Montenegro
Agency for Prevention of Corruption

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Pursuant to Articles 72, 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 issued the

O P I N I O N

Lack of precision of specific norms of the Law on Health Care in relation to procedures for the selection of Directors, members of Boards of Directors, as well as recruitment of healthcare professionals and associates for the healthcare system institutions makes it possible to undermine the transparency and integrity of health sector.

RATIONALE

Implementing *ex-officio* the procedure provided for under Article 79 of the Law on Prevention of Corruption, which enables the Agency to issue opinions for the purpose of improving anti-corruption measures, mitigating corruption risks, and strengthening the ethics and integrity of government bodies, the Agency has analysed the valid **Law on Health Care with regards to the selection of Directors, members of Boards of Directors, as well as the recruitment of healthcare professionals and associates for the healthcare system institutions**.

In the Opinion, the Agency calls upon provisions of the Constitution and other relevant laws, not in the light of assessing their constitutionality or lawfulness but in the light of application of Article 79 of the Law on Prevention of Corruption and meeting its objectives.

In April, the Agency passed an Opinion focused on the employment procedure in line with the general labour regulations, therein concluding that the given provisions make it possible to threaten the public interest and may undermine the integrity, equal treatment and transparency of the **public sector** recruitment procedures.

Based on the Opinion, **as a next step the Agency analysed the procedures for selection of Directors, members of Boards of Directors, as well as recruitment of healthcare professionals and associates for the healthcare system institutions.**

Anti-corruption measures for the sector of health, recognised as a high-risk sector in that respect, are regulated by the *Action Plan for Chapter 23: Judiciary and Fundamental Rights*, and its Annex the *Operational Document for the Prevention of Corruption in Areas of Particular Risk of the Government of Montenegro* (July, 2016). Additionally, over the previous period, the Ministry of Health had also adopted targeted anti-corruption action plans for the area of health.

Based on the **Report on Adoption of Integrity Plans in 2016**, in relation to the system of **health**, the Department for Integrity and Lobbying analysed the general risk areas identified by the healthcare institutions in their respective integrity plans based on risk self-assessments. Applying the procedure laid down by the Rules for Preparation and Implementation of Integrity Plans, the procedure of initial risk assessment, i.e. recognising the highly affected areas, and thus documenting the findings, identifying, assessing and ranking risks, the Department came up with certain recommendations for the sector. The analysis of the health sector plans showed that the institutions have identified, *inter alia*, the following risks in the listed general areas of work:

1. *Administration and management:* **Observing the transparency principle in relevant decision-making; Determining clear rules for the use of discretionary rights;** Reporting on oversight and audit of the functioning of individual structural units; Ensuring participation of all relevant stakeholders and units in the creation of development and management policies; Appointing the persons to monitor the implementation of regulations; Regularly reporting on the implementation of strategy papers, plans and programmes throughout the year; and Ensuring that quality information on the work and services provided by the healthcare institutions are continuously disseminated to both professionals in the field and the broader public.

2. *Human resource policy, ethical and professional conduct:* **Constant oversight over the implementation of recruitment procedures and decisions on employee rights; Assessing the human resources required by the institutions to provide all the necessary services and using the assessments when filling in vacancies in line with the Rulebook on Systematisation and Organisation of Positions;** Providing training to professional staff and associates, including the appointment of a person in charge of organising and implementing the training plans and programmes and regular reporting on the training and continuous education of healthcare professionals; Establishing, regularly updating and publishing a list of physicians allowed to perform additional services outside their regular place of work and the institutions where those services would be provided; Conducting periodical verifications of certificates on passed professional exams and work licenses; Conducting regular verification of the approved specialisations; Conducting periodical verification of the grounds for temporary unfitness of staff to work; and Regularly controlling the work attendance of staff.

Analysing the **Law on Health Care** (hereinafter: the Law), the Agency finds that health care is a type of **activity** which is aimed to provide and ensure health protection of citizens and which is **of public interest** (Article 8 of the Law).

Article 15 of the Law states that,

> *'[…] health policy shall be created by the state. Implementing the health policy, the state:*
>
> *[…] 9) shall establish a network of healthcare providers (hereinafter: the Healthcare Network);*
>
> *[…] 11) shall produce a human resource development plan for the healthcare sector.'*

Article 22 regulates that healthcare services shall be provided by healthcare institutions, healthcare professionals and associates, as well as all other entities dealing with the protection of health, in line with the Law.

