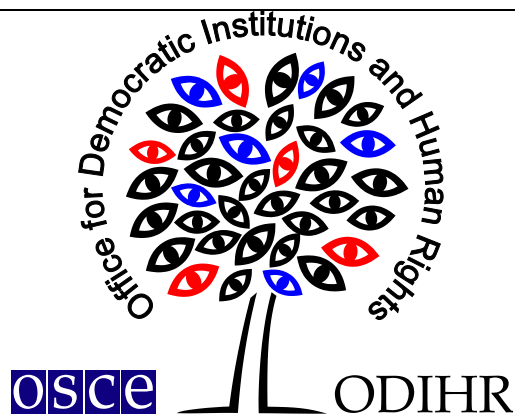


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## **OPINION ON THE LAW ON PREVENTION OF CORRUPTION OF MONTENEGRO**

**based on an unofficial English translation of the Law on Prevention of Corruption  
provided by the Agency for Prevention of Corruption**

*This Opinion has benefited from contributions made by Drago Kos, Independent Expert*

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*This Opinion is also available in Montenegrin.  
However, the English version remains the only official version of the document.*

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### Annex: Law on Prevention of Corruption

## **I. INTRODUCTION**

1. *On 20 July 2018, the OSCE Mission to Montenegro forwarded a request by the President of the Anti-Corruption Committee of the Parliament to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) for a legal review of the Law on Prevention of Corruption (hereinafter “the Law”).*
2. *On 10 August 2018, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Law with OSCE commitments and international human rights standards.*
3. *This Opinion was prepared in response to the above request.*

## **II. SCOPE OF REVIEW**

4. The scope of this Opinion covers only the Law on Prevention of Corruption, submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework governing the prevention of and fight against corruption in Montenegro.
5. The Opinion raises key issues and provides indications of areas of concern. In the interests of conciseness, the Opinion focuses more on those provisions that require improvements rather than on the positive aspects of the Law. The ensuing recommendations are based on international standards and practices related to the prevention of and fight against corruption. The Opinion will also seek to highlight, as appropriate, good practices from other OSCE participating States in this field.
6. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women<sup>1</sup> (hereinafter “CEDAW”) and the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the Opinion analyses the potentially different impact of the Law on women and men.<sup>2</sup>
7. This Opinion is based on an unofficial English translation of the Law provided by the Agency for the Prevention of Corruption, which is attached to this document as an Annex. Errors from translation may result. This Opinion is also available in Montenegrin. However, the English version remains the only official version of the document.
8. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on the respective legal acts or related legislation of Montenegro that the OSCE/ODIHR may wish to make in the future.

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<sup>1</sup> *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Montenegro is a State Party to this Convention since 23 October 2006.

<sup>2</sup> See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), available at <http://www.osce.org/mc/23295?download=true>.

### **III. EXECUTIVE SUMMARY**

9. At the outset it should be emphasized that many aspects of the Law on Prevention of Corruption adhere to international standards in this area and, while the ultimate success of the Law depends on its implementation, the Law in many ways represents an effective tool in the prevention of and the fight against corruption. Any future amendment of the Law should be undertaken carefully and ensure that the legal framework currently in place is not weakened. That being said, there are several ways in which the law could be enhanced to close existing loopholes, in particular, to safeguard the autonomy and independence of the Agency for Prevention of Corruption, the protection of whistleblowers and ensuring that definitions throughout the Law do not leave gaps which could end up weakening the entire anti-corruption legislative framework.
10. More specifically, and in addition to what is stated above, OSCE/ODIHR makes the following recommendations to further enhance the Law:
  - A. To complement the definition of “conflict of interest” in order for it to also apply to an appearance of a conflict of interest and to prohibit sponsorships or donations which appear to affect the legality, objectivity and impartiality of work of the authority; [par 16]
  - B. To fully implement GRECO’s Recommendation ii and find a similar solution for councilors to ensure sudden conflicts of interest are disclosed; [par 17]
  - C. To include a thing, right, benefit or service acquired without adequate compensation and loans granted at advantageous conditions or for free within the definition of “gift”; [par 19]
  - D. To explicitly include lobbying as an activity for which a cooling-off period is prescribed pursuant to Article 15 of the Law; [par 25]
  - E. To remove from the Law the authority of the Anti-Corruption Ministry to prescribe internal rules and procedures to the Agency for Prevention of Corruption to ensure that the Agency has full operational independence; [pars 26-32]
  - F. To provide a Council Member or Director faced with a dismissal the possibility to appeal this decision in an administrative procedure; [pars 34-35].
  - G. To supplement the Law with recourse that the Agency for Prevention of Corruption can take in cases where authorities, natural and legal persons referred, fail to act within the period and in the manner referred to in Article 35 par 3 and do not notify the Agency for Prevention of Corruption about their reasons for not doing so; [pars 38-39]
  - H. To ensure that reports from whistleblowers, which do not indicate corruption but point to other forms of unethical/illegal activities or behaviour, are referred by the Agency for Prevention of Corruption to the responsible public bodies; [par 43] and
  - I. To prohibit a public official from concluding a contract on provision of services with an authority, company or other legal person, which, while not having contractual relation with the specific authority in which the public official exercises his/her function, enters into contractual relations with or performing tasks for other public authorities [pars 46-47].

