Strasbourg, 21 May 2024 **CDL-PI(2024)008**

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

MONTENEGRO

URGENT OPINION

ON THE DRAFT LAW ON THE PREVENTION OF CORRUPTION

Issued on 21 May 2024 pursuant to Article 14a of the Venice Commission's Revised Rules of Procedure

on the basis of comments by

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Opinion co-funded by the European Union

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I. Introduction

1. By letter of 1 April 2024, the Minister of Justice of Montenegro, Mr Andrej Milović, requested an Urgent Opinion of the Venice Commission on the draft law on the prevention of corruption (CDL-REF(2024)013), along with other draft laws, indicating that Parliament planned to enact these draft laws urgently. On 29 April 2024, the Venice Commission received a revised draft law on the prevention of corruption (CDL-REF(2024)013rev) (hereinafter "the draft law") which forms the basis for this Opinion.

2. Mr Eirik Holmøyvik, Ms Verica Trstenjak, Mr Panayotis Voyatzis and Ms Elena Konceviciute acted as rapporteurs for this Urgent Opinion.

3. On 10 April 2024, the Bureau of the Venice Commission authorised the preparation of an Urgent Opinion, on the basis of Article 14a of the Commission's Revised Rules of Procedure.

4. On 29 and 30 April 2024, a delegation of the Commission composed of Mr Holmøyvik, Mr Voyatzis and Ms Konceviciute, accompanied by Ms Tania van Dijk from the Secretariat, held meetings in Podgorica with the Minister of Justice, members of Parliament (ruling majority and opposition parties), the Agency for the Prevention of Corruption and the President of the Administrative Court, as well as representatives of civil society organisations and of the EU (Delegation to Montenegro and DG NEAR). The Commission is grateful to the Montenegrin authorities and the Council of Europe Programme Office in Montenegro for the excellent organisation of this visit.

5. On 30 April 2024, the NGO "The Network for Affirmation of NGO Sector – MANS" provided comments on the draft Law. The Venice Commission is grateful for these comments and to all interlocutors for their input.

6. This Urgent Opinion was prepared in reliance on the English translation of the draft law. The translation may not accurately reflect the original version on all points.

7. Furthermore, this Urgent Opinion was drafted on the basis of comments by the rapporteurs and the results of the meetings on 29 and 30 April 2024. In line with paragraph 10 of the Venice Commission's Protocol on the preparation of Urgent Opinions (CDL-AD(2018)019), the draft Urgent Opinion was transmitted to the authorities of Montenegro on 20 May 2024 for comments. It was issued on 21 May 2024, pursuant to the Venice Commission's Protocol on the preparation of Urgent Opinions. It will be submitted to the Commission for endorsement at its 139th Plenary Session (Venice, 21-22 June 2024).

II. Preliminary remarks

8. The present request for an Urgent Opinion is linked to Montenegro's EU integration process and, in particular, the need to meet the interim benchmarks for Chapter 23 (Judiciary and Fundamental Rights) of the accession negotiations, before the Interim Benchmark Assessment Report (IBAR) is issued in June 2024. In parallel to submitting the request for an Urgent Opinion to the Venice Commission, the draft law was published on the website of the Ministry of Justice for public consultations.

9. With the exception of the provisions on whistleblowers, the draft law retains a large part of the provisions of the 2016 Law on the Prevention of Corruption currently in force (hereinafter: "the current Law"), as amended in 2017.[1] The current Law (and thus also the draft law) establishes the main corruption prevention rules for certain categories of persons working in the public sector. It is complemented by the Law on Lobbying and the Law on the Financing of Political Entities and

[1] Official Gazette of Montenegro 53/2014 and 42/2017

Election Campaigns, which contain additional responsibilities for the Agency for the Prevention of Corruption (hereinafter: "the Agency") set up pursuant to the current Law.

10. The current Law has over the years been subject to a series of analyses, including an 2018 opinion by OSCE/ODIHR[2], an EU Peer Review in 2021 and technical papers developed in the context of the EU/Council of Europe's Horizontal Facility for the Western Balkans in 2022 and 2023[3], in addition to the monitoring carried out by the Council of Europe's Group of States against Corruption (GRECO) and peer reviews under the umbrella of the UN Convention against Corruption, as well as analyses by civil society organisations. Where appropriate, this Urgent Opinion will draw on these analyses for those parts of the draft law which have not undergone substantial changes.

11. When it comes to the process of preparation of the draft law, the Venice Commission understands the reasons for the urgency (as mentioned above), but deeply regrets that a more thorough consultation and preparation process has not taken place. The Commission recalls that "*when adopting legislation on issues of major importance for society, such as criminal justice and the fight against corruption, wide and substantive consultations are a key condition for adopting a legal framework which is practicable and acceptable for those working in the field*".[4] Such consultations would have benefitted the quality of the draft law and would have likely created support for more in-depth improvements of the corruption prevention system, in particular given the remarkable similarities of the solutions offered by the abovementioned analyses. Therefore, as in the Venice Commission's previous opinions, the authorities are invited to ensure a comprehensive dialogue with major stakeholders and civil society at further stages of the legislative process.

12. Not every aspect of the draft law will be taken up in this Urgent Opinion. The Venice Commission will focus on what it considers the most important aspects of the draft law. The absence of remarks on other aspects of the draft law should not be interpreted as their tacit approval.