Article 31 of the Law stipulates that, with aim to meet the public interest and implement the healthcare programmes, a network of healthcare providers shall be established. The healthcare institutions shall provide healthcare services as part and independent of the Network. The Healthcare Network shall include the type, number, and distribution of all healthcare institutions founded by the state and of particular healthcare institutions or parts thereof founded by other legal entities and/or natural persons, by levels of healthcare, as well as certain legal entities performing the activities factoring into the exercising of health protection rights.

Article 58 of the Law regulating the establishment of healthcare institutions stipulates that the founder of a healthcare institution can be the state, municipality, national or foreign legal entity or natural person.

Article 60 stipulates that, *'when the founder of a healthcare institution is the state or a municipality, the Government or relevant municipal body shall adopt the founding act of the institution'.*

Article 68 regulates that every healthcare institution shall adopt its statute and other general legal acts. The statute shall regulate in particular: the activities of the healthcare institution; the organisation and methodology of work of the healthcare institution; the scope and methodology of work of its management, the Director and other professional and advisory bodies; the decision-making procedures; and other matters of relevance for the performance of healthcare services.

Article 69 regulates that the statute and document regulating internal organisation and systematisation of positions of the healthcare institutions founded by the state or municipality, shall be subject to approval by the Ministry or a relevant municipal body. The statutes of the healthcare institutions managed by the Director shall determine also the type of internal legal acts subject to approval by the Ministry.

Pursuant to the Law on Health Care (Article 70-72), the bodies of a healthcare institution shall include the Board of Directors (as administrators) and the Director (as the manager).

The Board of Directors and the Director of a healthcare institution shall be appointed and replaced by the founder.

All healthcare institutions providing the services falling under the competence of the Montenegro Clinic Centre and the Public Health Institute must have a Board of Directors, whilst such a board cannot be formed for any other healthcare institutions.

In the healthcare institutions without the Board of Directors, the management function shall be performed by the Director.

Article 70 may cause certain misunderstandings when it comes to the bodies of healthcare institutions as its paragraph (1) introduces a general norm concerning what constitutes the bodies of healthcare institutions, while paragraph (4) specifies the type of healthcare institutions eligible to have a Board of Directors.

The number of members sitting on the Boards of Directors of healthcare institutions shall be determined by their respective statutes, pending on the type and scope of work performed by the institution.

The Boards of Directors of healthcare institutions founded by the state or municipality may have maximum seven members. Representatives of the founder shall make over half of the members, with one of them selected as the Chair. The Boards of Directors may also include representatives of non-governmental organisations dealing with the protection of persons with disabilities (Article 71).

Paragraph (4) of this Article allows the founders to involve representatives of specific non-governmental organisations in the Boards of Directors. However, it does not regulate the exact composition of the Boards of Directors, thus leaving the participation of non-governmental organisations as an option only, without specifying the criteria for the selection of their representatives.

The Directors of healthcare institutions founded by the State shall be appointed and dismissed by the Government, upon the proposal by the Ministry.

The Boards of Directors of the healthcare institutions founded by the state and providing healthcare services across several municipalities shall include a representative agreed by the municipalities, upon the proposal of the relevant bodies of each municipality concerned and in line with the municipality statute. Members of the Boards of Directors of healthcare institutions founded by the state shall have a term of office of four years (Article 72).

The criteria for the selection of members of Boards of Directors of healthcare institutions are not regulated by the Law, leaving the discretionary rights for suggesting those members to the proponents. Similarly, the Law does not stipulate the criteria for dismissal of the Members of Boards of Directors.

Furthermore, the Law does not mandate or make reference to any bylaws that would regulate the criteria for either selection or dismissal of the Boards of Directors, other than instructing healthcare institutions to determine the number of the members of respective Boards of Directors by their statute.

Article 74 regulates that the Directors of the Montenegro Clinic Centre and the Public Health Institute shall be appointed and dismissed by the Government, upon the proposal by the Minister, whilst the Directors of other healthcare institutions founded by the state shall be appointed and dismissed by the Minister, based on a public vacancy procedure.

The Directors of healthcare institutions founded by municipalities shall be appointed by the relevant municipal bodies, based on a public vacancy procedure and the programme submitted.

The above provisions grant the Ministry of Health with the discretionary right to propose to the Government the Directors of healthcare institutions providing the services that fall under the competence of the Clinic Centre and the Public Health Institute, as there are no criteria to be met by the candidates nor the requirement to have a public vacancy procedure.

Moreover, the same norm gives the Minister the discretionary right to appoint the Directors of other healthcare institutions as well since, apart from the general requirements regulated by the Law on Labour and those included in the Rulebook on Systematisation that must be met by the candidates for the positions of Director of any of these institutions, there are no other criteria for evaluating and selecting the best candidates based on their curriculum vitae *and past work results.*

This is especially relevant given that it concerns a public sector identified by both the Action Plan for Chapter 23 and the Operational Document as an area of particular risk as far as corruption is concerned.