*Additional Recommendations, highlighted in bold, are also included in the text of the opinion.*

#### IV. ANALYSIS AND RECOMMENDATIONS

##### 1. International Standards on Anti-Corruption

11. The most prominent anti-corruption standards on a global level derive from the United Nations Convention against Corruption<sup>3</sup>. The Council of Europe's Criminal Convention on Corruption<sup>4</sup>, the Civil Law Convention against Corruption<sup>5</sup> and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime<sup>6</sup> are standard-setting regional conventions.
12. These standards are also contained, reiterated and expanded in a number of soft-law standards, including the United Nations Declaration against Corruption and Bribery in International Commercial Transactions<sup>7</sup>, UN General Assembly Resolution 51/59 on Action against Corruption,<sup>8</sup> Council of Europe Committee of Ministers Recommendation (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption,<sup>9</sup> Recommendation CM/Rec(2017)2 on the legal regulation of lobbying activities in the context of public decision making<sup>10</sup> as well as Council of Europe Recommendation (2000)10 on Codes of Conduct for Public Officials.<sup>11</sup>
13. At the OSCE level, the fight against corruption is an integral part of the commitments undertaken by OSCE participating States, as underlined most recently in the 2012 OSCE Ministerial Council's Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism.<sup>12</sup>
14. Standards specific to anti-corruption agencies or authorities can be found in the Jakarta Statement on Principles for Anti-Corruption Agencies<sup>13</sup> (hereinafter "Jakarta

<sup>3</sup> UNGA Res 58/4, *United Nations Convention against Corruption* (hereinafter "UNCAC"), adopted 31 October 2003, entered into force 14 December 2005, GAOR 58th Session Supp 49 vol 1, 4. Montenegro is a State Party to the UNCAC since 23 October 2006 (by succession).

<sup>4</sup> *Criminal Law Convention on Corruption*, adopted on 27 January 1999, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=173&CM=8&DF=2/20/2008&CL=ENG>; Montenegro acceded to the Convention on 18 December 2002; see also the *Additional Protocol to the Criminal Law Convention on Corruption*, adopted on 15 May 2003, ratified by Montenegro on 17 March 2008, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=191&CM=8&DF=2/20/2008&CL=ENG>

<sup>5</sup> *Civil Law Convention against Corruption*, adopted on 4 November 1999, ratified by Montenegro on 28 January 2008, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=174&CM=8&DF=2/20/2008&CL=ENG>.

<sup>6</sup> *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, adopted on 8 November 1990, ratified by Montenegro on 9 October 2003, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=141&CM=8&DF=2/20/2008&CL=ENG>.

<sup>7</sup> *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, A/RES/51/191, 86th plenary meeting 16 December 1996, available at <http://www.un.org/documents/ga/res/51/a51r191.htm>.

<sup>8</sup> *UN General Assembly Resolution 51/59 on Action against Corruption*, A/RES/51/59, adopted on 12 December 1996, available at <http://www.un.org/documents/ga/res/51/a51r059.htm>.

<sup>9</sup> Council of Europe Committee of Ministers, *Resolution (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption* (hereinafter "Twenty Guiding Principles in the Fight Against Corruption") of 6 November 1997, available at <https://wcd.coe.int/ViewDoc.jsp?id=593789>.