III. Analysis

A. Personal scope of the draft law

13. Similarly to the current Law, the draft law covers "*persons elected, that is appointed*[5] *in a state authority, state administration body, judicial authority, local self-government body, local government body, independent body, regulatory body, public institution, public enterprise or other company or legal person exercising public authority (…), as well as the persons whose election, appointment or assignment to a post subject to consent by an authority, regardless of the duration of the office and remuneration*" (Article 3, paragraph 1, draft law). Departing from the methodology

[2] OSCE/ODIHR (2018), Opinion on the Law on the Prevention of Corruption of Montenegro.

[3] Škrbec, J., *Technical Paper: Analysis of the parts of the Law on Prevention of Corruption which regulate the setup and functioning of the Agency for Prevention of Corruption*, ECDD-HFII-AEC-MNE-TP4-2022 (May 2022); Kalniņš, V., Škrbec, J., *Technical Paper: Analysis of the parts of the Law on Prevention of Corruption which regulate conflict of interest, restrictions in the exercise of public functions (incompatibilities of functions), asset declarations, gifts, donations and sponsorships*, ECCD-HFII-AEC-MNE-TP9-2022 (September 2022); Savage, A.C., *Technical Paper: A Review of the Legislative Framework of Montenegro on Whistleblower Protection*, ECCD-HFII-AEC-MNE-TP1-2023 (April 2023); Kalniņš, V., Škrbec, J., *Technical Paper: Analysis of the parts of the Law on Prevention of Corruption which regulate Integrity plans, and Administrative and Misdemeanour procedures,* ECCD-HFII-AEC-MNE-TP2-2023 (April 2023) – all developed within the EU/Council of Europe Horizontal Facility for the Western Balkans and Türkiye.

[4] Venice Commission, CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code, para. 39. Regarding the importance of prior consultations with the public and main stakeholders, see also CDL-PI(2021)003, Compilation of Venice Commission opinions and reports concerning the Law making procedures and the quality of the law.

[5] The draft law no longer mentions persons "assigned" to the various mentioned public authorities, but the Venice Commission was informed that this is a mistake in the translation.

of not providing a list of functions, pursuant to paragraph 2 of Article 3 "*notaries, public enforcement officers and bankruptcy administrators*" will now be explicitly included in the definition of a public official in the draft law. These professions already fell under an obligation to submit asset and income declarations under other legislation, but the Agency reportedly did not have the authority to check their asset and income declarations.[6] This is now being addressed in the draft law. It may however have been preferable not to include them in the definition of a public official as such, but - as will be outlined below - instead have specific provisions of the draft law apply to them.

14. It is clear that the definition of a public official in Montenegro is comprehensive. It reportedly includes up to 8 000 officials (i.e., elected and appointed public officials of a certain rank, such as the President of Montenegro, members of the Government, members of Parliament, judges and prosecutors, local councillors, secretaries general and political appointees in ministries etc.). However, due to developing interpretations of the definition of a public official over time, it now also includes – as regularly mentioned during the meetings in Montenegro – members of school boards and even representatives of civil society organisations if they are appointed in working groups or to a body like the Council overseeing the work of the Agency.

15. The Commission finds that the definition of "public official" lacks clarity, in that it allows for differing interpretations. More importantly, such a broad and comprehensive definition, due to the way the current Law has been structured, has as a consequence that all obligations of the draft law (and the current Law), be it in the area of conflicts of interest, incompatibilities, post-employment restrictions or asset and income declarations, apply without distinction to different categories of public officials. This means that, for example, a member of a school board (a part-time position with little decision-making power) is subject to the same prohibitions on incompatibility of functions as a secretary general in a ministry and has similar obligations to submit asset and income declarations and transfer management rights in a company as a member of the government.

16. While a general requirement to avoid conflicts of interest and to refuse gifts offered in relation to public duties should apply to everyone working in the public sector regardless of the nature of their function, those with higher levels of influence, responsibility and decision-making power should be subject to higher level of obligations and restrictions. While it is up to each State to define who it considers to be public officials in its legal system, the obligations it imposes on those public officials should be related to "*the nature of the functions performed and the responsibilities relating thereto*".[7] Certain categories of persons engaged in the public sector (for example, members of school boards, civil society representatives temporarily assigned to working groups etc.) should thus not be subject to rules on incompatibilities, post-employment restrictions and requirements to submit asset and income declarations, unless the specific nature of their engagement in the public sector would make the application of one or more of those rules both logical and necessary. As such it would be advisable to make an explicit list of public officials who are subject to the requirement to submit asset and income declarations and those who should declare potential conflicts of interest, other positions and side activities. Preferably the definition of a public official should not only be comprehensive but also focused, whereby certain categories of persons (for example, the abovementioned civil society representatives assigned to working groups) are not included in the definition as such but are subject to certain obligations and general rules on – for example – conflict of interests, when they are engaged in certain activities in the public sector. Concurring with various previous analyses,[8] the Venice Commission thus recommends that the

[6] To this end, it was recommended to the Montenegrin authorities to "*Amend the LPC to apply the obligation to submit a report and the procedure of verification of the data from the report to all persons who are obliged to submit the report in accordance with special law*" (Kalniņš and Škrbec (2022), op. cit., p. 75).
[7] Council of Europe, Explanatory Memorandum to CM Recommendation Rec(2000)10 on Codes of Conduct for public officials (2000), p. 7, adding "This may lead states to impose such obligations upon certain officials even if they hold posts of a modest hierarchical level".
[8] Kalniņš and Škrbec (2022), *op. cit.*, p. 44; EU Peer Review Report (2021), p. 17-18; Trivunović, M. / MANS, Analysis of the Montenegro Law on Prevention of Corruption (2023), p. 20.

above definition of a public official is clarified in the draft law in order to avoid any ambiguity about its scope and to include a categorisation in the draft law of the obligations and restrictions in relation to the concrete positions occupied.