A Director of a healthcare institution shall be appointed for a period of four years and may have maximum two consecutive terms of office. *This provision is not clear enough, as it fails to specify what is meant by two consecutive terms of office. One plausible interpretation could be that it refers to two consecutive terms of office in the same institution but it is also possible to take it as though meaning that more than two terms of office are permissible if the appointment concerns two different institutions. This raises the question of how the terms of office should be calculated in the event of further amendments to the Law (specifically, whether in such a case the ongoing term should be considered as the first term of office of the sitting Director) thus,* de facto*, leaving the possibility for the same person to act as a Director for more than the legislated two terms of office (eight years). It also creates a dilemma over whether it is even justifiable to limit the number of terms of office for the Directors if the persons upholding such positions have displayed the professional and organisational qualities and produced the type of outputs that prove them appropriate for the job.*

Article 90 of the Law stipulates that the rights, obligations and responsibilities of the persons working in healthcare institutions shall be subject to general labour regulations, giving raise to the conclusion that the **employment of healthcare professionals** and healthcare associates should also be subject to the Labour Law.

The Law does not provide any special procedures for the recruitment of healthcare professionals and associates, i.e. it does not stipulate any procedural or other specific requirements that have to be met (other than those regulated by the Systematisation Rulebook).

This issue was brought up in the Opinion of the Agency for Prevention of Corruption from April 2017, wherein the Agency analyses compliance of the recruitment procedure with the Law on Labour and the Law on Employment, as well as the entitlement to unemployment benefits. In specific, the Opinion states that, *'lack of clear criteria concerning the public sector employment procedure makes it possible to threaten the public interest and may undermine the integrity, equal treatment and transparency of the procedure. Moreover, the Agency provides for further consideration the amendments to the Law on Labour introducing legal grounds for the adoption of bylaws that would define the public sector recruitment procedure and requirements, i.e. an obligation to set the procedure which would include mandatory verification of skills and evaluation of candidates for public sector positions modelled after the solutions applied when appointing civil servants and other civil service employees (Regulation on the methodology of mandatory verification of skills, detailed criteria and the procedure for evaluating the candidates for public service positions).'*

Furthermore, the Law makes a distinction between healthcare professionals and healthcare associates.

Bearing in mind the fact that both of these categories are hired by healthcare institutions, i.e. that their rights and obligations (including the right to specialisation) stem from the given employment contracts, the Agency finds it necessary to specify (list, if possible) what exactly constitutes a healthcare associate.

CONCLUSIONS AND RECOMMENDATIONS:

- Considering the matter of establishing the administration and management bodies of healthcare institutions, as well as the recruitment of healthcare professionals and associates in line with the Law on Health Care, the Agency for Prevention of Corruption points out that the insufficient precision of those norms, lack of transparency and excessive discretionary rights with regards to certain procedures could pose a threat to the public interest.

Based on this, the Agency recommends as follows:

- When preparing amendments to the Law, the drafters should consider using a different technique to define the subject matter of Article 70 of the valid Law in order to remove any inconsistencies and doubts that the Boards of Directors as management bodies of healthcare institutions are **more an exception than the rule** as may be construed from the said Article.

- In relation to Article 71 (4), one should consider the possibility of making the **involvement of representatives of non-governmental organisations as members of the Boards of Directors mandatory** and defining their candidacy and selection in more detail, should the legislator wish to make the composition of the Boards of Directors more specific in this way.

- It is recommendable to define in detail the legal norms pertaining to the **selection, composition and dismissal of the members of Boards of Directors** of the healthcare institutions providing the services that fall under the competence of the Montenegro Clinic Centre and the Public Health Institute.

- It is recommendable to define the criteria for the **appointment and dismissal of Directors of the healthcare institutions** providing the services that fall under the competence of the

Montenegro Clinic Centre and the Public Health Institute, as well as of other healthcare institutions in the Law in order to reduce discretionary rights of the founders.

- It is recommendable to consider making the legal norms pertaining to the **requirements for the recruitment of healthcare professionals and associates** more precise, i.e. adopting a bylaw to regulate mandatory verification of skills and stipulate the criteria for evaluation of candidates for the subject positions.

- Lastly, it is advisable to **define the category of healthcare associates more precisely**, given the fact that they, as a category with no formal medical training, are employed by healthcare institutions and gain all the related rights and obligations under the law.

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