<sup>10</sup> Council of Europe Committee of Ministers, *Recommendation CM/Rec(2017)2 on the legal regulation of lobbying activities in the context of public decision making* of 22 March 2017, available at <https://rm.coe.int/legal-regulation-of-lobbying-activities/168073ed69>.

<sup>11</sup> Council of Europe Committee of Ministers, *Resolution (2000)10 of the Committee of Ministers to Member states on codes of conduct for public official* (hereinafter "Resolution (2000)10") of 11 May 2000, available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805e2e52](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2e52) and Appendix (*Model Code of Conduct for Public Officials*; hereinafter "CoE Model Code"); see also its Explanatory Memorandum, available at <https://rm.coe.int/1680534424>.

<sup>12</sup> OSCE Ministerial Council, *Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism*, 7 December 2012, available at <http://www.osce.org/cio/97968?download=true>.

<sup>13</sup> *Jakarta Statement on Principles for Anti-Corruption Agencies*, 26-27 November 2012, available at [https://www.unodc.org/documents/corruption/WG-Prevention/Art\\_6\\_Preventive\\_anti-corruption\\_bodies/JAKARTA\\_STATEMENT\\_en.pdf](https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf). These principles were developed at a conference organized in Jakarta, Indonesia

- Principles”) and the Anti-Corruption Authority Standards (hereinafter the “EPAC Standards”) and Ten Guiding Principles against Corruption (hereinafter “EPAC Principles”) of the European Partners against Corruption (hereinafter “EPAC”), an independent forum for practitioners aiming to prevent and combat corruption.<sup>14</sup>
15. Throughout the opinion, reference will be made to reports issued by the Council of Europe’s Group of States against Corruption (hereinafter “GRECO”)<sup>15</sup> and previous OSCE/ODIHR legal opinions which deal with the subject of anti-corruption.<sup>16</sup>

## 2. Analysis of the Law

### 2.1. Conflicts of Interest

16. Article 7 par 2 defines a conflict of interest as private interest, which “affects or may affect the impartiality of the public official in the exercise of public function”. However, it is not enough if public officials function objectively to pursue the public interest, they also have to be seen as such. **Therefore, it is an international standard that also the appearance of a conflict of interest be avoided and should fall within the ambit of the Law.**<sup>17</sup> Similarly, Articles 21 par 2 and 22 par 2 of the Law only prohibits sponsorships and donations which “affect or could affect the legality, objectivity and impartiality of work of the authority”. Similar to the recommendation made regarding Article 7 of the Law, also sponsorships and donations, which *appear* to affect the legality, objectivity and impartiality of work of the authority, shall be prohibited.
17. Members of parliament and (local) councillors are not obliged to disclose their conflict of interest situations (Article 8 par 2 of the Law). It is unclear why such an exemption would be necessary. GRECO recommended that “a requirement of ad-hoc disclosure should be introduced when a conflict emerges between the private interests of individual members of parliament and a matter under consideration in parliamentary proceedings.”<sup>18</sup> This recommendation has been revisited in the recent GRECO Compliance Report on Montenegro. While it is welcome that, as the authorities report, “Code of Ethics for MPs states that an MP shall act solely in the public/general interest while performing his/her duties and cannot act in his /her private interests, or in the interests of individuals or groups of individuals, with the purpose of obtaining direct or indirect benefits”<sup>19</sup> and the recently adopted 2017 Guidelines for Good Practice of MPs stress the obligations of members of parliament to report any conflict of interest prior to

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on 26-27 November 2012 for this purpose, which was attended by current and former heads of anti-corruption agencies, anticorruption practitioners and experts from around the world. The event was organized by the Corruption Eradication Commission of Indonesia, the United Nations Development Programme (hereinafter “UNDP”) and the United Nations Office on Drugs and Crime (hereinafter “UNODC”).

<sup>14</sup> Available at [https://www.iaca.int/images/sub/activities/EPAC/EPAC\\_Handbook.pdf](https://www.iaca.int/images/sub/activities/EPAC/EPAC_Handbook.pdf) (the EPAC Guiding Principles can be found in the annex to the EPAC Standards).

<sup>15</sup> E.g. GRECO, *Fourth Evaluation Round, Corruption prevention in respect to members of parliament, judges and prosecutors – Compliance Report Montenegro* (hereinafter “GRECO Compliance Report”) (18 October 2017), available at <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16807af20f>; GRECO, *Corruption prevention in respect of members of parliament, judges and prosecutors - Evaluation Report Montenegro* (19 June 2015), available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c983a>.