B. Conflicts of interest and incompatibilities

17. Article 9 of the draft law states "*A public official shall perform his function in such a manner that the public interest is not subordinated to private, and without causing a conflict of interest in the exercise of public function. The conflict of interest in the exercise of public function exists when a private interest of a public official affects or may affect the impartiality of the public official in the exercise of public function (…)*." As such, covering actual and potential conflicts of interest, this definition is more limited than that contained in Council of Europe standards, which require, as also stressed in previous Opinions,[9] the inclusion of *apparent* conflicts of interest, "*a private interest which appears to influence the impartiality of the public official"*.[10] The Venice Commission recommends supplementing Article 9 of the draft law to include situations which appear to create a conflict of interest, since even the perception of a conflict of interest will undermine trust in public officials and the authorities they represent.

18. A central concept in the provisions on conflicts of interest is that of a private interest of a public official, which is defined in Article 4 as "*ownership or other material or non-material interest of a public official or a person related to him*", whereby "*a person related to a public official*" is defined in Article 8 of the draft law as "*a relative 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, partner in a life partnership of the same sex, adoptive parent or adopted child, member of the same household, other natural or legal person with whom/which the public official establishes or has established a business relationship*". The Venice Commission notes that in the draft law the definition of a private interest has been moved from the general provision on definitions in Article 8 to the provision that deals with whistleblowing in Article 4. As the provisions on conflicts of interest are otherwise silent on these related persons, it is now no longer sufficiently clear that the private interests of a public official indeed also include advantages for persons related to a public official. Furthermore, when it comes to these persons related to a public official, as outlined in Council of Europe's CM/Rec(2000)10, these should include "*friends and persons or organisations with whom he or she has had business or political relations*".[11] With this in mind, the Venice Commission recommends that Montenegro clarifies that a private interest of a public official includes advantages for "*a person related to a public official*" (for example, by moving the definition of a private interest from the provision on whistleblowing in Article 4 to the provision on general definitions in Article 8) and to also include personal and political relationships in the definition of related persons.[12]

19. When it comes to the practical application of mechanisms to prevent, manage and/or resolve conflicts of interest (or the appearance thereof), the provisions have undergone few changes but do now contain a welcome deadline with which the public official has to comply with an opinion of the Agency on the existence of a conflict of interest. The draft law obliges a public official to avoid a conflict of interest (Article 9), to declare a potential conflict of interest to participants in a discussion and decision-making (whereby the authority in which the authority exercises her/his public function is meant to record this in the minutes and request an opinion of the Agency) (Article 10), to not-participate in the discussion and decision-making until the Agency issues an opinion on the non-existence of a conflict of interest (Article 10), to resolve the conflict of interest (Article 30), to report a suspicion of a conflict of interest to the Agency by submitting a

[9] Venice Commission, CDL-AD(2021)024, Opinion on the Draft Law on the Prevention of Conflict of Interest in the Institutions of Bosnia and Herzegovina, para. 26; Venice Commission, CDL-AD(2010)018, Opinion on the Draft Law on the Prevention of Conflict of Interest in the Institutions of Bosnia and Herzegovina.
[10] Council of Europe, Model Code of Conduct for Public Officials (Appendix to CM Recommendation No. R(2000)10), Article 8, paragraph 1 and Article 13, paragraph 1, and its Explanatory Memorandum, p. 7.
[11] *Ibid.*, Article 13, paragraph 2.
[12] See CDL-AD(2021)024, para. 28; See also Kalniņš and Škrbec (2022), *op. cit.*, p. 85.

request for an opinion of the Agency on the existence of a conflict of interest (Article 9). This is welcome.

20. On a general note, it should be borne in mind that the success of a conflict-of-interest regime depends largely on the awareness and internalisation of it by each and every member of society, including public officials, the private sector and society at large. The responsibility for noticing and managing a potential conflict of interest (or appearance thereof) lies with the person(s) concerned, whose awareness depends on the level of conscientiousness, training, guidance and the culture around. The conduct of public officials in the way they respond to an actual, potential or perceived conflict of interest should thus not depend solely on whether or not the Agency issues a corresponding opinion and "*undertake[s] measures to prevent a conflict of interest"* but on a public official's own management of such risks, whereby it is for the superior of the public official concerned "*to decide what measures to take to resolve or manage the actual or potential conflicting situation*".[13] In this respect, it should also be considered to include an obligation to prevent, avoid and manage conflicts of interest in general administrative law for all public officials / public bodies, as a catch-all provision, to avoid an over-reliance on the Agency.

