

OPINION

on the need for changes and amendments to Amendment 12 of the Law on Prevention of Corruption (Official Gazette of Montenegro, no. 53/14)

Article 12 of the Law on Prevention of Corruption tackles some of the issues related to “Limitations with regards to execution of public functions”. In addition to scope of these limitations, its application depends on the definition of the public official from Article 3 of this Law.

The Law on Prevention of Corruption in Article 3 provides a definition of a public official, with description of criteria based on which public functions are identified, but without an exhaustive list of public functions to which it refers.

Since regulation of the conflict of interest through laws started in Montenegro, none of the relevant legal texts provided exhaustive list of public functions (Law on Conflict of Interest, Official Gazette of Montenegro, no. 42/2004, 12/2005, and 17/2005 and Law on Prevention of Conflict of Interest, Official Gazette of Montenegro, no. 1/2009, 41/2011, 47/2011 and 52/2014).

Looking at how the institute of public official is regulated elsewhere in the region, Serbia’s Law on Anti-corruption Agency identifies a public official in the same way, while Croatian Law on Prevention of the Conflict of Interest provides for an exhaustive list of public officials and additionally in Article 3, Paragraphs 2 and 3, stipulates descriptive criteria for other categories of public officials and civil servants not covered by Paragraph 1 of the same Article.

Comprehensive definition of the public official was required under a number of international assessments and reports, in the process of drafting the Law on Prevention of Corruption in Montenegro. Since 2004 and adoption of the Law on Conflict of Interest, there were repeated requests for harmonisation of local regulation with United Nations Convention against Corruption (UNCAC), in the part concerning the definition of public function. (Report by expert Drago Kos: Project title: Support to implementation of the anti-corruption strategy and AP (Project: MN 10 IB JH 03, short term mission: support to creation of Law on Prevention of Corruption: *"Where possible, the definitions in Law should be brought in line with definitions used in international instruments signed and ratified by MNE. For example the UNCAC Convention has a definition of what a public official is"*).

In addition, AP for Chapter 23 in the Measure 2.1.2.1 provides for analysis focused on assessment as to which extent are provisions of the Law on Prevention of Conflict of Interest harmonised with international standards, in particular when it comes to definition of a public official.

Therefore, through the process of regulating the definition of a public official through law up until our regulation was adopted, the definition was only expanded.

Definition of the public official from Article 3 was deemed harmonised with international standards by the EU experts, when the law was in process of being adopted.

On the other hand, in the part of the law regulating limitations to execution of the public functions, our law does not prohibit dual public function (as provided for in the Serbia's Law on Anti-corruption Agency in Article 28); however, it does in individual articles of the law provide for prohibitions and limitations regarding enterprises and other legal entities.

In situations stipulated under Article 12, Paragraph 2 and 4, whereby some categories of public officials are allowed to execute more than one public function, they are not allowed to earn remuneration or income based on that.

According to the assessment, the definition of public official was harmonised with the international standards and the coverage of the limitations set for the public officials refers to all possible categories of public officials (other than exceptions from Article 12, Paragraph 2 and 4).

It is important to note that in comparison with the expansion of the application of the limitations for public officials, the Law on Prevention of Corruption went a step further in comparison to the Law on Prevention of Conflict of Interest since the limitations introduced in this article concerning primarily execution of public functions in public enterprises and public institutions are expanded to councillors in the same way as was relevant for representatives. Prohibition of compensations for exceptions identified in Paragraphs 2 and 4 of the same Article was equally important novelty.

Formulation concerning "other legal entity" is a point that has been creating a issue with application of Article 12, Paragraph 1. In particular looking at the title of the same article, which undoubtedly stipulates that the intention was to limit execution of public functions in public enterprises and public institutions, and if we look at Article 11, Paragraph 1, which restrictively (since it includes the category of authorised representative) introduces prohibition to manage and run all enterprises.

The second question that was raised through practice recently, regarding application of Articles 11 and 12 of the Law on Prevention of Corruption, is the same scope of prohibitions for all categories of public officials, i.e. an attempt to introduce for certain categories of public officials smaller scope of prohibitions in comparison with others (the issue was particularly relevant for councillors in the local parliaments).

Possible exclusion of certain categories of public officials from limitations identified in the law would mean introduction of different categories of public officials, i.e. setting up an exhaustive list to exclude certain categories from certain prohibitions. Under current circumstances, such solution would mean taking a step back in terms of how the definition evolved from 2004 onwards.

If for certain categories of public officials, certain options would be introduced in terms of second public function, obligation for filing reports on property and income would have to remain in force, since enabling second public function would create the risk and possibility of using the second function for inappropriate gains.

Montenegro is currently in the process of EU integration, under which harmonisation of its definition of public official and limitations relevant to execution of public function will be subject to negotiations and assessments by EC representatives, in the way as it was done since the beginning of negotiations in 2012. Due to the above, possible changes to definition of public official and limitations relevant to them, would require a wider consensus among national policy makers and international partners in this process. Particularly in view of the recommendations and opinions addressed to Montenegro by GRECO through a total of IV cycles of assessment of the conditions against the criminal justice and citizens rights under the Convention of the Council of Europe¹ and the finding that Law on Prevention of Corruption received in the part regarding definition of the public official it received from EU experts prior to its adoption.

With regards to application of Article 12, we would like to refer to the Opinion regarding application of Article 12 of the Law on Prevention of Corruption, which the Agency adopted in May 2016, seeking to avoid possibly complicated terminology of the article. The aim of this opinion was to highlight importance of uniform application of prohibitions or limitations, with regards to the same categories of public officials in the same or similar situations. This is essential for reputation of an institution and legal certainty of its tax-payers.

RECOMMENDATIONS:

- In case of possible changes to the Law on Prevention of Corruption, the option of different legal methodology should be considered for defining of limitations for public officials, i.e. using positive formulations for allowing execution of only one public function with provided exemptions from that.
- Article 12, Paragraph 1, remove the following: “or other legal person” since the same prohibition is provided for in Article 11, Paragraph 1, while the intention of Article 12 is to identify limitations in terms of public enterprises and public institutions.
- Any possible changes to definition of public official would require wider consensus of sectors in charge of creation of anti-corruption policies, in cooperation with international partners.

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¹ Excerpt from GRECO report on I and II assessment of Montenegro regarding the area of conflict of interest:

“...Furthermore, the law allows for the politicians at the highest level, members of the Government and other high officials, to be board members of the enterprises with majority state and municipal capital and at the same time negotiate about privatisation of the state property on behalf of the state. According to GRECO assessment team, this situation could cause a serious conflict of interest and at the same time they recommend undertaking legislative and other measures to ensure that all public officials and civil servants are prohibited from using their membership in boards of public enterprises for inappropriate gains for themselves or related persons...”