<sup>16</sup> E.g. OSCE/ODIHR *Opinion on Two Draft Anti-Corruption Laws of Ukraine* (hereinafter “2014 OSCE/ODIHR Ukraine Opinion”) (18 July 2014) available at <http://www.legislationline.org/documents/id/19137>; OSCE/ODIHR *Opinion on the Law on the Bureau on Prevention and Combating of Corruption of Latvia* (hereinafter “2014 OSCE/ODIHR Latvia Opinion”) (17 November 2014), available at <http://www.legislationline.org/documents/id/19392>.

<sup>17</sup> E.g. see op. cit. footnote 11, Article 13: “Conflict of interest arises from a situation in which the public official has a private interest which is such as to influence, or appear to influence, the impartial and objective performance of his or her official duties.” (CoE Model Code).

<sup>18</sup> See op. cit. footnote 15, Recommendation ii, p. 12 (GRECO Evaluation Report).

<sup>19</sup> See op. cit. footnote 15, p. 3 (GRECO Compliance Report).

participating in debates, it remains that no such obligation to report an occurring conflict of interest has been included in primary legislation. For these reasons, the GRECO Compliance Report also finds that this particular recommendation has not yet been addressed.<sup>20</sup> The same issue applies to councillors. **Therefore, it is recommended to fully implement GRECO's Recommendation ii and find a similar solution for councillors to ensure sudden conflicts of interest are disclosed. Keeping in mind prominent position of members of parliament and councillors in a democratic society and the fact that, as elected representatives, for the period of their mandate, they cannot be replaced on an ad hoc basis, the modalities and circumstances for reporting a conflict of interest of a member of parliament or councillor might differ from general rules, applicable for other public officials.**

18. "Persons related to public officials" according to Article 6 par 4 of the Law are "relatives of a public official in straight line and to the second degree in lateral line, a relative by marriage to the first degree, married and common-law spouse, adoptive parent or adopted child, member of a household, other natural or legal person with which the public official establishes or has established a business relationship." This definition is too narrow as it is equally important and in line with Council of Europe Recommendation No. R (2000) 10 of the Committee of Ministers to Member states on codes of conduct for public officials, to also **cover persons with which the public officials had or has political relationship.**<sup>21</sup> **It is recommended for the Law to be amended accordingly.**

## *2.2 Gifts*

19. A gift in Article 6 par 5 of the Law is defined as "a thing, right or service acquired or performed without compensation". **This definition is not sufficient as a gift is also a thing, right, benefit or service acquired without adequate compensation (e.g. at a large discount). Additionally, it would be useful for the Law to explicitly state that loans granted at advantageous conditions or loans that are written off by the creditor would fall under the definition of "gift."** **It is recommended for the Law to be amended accordingly.**
20. The group of persons related to a public official upon whom the Law in Article 16 par 5 poses limits on accepting gifts is too narrow. It merely includes those living in the public official's household, which constitutes a loophole for misuse. **The Law should expand the limitations on accepting gifts in connection with the public official or the exercise of public function to spouses and children of the public official who are not living in his or her household.**<sup>22</sup>
21. Articles 17 and 18 of the Law regulate the refusal of gifts and their disposal respectively. If a public official is offered a gift he or she shall not accept it, he or she is obliged to refuse it and, within eight days of the offer, submit a report on the offer to the authority in which he or she exercises a public function. This provision is in line with international standards. Equally, it is welcome that Article 17 par 3 acknowledges there are situations in which the public official might not be able to refuse the gift or return it to its donor. In these situations, the public official shall hand over the gift to the authority for which he or she works. The same is true pursuant to Article 18 par 2 of the Law, when it is later determined that the gift an official already accepted is of a greater

<sup>20</sup> Ibid.

<sup>21</sup> See footnote 11, Article 13 par 2: "The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organizations with whom he or she has had business or political relations. It also includes any liability, whether financial or civil, relating thereto" (CoE Model Code).