21. The Venice Commission notes that while the current centralised system of requesting the Agency for an opinion in case of a suspicion of a conflict of interest has as a benefit that it allows for a consistent and uniform interpretation of the conflict of interest provisions and an uniform approach to managing risks in this respect, it is rather a heavy and time-consuming procedure (especially considering the frequency with which situations of conflicts of interest may arise and the number of persons falling within the remit of the draft Law), which largely ignores the responsibility of the public official and her/his superior her/himself.

22. Thus, the Venice Commission recommends that at the very least Article 10 of the draft law should be amended to ensure that a statement or notification of a possible conflict of interest and subsequent recusal of the public official concerned is not limited to participation in "*discussion and decision-making*" but also covers any kind of other engagement in a matter. Preferably, this would take the form of an electronic disclosure of *ad hoc* conflicts of interest, which would be separate from the asset and income declaration regime, whereby the disclosures are published (as this will in itself serve as a tool for raising awareness and thereby stronger prevention of conflict of interest situations) and not just shared with the small circle of participants in the discussion and decision-making as they are now.[14] Additionally, based on good international practices[15], the Venice Commission recommends that consideration be given to making further changes to the current provisions on conflicts of interest, by complementing them with a requirement for a public official to immediately exclude her/himself from any work (and not just cease her/his participation in "*discussion and decision-making*" as it is now) in which there is the possible existence or risk of a conflict of interest, notify this in writing within a limited time-frame to her/his superior or the collegial body in which s/he is engaged. Subsequently it would be for her/his superior or the head of the collegial body to take a decision on this within a limited timeframe.[16] In this respect, the superior or head of the collegial body can also decide to not exclude the public official from the matter in question entirely but to restrict

[13] Comparative Overview of OECD Countries attached to the OECD Guidelines for Managing Conflict of Interest in the Public Service (2003), p.62. Similarly, the abovementioned Mode Code of Conduct for Public Officials (Article 13) highlights the disclosure of a conflict of interest by a public official to her/his superior as soon as s/he becomes aware of it, to comply with any final decision to withdraw from the situation or divest her/himself from the advantage causing the conflict and to declare whether or not s/he has a conflict of interest, whenever required to do so.

[14] See also the Model Code of Conduct for Public Officials (Article 14); In a similar vein, Kalniņš and Škrbec (2022), *op. cit.*, p. 51.

[15] See for an overview of good practices in other countries, Kalniņš and Škrbec (2022), *op. cit.*, pp. 23-28. See also the abovementioned Comparative Overview of OECD Countries attached to the OECD Guidelines for Managing Conflict of Interest in the Public Service (2003) (which in some cases may however out of date).

[16] This suggestion leans heavily on and endorses the proposal of Kalniņš and Škrbec (2022) for two new provisions to be added to the draft Law (pp. 48-49). Inspiration may in this respect also be drawn from relevant provisions in the Integrity and Prevention of Corruption Act of Slovenia.

access to certain information or to rearrange her/his duties and responsibilities. The Agency would in all cases have to be notified (with the possibility of the Agency deciding differently than the public official's superior or head of collegial body).

23. Unlike conflicts of interest, which arise and are resolved on an *ad hoc* basis, incompatibilities – which in essence pursue the same goal as conflict-of-interest regulations – are of a longer-lasting nature. In this respect, Articles 11-16 of the draft law do not include any substantive changes to the provisions of the current Law. It is provided that public officials may not be engaged in other than scientific, educational, cultural, artistic and sports activities (but may be elected or appointed to working bodies and earn an income of intellectual property rights and other similar rights, on which s/he is to report to the Agency) (Article 11, draft law), have to transfer her/his management rights in companies (Article 12, draft law) and – with the exception of a few high-level public officials – may not be member of a management body or supervisory body of a public enterprise, public institution or other legal person (except for a scientific, educational, cultural, artistic, humanitarian or sports association) (Article 14, draft law), may not conclude contracts on the provision of services to a public enterprise or with an authority or company that has a contractual relationship or performs tasks for an authority in which the public official exercises her/his function unless the value of the contract is less than €1 000 a year.

24. The Venice Commission finds that, as such, the abovementioned provisions are comprehensive but would benefit from a few amendments, in order to make them both practical and fair. First and foremost, as already referred to in paragraph 16 above, provisions on incompatibility of functions should only apply to specific categories of public officials for whom such a restriction would be necessary to preserve the integrity of the public authority, while at the same time ensuring that persons (especially when they have a part-time or unremunerated position) for whom there are few risks of conflicting interests or risks to integrity of the office can engage in other gainful activities.[17] It is for example not clear why members of school boards or representatives of civil society organisations who are engaged in a working group (see above) have in all cases to transfer their management rights in companies and cannot be members of supervisory bodies of any public enterprise, public institution or legal person. Provisions on incompatibilities which are more tailored to specific categories of public officials can in turn be complemented by a general obligation for public officials to inform the Agency of side activities (including those authorised scientific, educational, cultural, artistic and sports activities in Article 14 of the draft law), upon which the Agency can prohibit or impose conditions for engaging in this activity in order to avoid risks of a conflict of interest.[18]

25. Article 16 of the draft law contains limitations on contractual relationships, with paragraph 2 excepting contracts with a value of less than €1 000 and paragraph 3 prohibiting "*the authority in which a public official exercises his functions"* to conclude a contract *"with a legal entity in which the public official and a person related to him have a private interest*". While the aim of paragraph 3 is clearly to ensure there is no collision between a public official's private and public interests, the provision as it stands now is too wide (e.g. it would annul the contract between a relative of a public official and her/his public authority for – for example – the provision of stationary if this has a value of more than €1 000, even if the public official has had no involvement or even knowledge of the tender preceding the contract; it would prohibit a public authority to have any kind of contract with a university where a public official employed by this public authority performs paid lectures, if the public officials earns more than €1 000 from these lectures etc.), which makes its implementation unpractical. It is thus recommended to further tailor this provision.

