – in view of the uncertainty of the legal position of the candidates due to lack of precision in the law about expiry of the advertisement - it also indicates the possibility of abuse. Moreover, it is possible to advertise vacancy announcement for one day only, so that it is practically impossible for potential candidates to prepare the necessary documentation over such a short period of time. This may indicate that the employer enters the advertising process only formally, without intending to ensure competition among the candidates because they already selected a candidate they want to hire.

The right of the employers from the private sector to completely autonomously organise their business operations, on the basis of the specific nature of their business activities, in a manner that they consider the best, most efficient, cost-effective and economical, is indisputable. For this reason, number of workers, their skills and work experience, the type and level of professional qualification, the level of education and occupation, are identified by the general and internal acts of the employer, unless otherwise stipulate by a separate law.

This is in line with the interest of the private sector employer to select an employee who will through his/her engagement be implementing private interests of the company; in that case, the criterion of employer's interest in selection of an employee is his/her dominant interest. This is corroborated by the fact that advertising, in line with general labour regulations, is not a constitutive element of the employment relationship, which noted in the Legal Opinion of the Supreme Court *Su./ no. 148–6/15* of 8 July 2015 that advertising had been transferred from employment relationship field to the field of labour market. "The accurate interpretation of stipulations of the given regulations indicate that public advertising of the vacancy is not a requirement for lawfully established employment relationship, unlike in the previous period, when that was an integral part of the employment procedure in line with general labour and employment regulations; at the time, these regulations regulated that employment relationship is established based on individual acts issued by the authorised person from the company (company or other legal person).

The purpose of the current legal provisions from the Labour law and Law on employment is to transfer the advertisement segment from the area related to employment relationship to the area of labour market, to enable more efficient monitoring of trends in the labour market in view of the fact that its functioning is one of the targets of an organised state. For that reason, employers currently have the obligation to inform the employment mediation agency about the vacancy, which – the same as public advertising of vacancy announcements - is not seen as part of employment procedure but rather as an obligation in terms of the labour market. In that sense, this obligation is also provided for by the Law on employment and exercising the rights of unemployment insurance, in Articles 26 and 27. Thus, public advertising is seen as having no legal significance in terms of establishment of the lawful employment relationship, but rather as something with market and economic relevance. All the more, since the current legislative framework has reduced the procedure of establishing an employment relationship with the employer to negotiations between the employee and employer, signing of an employment contract and commencement of work. Penal provisions clearly point to such conclusion as well – Articles 66 and 67 of the Law on employment and exercising the rights of unemployment insurance - whereby violations of the obligations on the part of the employers are sanctioned as misdemeanour, having no impact on lawfulness of the employment relationship set up in line with the signed employment contract.

However, in the public sector institutions exercising public interest and covered by the general regime of employment relations, employment of the most qualified candidates and candidates who demonstrate, in the recruitment process, the best competencies for the job should be a dominant principle for the employment. For that reason, in the public sector regime, public advertising of vacancy announcements should be an obligatory part of the employment procedure, thus allowing for equal competition among the candidates, with clearly identified rules and criteria for selection of the best candidate. The above mentioned system, when the advertisement was required for lawfully established employment relationship, existed in the earlier general labour regulations, and employment was established based on the individual act issued by the employer: Law on employment relationships (Official Gazette of the Socialist Republic of Montenegro, no. 29/1990, 42/1990

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and 28/1991 and Official Gazette of the Republic of Montenegro, no. 48/1991, 17/1992,16/1995, 21/1996).

For example, the legislators also prepared the Law on salaries for employees in the public sector, which had intention to try to set up legal equality and balance in terms of salaries in the public sector: “The need to pass this law derived from the need to harmonise the amounts of salaries in all areas of the public sector, in line with the same principles, for officials, employees in the administration at the state and local levels, companies that are majority owned by the state and local self-governances, as well as in regulatory agencies and other institutions and bodies that exercise public authorisations.” Excerpt from Rationale on Law on salaries for employees in the public sector.

However, one employment regime is valid for one part of public sector, namely, the state bodies and other institutions that are subject to the Law on civil servants and state employees, where advertising is a constitutive element of employment relationship with obligatory procedure involving check of the candidates’ competencies and their scoring (Governmental Regulation stipulates clear requirements and criteria regarding obligatory check of candidates’ competencies, as well as more specific criteria and methodology for scoring of the candidates’ results); while completely different regime is valid for employees in the part of public sector that is subject to the Labour law, which does not provide for this but allows for the employers’ wide discretionary in the process of candidate selection – clearly, in this case there is no balance or equality in requirements and criteria for establishment of employment relationship in the public sector, as is the case with salaries.

## **CONCLUSION AND RECOMMENDATIONS:**

The fact that legal obligation regarding the start and finish of the vacancy announcement advertisement has not been clearly specified in Article 27, Paragraph 1, of the Law on employment and exercising the rights of unemployment insurance, poses the risk that public interest could be jeopardised through arbitrary interpretation of the law. This could undermine integrity and activate the corruption risks in terms of lack of transparency and competitiveness related to the employment procedures.

In line with the above, for the purpose of protection of the public interest, the Agency will submit for review the need to amend the Labour law and the Law on employment and exercising the rights of unemployment insurance in **the part related to employment in the public sector** in a way that will make the obligation of advertising vacancy announcements an integral element of the establishment of employment relationship, as well as clearly specify start and end date of the advertisement period and note the obligation to decide on selection of the candidate within the specified period of time.

Also, the Agency will submit for review changes to the Labour law in terms of introducing legal basis for adopting a by-law that will identify terms and procedures for employment in public sector. Namely, the obligation to identify procedures for obligatory check of



competencies and scoring of the candidates who applied for a position in the public sector, similar to regulations provided for civil servants and employees.

In terms of employment in the public sector, this would remove not only possible corruption risks in the process of exercising public interests through work of the public institutions, but also minimise violations of the right to work and employment rights occurring due to arbitrary operations, in particular regarding unemployed persons and persons who due to unclear provisions, criteria or practice were placed or could be placed in less favourable position, relative to other persons, jobseekers or employed persons.

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