<sup>22</sup> Ibid, Article 18.

value than the one indicated as appropriate for the official to keep in Article 16 par 4 (gifts up to EUR 50). Equally, a public official has to hand over a gift after the Agency for Prevention of Corruption determined that it was received contrary to the Law (Article 20 par 2 of the Law). **However Articles 17 par 3, Article 18 par 2 and 20 par 2 of the Law all lack a time limit which is crucial for the enforcement of the provisions in question. The lawmakers should add to the mentioned provisions a set time limit (e.g. a limit of eight days similar to the deadline until which a public official has to submit a report on a gift he or she should not have received) for handing over the received gift.**

#### *2.4 Assets and Income Declaration*

22. According Article 23 par 1 and Article 24 of the Law, public officials are obliged to submit to the Agency for Prevention of Corruption a report on assets and income for themselves and for their married or common-law spouses and children, if they live in the same household. Obliging public officials to report on their income and assets is generally accepted standard in the majority of countries engaged in anti-corruption preventive measures. Equally, in order to detect misuse and close loopholes which might facilitate corruption, persons related to a public official can be required to report on their assets and income.
23. Article 24 par 3 of the Law outlines the data on assets and income that the public official and his or her family members are required to submit. **In order to guarantee that the information submitted to the Agency for Prevention of Corruption is relevant and that the Agency is able to process the submitted information in a timely, efficient and meaningful manner, it is suggested that some parts of Article 24 par 3 of the Law could be clarified. Bullet point 3 of Article 24 par 3 of the Law could be rephrased as “Ownership rights over the immovable and movable assets of a company, institution or other legal person established or directly or indirectly owned by the public official”. In addition, in order to avoid the Agency for Prevention of Corruption’s resources being too overstretched to process and evaluate reports in an efficient and timely manner, a value threshold in bullet-points 3, 4 and 5 of Article 24 par 3 could be introduced.**
24. Lastly according to Article 30 par 4 of the Law, “[t]he Agency shall carry out verification of the data from the Reports according to the annual plan of verification for a certain number of public officials and categories of public officials.” Although such a limitation often appears in many countries with similar systems in place, it opens up possibilities for misuse or for the appearance of misuse. **Therefore, ideally, data from all reports should be verified with the use of electronic tools. As an alternative, the Law could provide for the annual plan of verification to stipulate that all public officials’ reports will be checked on a reoccurring and rotating basis. The annual plan of verification used as the basis for reviewing the report should be internal and confidential.**

#### *2.5 Restriction for a former Public Official upon Termination of Public Function*

25. Article 15 of the Law establishes certain restrictions within a two-year period after termination of a public function. It is welcome that the article includes a comprehensive list of activities which a former public official has to refrain from within this cooling-off period. While certain aspects of it could potentially be subsumed under one of the



alternatives of Article 15 of the Law already, **it is recommended for the article to explicitly include lobbying as a prohibited activity.** Lobbying is defined as “promoting specific interests by communication with a public official as part of a structured and organised action aimed at influencing public decision making.”<sup>23</sup> The Appendix to Recommendation CM/Rec(2017)2 in Guiding Principle H on “public sector integrity” recommends a cooling off period “before either a public official may become a lobbyist after leaving public employment or office, or a lobbyist may become a public official after ceasing lobbying activities.”<sup>24</sup>

### ***2.6 The Role of the Agency for Prevention of Corruption as an Autonomous and Independent Body***

26. Chapter V of the Law establishes the Agency for Prevention of Corruption. The Agency has two bodies, the Council of the Agency and the Director (Article 81 of the Law). The Council consists of five members that are elected by the Parliament on the proposal of the working body responsible for anti-corruption affairs (Article 82 of the Law). The Director of the Agency is elected by the Council on the basis of public competition (Article 91 of the Law). The responsibilities of the Council and the Director are spelled out in Article 88 and Article 92, respectively.
27. As a general note, in order to properly execute its important functions, additionally to the details already enshrined in Article 95 on Financing of the Agency for Prevention of Corruption the public funds provided for the operation of the Agency for Prevention of Corruption should come from a separate budget line marked for their purpose.
28. The Law establishes the Agency for Prevention of Corruption as an “autonomous and independent body”. The independence of the Anti-Corruption Agencies is the cornerstone of the prevention of and fight against corruption. Article 6 par 2 and Article 36 of the UNCAC state that “[e]ach State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence.” Guiding Principle 3 of the Twenty Guiding Principles for the Fight Against Corruption states “to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations”.<sup>25</sup> The EPAC Standards highlight further that “[i]ndependence must be understood as enabling the ACA to perform its functions without undue influence. Independence is a key element for establishing and safeguarding the overall credibility of the ACA. There are several aspects to independence, which include political independence, functional and operational independence, as well as financial independence.”<sup>26</sup> Operational independence means the ability to take decisions within one’s sphere of competence without undue