[17] Kalniņš and Škrbec (2022), *op. cit.*, p. 55; EU Peer Review Report (2021), p. 18.
[18] Kalniņš and Škrbec (2022), *op. cit*, pp. 55-56. See also in this respect, the Model Code of Conduct for Public Officials, which prescribes that a public official "*should be required to notify and seek the approval of his or her public service employer to carry out certain activities, whether paid or unpaid, or to accept certain positions or functions outside his or her public service employment"* (Article 15, paragraph 2).

26. Article 17 of the draft law deals with post-employment restrictions. This provision has undergone a small change in that it reduces the post-employment restrictions (other than the use of information not in the public domain) to a one-year period (instead of two years in the current Law) to align it with the period of redundancy pay for public officials. This article *inter alia* prohibits the public official for a period of one year to "*establish an employment relationship or business cooperation with the legal person, entrepreneur or international or other organisation that acquires gain based on the decisions of the authority in which a public authority has exercised function"*. As such it suffers from the same practical drawback as outlined in the previous paragraph, meaning that a public official (including the abovementioned representatives of civil society organisations assigned to a working group of – for example – the Ministry of Justice etc.) cannot work for a legal person if this legal person has had – for example – any kind of service contract with the authority for which the public official has worked, regardless of their knowledge or involvement of such contracts. In a country of the size of Montenegro this solution seems excessive, and this restriction should be limited to those (high-level) officials who may have had an influence over the decisions of the public authority in question and those public officials who have been directly involved in the decision-making of the public authority.

C. Gifts, Sponsorships and Donations

27. Articles 18-24 of the draft law establish regulations regarding gifts, sponsorships and donations, The provisions are again largely the same as the ones in the current Law, prohibiting the acceptance of gifts other than "*protocol and appropriate gifts*" (with the latter being defined as being up to €50 in value[19]), which are to be duly recorded (Article 19 and 20, draft law). The same prohibition applies to spouses and children of public officials if the gift is related to the public official or the exercise of her/his public function (Article 19, draft law). Furthermore, the conclusion of sponsorship agreements and the receipt of donations on behalf of the authority in which the public official exercises her/his public function, which "*affects or could affect the legality, objectivity and impartiality of the work of the authority*" is prohibited, with the possibility to ask the Agency for an opinion on this.

28. Even if largely similar, there are a number of improvements in the draft law as compared to the current Law. These include the deletion of a previous reference to "*money, securities and precious metals*" with instead the general definition of a gift in Article 8 of the draft law being referred to, the introduction of a deadline in Articles 19 and 22 of the draft law for handing over unlawful or inappropriate gifts (subject to a fine) and the introduction of an obligation to act in line with the opinion of the Agency on sponsorships and donations (subject to a fine) in Article 23 of the draft law.

29. The notion of a gift in Article 8 of the draft law ("*an item, right or service acquired or performed without compensation and any other gain provided to the public official or a person related to the public official in connection with the exercise of public function*") is comprehensive, in that it includes things, rights and services, with presumably "*any other gain"* covering items received with a large discount or loans provided under advantageous conditions or written off. In the Commission's view, this could however be made clearer in the draft law to avoid any ambiguities in this respect.[20] Similarly, as recommended by GRECO, it would be welcome to clarify the definition of "*protocol and appropriate gifts*".[21] In addition, it would be useful to: 1) introduce a prohibition on the acceptance of non-protocol gifts when a public official is not sure if the value of the gift is less than €50, 2) extend the prohibition on the acceptance of gifts to other third parties than spouses and children of public officials if the gift is related to the public official or the exercise of her/his public

[19] With the public official not being allowed to accept more gifts in a year from a given donor if the combined value exceeds €50 or not more than €100 a year if it concerns several donors.
[20] As also previously recommended, see OSCE/ODIHR (2018); similarly, Kalniņš and Škrbec, *op. cit.*, p. 62.
[21] GRECO, Fifth Round Evaluation Report on Montenegro (GrecoEval5Rep(2022)2), 17 June 2022, para. 99.

function (see also in this respect the remarks on "persons related to a public official above"), and 3) explicitly require also spouses and children of the public official (as well as other third parties) to hand-over any gift received in relation to the public official or her/his public function.[22]

30. The provisions on sponsorships and donations in Article 23 of the draft law, prohibit – in a similar manner as the current Law – sponsorships and donations if they affect or could affect the legality, objectivity and impartiality of work of the authority, with a notification of such sponsorships and donations to be submitted to the Agency. The provisions are sound, but the Commission recommends – similarly to what has been described above in respect of conflicts of interest – including the *appearance* of affecting the legality, objectivity and impartiality of the work of the authority.[23]

D. Reports on Assets and Income of Public Officials

31. The draft law contains several provisions on the obligation of public officials to submit detailed asset and income declarations. These are largely identical to the provisions in the current Law, with a notable exception: the draft law adds a new provision to Article 33 allowing public officials to correct mistakes in their asset and income declarations (in case there is a difference of up to €1 000 in the reported amounts) without this straightaway being considered a violation of the Law. While it is not clear on which ground the amount of €1 000 was chosen as a threshold (as mistakes can be made in any amount), it is welcome that the possibility of correcting an asset and income declaration now exists.

32. There are no international standards on the scope of public officials who should be required to submit asset and income declarations. Nevertheless, the Venice Commission recalls that in respect of public officials the ECtHR has found (in a case concerning local councillors) the interference with the right to privacy as a result of the declarations of assets (and their publication) justified, in that they pursued the legitimate aim of preventing corruption, and found that this was necessary in a democratic society in that running for public office was voluntary and the financial situation of persons holding such office is one of legitimate public interest.[24]

33. It can however be questioned if the financial situation of all persons covered by the draft law would be one of legitimate public interest. Publication of data from asset and income declarations could mean a disproportionate violation of privacy in relation to the public's right to information. It would therefore, in the view of the Venice Commission, be appropriate to limit either the obligation to submit asset and income declarations or the publication of such asset and income declarations to those public officials with genuine decision-making powers (or influence thereon), for whom the anticipated risks of corruption are high (for example, officials in the field of procurement, high-level political officials etc.). The Venice Commission recalls its recommendation made in paragraph 16 above to include a categorisation in the draft law of the obligations and restrictions in relation to the concrete positions occupied.

34. Article 26 of the draft law contains a comprehensive list of the categories of income and assets to be reported, which – with the exception of raising the threshold for cash to be reported from €5 000 to €10 000 – are again identical to the categories to be reported under the current Law. In most cases, this would provide a sufficient overview of the financial assets and interests of a public official. A few gaps nevertheless remain such as the rights of use of property (which would address the issue of leases and illegally constructed real estate in Montenegro), beneficial ownership of assets, moveable assets above a certain value located abroad (i.e. boats, aircrafts, etc.), significant transactions (i.e. transactions above a certain value, addressing the issue of the undervalued purchase and inflated sale of property within the reporting period) and digital assets

[22] See in a similar vein, Kalniņš and Škrbec, *op. cit.*, p. 64;
[23] Kalniņš and Škrbec, *op. cit.*, p. 70.
[24] ECtHR, *Wypych v. Poland* (Dec.), no. 2428/05, 25 October 2005.

(cryptocurrencies).[25] In respect of the latter, it can also be decided to have public officials declare "any other assets" above a certain value. The Venice Commission recommends including these categories in the asset and income declarations of public officials.

35. Verification by the Agency of the asset and income declarations comprises three stages: a check of all submitted reports of compliance with the submission requirements, a check on the accuracy of the reported data for a smaller group of reports, based on a comparison with data held by other authorities (in accordance with the annual plan of verifications), and an in-depth assessment of yet an even smaller group of reports to see if the official income of a public official is commensurate with the acquisition of wealth by that official (i.e. indications of illicit enrichment). The Venice Commission notes that the lack of adequate information technology tools which would allow for an automatic risk-based analysis of declarations and an automatic cross-check with other databases is a major obstacle in carrying out these checks. The development of such tools should in view of the Venice Commission be a priority, to allow for an effective and efficient verification of asset and income declarations.

36. Furthermore, the Venice Commission was informed that the Agency's capacity of verification was hampered by a lack of access to data from banks and other financial institutions.[26] Pursuant to Article 26 of the draft law, the public official may give consent to the Agency to access this data but is not obliged to do so. The Venice Commission is aware that regulations on banking secrecy prevent that anti-corruption bodies without law enforcement functions have access to information from banks and other financial institutions. Nevertheless, if these bodies flag a suspicion, there should be a way for them to follow-up on this. Other States have found ways to regulate access to financial information for their corruption prevention bodies, for instance the Commission for the Prevention of Corruption of Slovenia, the Corruption Prevention Commission of Armenia, and the National Agency for the Prevention of Corruption of Ukraine.[27] In light of its earlier recommendations to establish "*an obligation of public bodies and private companies (and in particular financial institutions) to provide information about financial instruments*" without which "*the whole mechanism of asset declarations may become superfluous*", [28] the Venice Commission recommends exploring avenues to provide the Agency with access to information held by banks and other financial institutions for the purpose of verifying the declarations on assets and income of public officials and members of their household.

E. Whistleblowers

37. The largest number of changes in the draft law compared to the current Law relates to the part on whistleblowers. As stated in the explanatory memorandum appended to the draft law, the latter's aim is to transpose both Council of Europe CM Recommendation CM/Rec(2014)7 and EU Directive 2019/1937 into Montenegrin legislation.[29] A general comment is that, for the sake of clarity and harmonisation, the concepts used in the draft law concerning whistleblowers should, as far as possible, be the same or similar to the concepts used in Recommendation CM/Rec(2014)7 and Directive 2019/1937, subject to the specificities of the Montenegrin legal terminology.