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<sup>23</sup> Appendix to CoE Recommendation CM/Rec(2017)2 to regulate lobbying of the Committee of Ministers to member States on the legal regulation of lobbying activities in the context of public decision making; “Guiding principles on devising policy at national level”, available at <https://rm.coe.int/legal-regulation-of-lobbying-activities/168073ed69>, p 7.

<sup>24</sup> Ibid, par 17.

<sup>25</sup> See op. cit. footnote 9 (Twenty Guiding Principles in the Fight Against Corruption).

<sup>26</sup> Ibid p. 15. (“Independence”) (Twenty Guiding Principles in the Fight Against Corruption).

- interference from other actors.<sup>27</sup> While internal accountability is a key principle of the Jakarta Principles and anti-corruption agencies require administrative rules and internal procedures, the Principles also reiterate the “vital need” for independence of anti-corruption agencies.<sup>28</sup> In line with Articles 6 par 2 and 36 of the UNCAC, the Jakarta Principles highlight that “ACAs shall develop and establish clear rules and standard operating procedures, including monitoring and disciplinary mechanisms, to minimize a misconduct and abuse of power by ACAs”.<sup>29</sup>
29. The Law, however, interferes with the autonomy of the Agency for Prevention of Corruption to set its own administrative rules on several occasions. In Article 22 par 5 of the Law it is the Ministry in charge of anti-corruption (hereinafter “Ministry”) that prescribes the manner of keeping the register of sponsorships and donations and the content of the relevant reports of the authorities.
  30. Pursuant to Article 26 par 4 of the Law the Ministry determines the manner of entering information from the Report to the Register, as well as the content and manner of keeping the Register. The same problem can be identified in article 49 par 3 of the Law.
  31. The same problem reappears in Article 97 par 4 of the Law which provides the Anti-Corruption Ministry with the powers to prescribe the form and content of the official identity cards that the Director and the authorized officers of the Agency for Prevention of Corruption need in order to perform their duties and enforce their powers.
  32. Diminishing the influence that outside bodies such as ministries have in the work of the anti-corruption body has been one of the key concerns of previous OSCE/ODIHR legal opinions and the subject of recommendations thereto.<sup>30</sup> The rationale behind the said articles in the Law, which open the doors to outside interference into the work of the Agency for Prevention of Corruption is not clear. **The Law should be adamant that the Agency for Prevention of Corruption has the operational independence to adopt its own internal rules and procedures. Hence, the above-mentioned articles should be amended to remove the authority of the Anti-Corruption Ministry to prescribe the manner in which the Agency for Prevention of Corruption keeps or handles its records and other evidence.**
  33. Additionally, Article 18 par 4 of the Law states that “the manner of disposal of gifts referred to in paragraph 1, 2 and 3 of this Article, the manner of keeping records of gifts, as well as other issues relating to restrictions regarding the acceptance of gifts in connection with the exercise of public functions shall be prescribed by the Ministry.” **The meaning of “other issues relating to restrictions regarding the acceptance of gifts in connection with the exercise of public functions” is not entirely clear and could be further defined. Moreover, referring to what has been said in pars 26-31, it needs to be ensured that these instructions do not negatively affect the independence and autonomy of the Agency which, pursuant to Article 19 of the Law, examines the records of gifts submitted by public authorities.**
  34. Article 87 of the Law spells out the reasons for a dismissal of a member of the Council but it lacks details on the procedure of the Council to be used in the process of determination of reasons for dismissal.
  35. Additionally, the Law does not provide any recourse to a member to appeal a decision in which the Council determined that a reason for dismissal referred to in Article 87 par

<sup>27</sup> See op. cit. footnote 15, par 17 (2014 OSCE/ODIHR Latvia Opinion).

<sup>28</sup> Preamble, referring to resolutions 3/2, 3/3 and 4/4 adopted by the Conference of the States Parties of the UNCAC at its third and fourth sessions that acknowledge the “vital importance of ensuring the independence and effectiveness” of ACAs.