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[25] See for a detailed analysis of the need to complement the current reporting categories with these issues: Kalniņš and Škrbec, *op. cit.*, p. 77.
[26] See on this issue, the EU Peer Review Report (2021), p. 21.
[27] See Article 16 of the Integrity and Prevention of Corruption Act of Slovenia; As described in Kalniņš and Škrbec, *op. cit.* p. 79, in Armenia, the Corruption Prevention Commission may request information on account balances, summary information on inflow and outflow during a specific period (etc.); in Ukraine the National Agency for the Prevention of Corruption may request the disclosure of information constituting a banking secrecy if needed for the verification of asset declarations.
[28] CDL-AD(2021)024, paras. 85 and 86.
[29] Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers; Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union Law.

38. The material scope of the provisions on whistleblowing in the draft law (Articles 1, 4, 5, 8(6) and 8(7), 56, 58 and 64) is limited to "*threats to the public interest that indicate the existence of corruption*". It is understandable that in a law on the prevention of corruption, the scope of whistleblowing is somehow linked to corruption. Yet, this is not in line with Recommendation CM/Rec(2014)7, which in general relates to a "*threat or harm to the public interest*" and EU Directive 2019/1937, which covers breaches of European Union law (Article 2, paragraph 1). Whilst principle 2 of Recommendation CM/Rec(2014)7 explicitly leaves it to the States to define the material scope of public interest in relation to whistleblowing, it nonetheless states that the scope "*should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment*".[30] Article 2, paragraph 1(a) of the EU Directive in turn provides a list of breaches of the European Union that fall within the scope of the Directive,[31] which includes areas such as "*public health*" and "*food and feed safety, animal health and welfare"*, leaving it explicitly to States to extend protection under national law to areas and acts not mentioned in this article. The ECtHR has also taken a broad approach to whistleblower protection under Article 10 of the ECHR, indicating "(…) *the range of information of public interest that may fall within the scope of whistleblowing is defined in a broad manner"*.[32] Seemingly in an attempt to address this issue, Article 4 of the draft law extends the definition of "*threats to the public interest that indicate the existence of corruption*" to "*a breach of regulations and ethical rules*" (as well as "*an action that is aimed at preventing such a breach from being discovered*") in all the fields mentioned in the above EU Directive.

39. In view of the Venice Commission, the initial limitation of whistleblowing to "*threats to the public interest that indicate the existence of corruption*" and the subsequent extending of the definition of such threats to all breaches of regulations mentioned in the EU Directive manifestly leads to confusion, potentially discouraging people from reporting breaches of law which do not contain an element of corruption, leading to misunderstandings on the side of institutions required to act on such reports and/or protect whistleblowers. In this context, the Venice Commission also considers that the specific provisions of the draft law concerning the protection of whistleblowers are explicitly meant to cover the private sector,[33] whereas the draft law almost exclusively deals with public officials. As a law on the prevention of corruption should understandably include provisions that are linked to corruption, the Venice Commission recommends creating a special law on whistleblowing, whereby it should also be explored if another authority than the Agency (for example, the Ombudsperson) would not be better placed to play a central role in the protection of whistleblowers, in consideration of the fact that not all whistleblower reports will be related to the existence of corruption (notwithstanding the fact that in certain other countries, it is also a corruption prevention bureau which has the responsibility for whistleblowers[34]) and to facilitate reporting by whistleblowers in the private sector, allowing the Agency to focus on its many core tasks.[35] The

[30] See in this regard also Council of Europe, Protection of Whistleblowers: A Brief Guide for Implementing a National Framework (2015), p. 8, which outlines the necessity of member states taking "*a broad approach*", warning that "*Restricting legal protection to those who disclose only certain types of information, such as corruption offences for example, and only to certain bodies will risk confusing "whistleblowing in the public interest" with "informing" or "denouncing" and may increase opposition to the law and distrust in its purpose*."

[31] Article 2, paragraph 1 of the Directive lists "*public procurement; financial services, products and markets and prevention of money laundering and terrorist financing; product safety and compliance; transport safety; protection of the environment; radiation protection and nuclear safety; food and feed safety, animal health and welfare; public health; consumer protection; protection of privacy and personal data, and security of network and information systems", as well as "breaches affecting the financial interests of the Union (…)" and "breaches related to the internal market (…)*".

[32] ECtHR, *Halet v. Luxembourg* [GC], no. 21884/18, 14 February 2023, para. 133, outlining *inter alia* that the Court "*has accepted that issues falling within the scope of political debate in a democratic society, such as the separation of powers, improper conduct by a high-ranking politician and the government's attitude towards police brutality, were matters of public interest"* (para. 134). See also *Guja v. Moldova* [GC], no. 14277/04, 12 February 2008, para. 88).

[33] To this end, Article 8 of the draft law defines "*work-related context*" as "*work activities in the public or private sector through which, irrespective of the nature of those activities, persons acquire information on a threat to the public interest that indicates the existence of corruption (…)*".

[34] Such as, for example, the Commission for the Prevention of Corruption in Slovenia.

[35] See also on the need to establish a stand-alone law on whistleblowers: Savage, *op. cit*, pp. 5, 14 and 37.

Venice Commission was however informed that due to the deadlines set for the preparation of the Interim Benchmark Assessment Report there was no time to create a separate law on whistleblowers.

40. Furthermore, the Commission recommends aligning more closely the provisions on whistleblowers to the terminology used in Recommendation CM/Rec(2014)7 and the EU Directive. However, when it comes to the material scope of the provisions, while threats to the public interest that do not have a link with corruption and are not covered by the areas mentioned in Article 2, paragraph 1 of and the Annex to the EU Directive (such as – for example - violations of certain human rights), should clearly be covered in the law to be in line with Principle 2 of Recommendation CM/Rec(2014)7 and the case-law of the ECtHR (see above), this can only be done to a limited extent in a law that deals exclusively with the prevention of corruption. This further underlines the need for a dedicated law to address the issue of whistleblowing effectively.