<sup>29</sup> See op. cit. footnote 13, p. 3 (Jakarta Principles).

<sup>30</sup> E.g. op. cit. footnote 16, Key Recommendation B and pars 19-26; 32-39 (2014 OSCE/ODIHR Ukraine Opinion); pars 17-20 (2014 OSCE/ODIHR Latvia Opinion).

1, bullet-points 2, 3 and 4 of the Article exists. The same is true for the provision which deals with the reasons for dismissal of the Director pursuant to Article 93 par 3 of the Law. **Similarly to Article 40 of the Law, which gives a public official the opportunity to initiate an administrative dispute against the final decision of the Agency for Prevention of Corruption, a Council member or Director faced with a dismissal should have the possibility to find recourse against this decision in an administrative procedure. The Law should be supplemented accordingly.**

### *2.7 Proceedings for Determining Violations of the Law*

36. Articles 31 to 43 of the Law outline the procedure for determining a violation of the provisions of the Law relating to the prevention of conflict of interest, restrictions on the exercise of public functions, gifts, sponsorships and donations and reports on income and assets of public officials. Requests for the start of such procedure can, according to Article 31 of the Law also be made by the authority in which the suspected public official is exercising or has exercised a public function. The Agency for Prevention of Corruption can also start procedures *ex officio*, on the basis of its own knowledge or anonymous requests (Article 31 par 2 of the Law).
37. In the case the proceedings are requested by an authority, or another legal or natural person, Article 32 specifies the form requests must take and the content they have to include. The content of the request for the initiation of the proceeding shall contain, inter alia, “the detailed facts on the violation of the provisions of this Law that are related to the prevention of conflict of interest in exercising public functions” according to Article 32 par 1 of the Law. **As the exact details of the violation may not always be accessible to applicants and since incompleteness of the request can lead to its rejection after the requester has been invited to amend or complement an insufficiently reasoned request, (according to Article 33 of the Law), it is recommended to amend Article 32 par 1 so that “relevant facts on the violation” suffice to request proceedings.**
38. The powers of the Agency for Prevention of Corruption in the determination of facts and circumstances are outlined in Article 35 of the Law. Pursuant to Article 35 par 3 of the Law, natural and legal persons are obliged to cooperate with the Agency for Prevention of Corruption and to submit requested data and information or make available documentation within the period and manner established by the Agency for Prevention of Corruption. According to Par 4 of the same article, natural and legal persons are obliged to notify the Agency for Prevention of Corruption on the reasons for their delay should they fail to act within the period provided to them by the Agency. This is welcome as an anti-corruption body “must have access to all necessary information, subject only to limitations or restrictions which are necessary in a democratic society, in order to conduct investigations into corrupt activities, identify and trace proceeds of corruption, research, understand and disseminate knowledge about and prevent corruption”<sup>31</sup>
39. **However, in order for the Agency for Prevention of Corruption to be able to efficiently perform its investigate function, in addition to existing measures in Article 35 par 5 of the Law (the possibility to submit a special report to Parliament and inform the public thereof), Article 35 would need to be supplemented with a course of action the Agency can resort to in cases where authorities, natural and legal persons, fail to act within the period and in the manner required by Article**

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<sup>31</sup> See op. cit. footnote 14 (“Accountability”) (EPAC Standards).

- 35 par 3 and do not notify the Agency for Prevention of Corruption about their reasons for not doing so.**
40. Article 36 par 2 of the Law introduces an obligation of the authorized officer to conduct a hearing, when this is requested by participants in the proceedings. **Since this might give rise to misuse and unnecessary prolongations of the proceedings, it might be advisable to state that the holding of a hearing lies within the sole discretion of the authorized officer (as described in Article 36 par 3 of the Law).**
41. It is crucial to ensure that the provisions in the Law are in line with the Code of Criminal Procedure ('CPC') of Montenegro.<sup>32</sup> While Article 37 par 1 states that the level of suspicion necessary for the Agency for Prevention of Corruption to submit a case to the prosecutor's office is "*osnovi sumnje*" (translated as "reasonable suspicion"), Article 254 of the CPC states "[p]ersons acting in an official capacity and responsible persons in state authorities, local governance authorities, public companies and institutions shall file charge for criminal offences, subject to prosecution by virtue of office, of which they have been informed or which they have learned while performing their office". It is unclear if this provision requires the same level of suspicion as Article 37 par 1 of the Law. Additionally, Article 57 of the Law on Prevention of Corruption, describing duties of the Agency for Prevention of Corruption and other organisations after dealing with the reports of whistleblowers, states that "[i]f, in the process of verification of allegations on a threat to public interest that indicates the existence of corruption, the head or the responsible person in authority, company, other legal person or entrepreneur, as well as the Agency, suspects that a criminal offense which is prosecuted *ex officio* has been committed [...], they shall submit the application with the gathered evidence to the competent state prosecutor without delay." **It is recommended to clarify whether all these provisions require the same level of suspicion to ensure that they do not contradict one another.**
42. **Finally, it is recommended that the Law explicitly states that the final decision in Article 38 par 3 of the Law shall be reasoned and that such reasoning shall be provided in writing.**

### *2.8 Protection of Whistleblowers*

43. Pursuant to Article 4 par 2 of the Law, a "whistleblower" for the purpose of the law is "a natural or legal person filing a report on a threat to public interest that indicates the existence of corruption."<sup>33</sup> Article 44 of the Law further defines threat to public interest as "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 action that is aimed at preventing such a violation from being discovered". These definitions are technically in compliance with international anti-corruption standards such as Article 33 of the UNCAC.<sup>34</sup> However, the Law could be enhanced further. First, while it is welcome that "threat to public interest" is defined very broadly, a person might not know when the issue they would like to report on does indicate corruption. As a consequence, they might not be sure they

<sup>32</sup> Criminal Procedure Code of Montenegro (2015) available at [www.legislationline.org](http://www.legislationline.org).

<sup>33</sup> On the issue of whistleblower protection, see Transparency International, *Whistleblower Protection and the UN Convention Against Corruption*, available at [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/libe/dv/ti\\_report/ti\\_report\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/ti_report/ti_report_en.pdf).

<sup>34</sup> Article 33 UNCAC states "[e]ach State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

fall within the ambit of the protection that the Law prescribes for whistleblowers and they might not report the issue at all. Second, if the Agency for Prevention of Corruption receives reports of illegal activities which do not fall within the ambit of the Law, the Agency is under no obligation to pass this information on to relevant bodies. **It would be useful for the prevention of corruption as well as protection of public interest, to encourage persons to come forward and, as a consequence, enhance the efficiency of the Law in question if reports from whistleblowers, which do not indicate corruption but point to other forms of illegal activities or behaviour, could be distributed by the Agency for Prevention of Corruption to the responsible public bodies. It is important that the legislation extends protection to whistleblowers in such cases.**

44. **It is unclear if Article 45 par 2 of the Law also covers the possibility to submit an application by telephone. It is suggested, that this is clarified in the Law and that this option is explicitly added.**
45. In general, Chapter III of the Law which deals with whistleblowers could be further enhanced with provisions regarding the whistleblower's right to inform the public about corruption and a provision on provisional protection of whistleblowers.

### *2.8 Contracts on Services and Business Cooperation*

46. Article 14 of the Law sets limits on contracts on services and business cooperation. The article contains several important limitations for public officials in the conclusion of contracts, as profit-making activities, with the exceptions already outlined in Article 9 of the Law, which could lead to serious conflicts of interests. **However, the article should also prohibit a public official from concluding a contract on provision of services with an authority, company or other legal person, which, while not having contractual relation with the specific authority in which the public official exercises his/her function, enters into contractual relations with or performs tasks for other public authorities.**
47. In such a case, the work of the public official in such authorities or companies can amount to serious instances of conflict of interest even if there are no contractual relations between those authorities/companies/legal persons and the authority in which the public official exercises his/her function. **A value threshold similar to the one in Article 14 par 2 of the Law could be introduced to allow such contracts in cases of minor value.**

### *2.9 Gender-Sensitive Language*

48. Finally, Article 5 of the Law is entitled "Use of Gender-Sensitive Language" and states "[t]he expression used in this Law to denote natural persons in the masculine gender shall equally apply to the feminine gender". In fact, this recognizes that the language used in the Law is non-gender sensitive, which should be rectified. **It is recommended to ensure that throughout the Law, both the male and female denominations and personal pronouns are used.**

*[END OF TEXT]*