41. When it comes to the personal scope of the provisions, Recommendation CM/Rec(2014)7 and the EU Directive cover respectively "*all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not"* (Principle 3, Recommendation CM/Rec(2014)7) and "*persons working in the private or public sector who acquired information on breaches in a work-related context"* (Article 4, paragraph 1, EU Directive). In this context, it should be made explicit in the definition of Article 5 of the draft law that the protection offered to whistleblowers includes 1) persons whose work-based relationship has ended or whose work relationship is yet to begin – when information concerning the threat or harm to the public interest has been acquired during the recruitment process or other pre-contractual negotiation stage – (as outlined in principle 4 of Recommendation CM/Rec(2014)7 and Article 4, paragraphs 2 and 3 of the EU Directive), 2) self-employed persons (Article 4, paragraph 1 (b), EU Directive) and 3) persons working under the supervision and direction of contractors, subcontractors and suppliers (Article 4, paragraph 1(d), EU Directive), notwithstanding the reference to "*a person who has concluded (…) a service contract"* in Article 5 of the draft law.[36] In a similar way, it would be appropriate to include in the draft law a more open-ended reference to other "*third persons"* who are connected to the reporting person and who for that reason can suffer retaliation, as is done in Article 4, paragraph 4 of the EU Directive, rather than referring to a limited list of "*persons related to a whistleblower*", as is done in Article 8, paragraph 8 and Article 71 of the draft law.[37]

42. Furthermore, it would be useful to clarify in Article 47 of the draft law that reports can be made through "*other voice messaging systems*" (Article 9, paragraph 2, EU Directive), that a whistleblower may make a report confidentially or anonymously (as Article 48 of the draft law seems to indicate) and that if whistleblowers submit their report orally (and have disclosed their identity), they should be offered an opportunity to check, rectify and agree to the transcript of the call (Article 18, paragraph 2(b), EU Directive).

43. Moreover, when it comes to personal data protection, the latest amendments to Article 50 of the draft law which extend the protection of the identity of a whistleblower to facilitators of a whistleblower, third parties (or, in the words of the draft Law, "*persons related to a whistleblower*") and persons concerned, are welcome. It is additionally recommended to include the possibility that the whistleblower provides consent for their identity to be revealed and that, if the identity of a whistleblower is disclosed – if necessary and proportionate – as part of an investigation or in court proceedings, the whistleblower is informed of this and the reasons for doing so, as per Article 16, paragraph 3 of the EU Directive. In Article 61 of the draft law, it would be advisable to specify that the recordkeeping is to be done in full respect of the requirements to keep information (from which

[36] *Ibid.,* pp. 5 and 13-14.
[37] *Ibid.,* p. 14.

the identity of the whistleblower may be deduced) confidential, by linking this back to Article 50 of the draft law, as per Article 18, paragraph 1 of the EU Directive.[38]

44. Regarding the rules on reporting channels, the draft law provides for a three-tiered model of reporting (internal, external and public disclosure) in accordance with the requirements of the Recommendation CM/Rec(2014)7 and the EU Directive, and in order to qualify for protection it does not oblige a whistleblower to first report internally before submitting a report to the Agency or – under certain conditions – before publicly disclosing information. With regard to internal reporting (Article 52-55, draft law), the draft law goes further than the Directive by imposing an obligation to establish internal channels for reporting and follow up on all employers employing more than 20 persons, whilst the Directive allows exceptions for private sector entities with less than 50 workers. One potential issue of concern is that Article 54 of the draft law uses quite broad and descriptive language concerning key issues such as security and confidentiality, which are procedural requirements according to Article 9 of the EU Directive. Since the law requires employers to set up an internal reporting scheme but leaves it to the employers to decide its organisation in detail, the law should in a normative way set out the key legal requirements for the reporting and follow-up process as mentioned in Article 9 and detailed in Chapter V of the Directive.

45. With regard to external reporting in Article 56 of the draft law, it would be advisable to indicate external reporting channels other than the Agency, such as law enforcement and possibly the Ombudsperson, in line with principle 14 of Recommendation CM(2014)7, given that persons who report threats or harm to the public interest to an institution other than the Agency (for example, because there is no link with corruption) should still be entitled to protection pursuant to these provisions. The EU Directive's provisions on confidentiality in Article 11(2)(b) and timeframe to provide feedback to the whistleblower in 11(2)(e) have furthermore not been included in Article 56 of the draft law. Whilst Article 56 of the draft law delegates to the Ministry to adopt more detailed rules on the actions of the Agency for external reporting, the mentioned provisions on confidentiality and timeframe are important for the effectiveness of external reporting and should therefore be included in the draft law. Furthermore, when the Agency transmits a whistleblower report that does not fall within its competence to the competent authorities (for example, to law enforcement authorities in case of a crime, or a supervisory authority in a certain field), as outlined in Article 63, the reporting person should be informed of such a transmission (in line with Article 11, paragraph 6, EU Directive).

46. With regard to the protection of whistleblowers and redress available to them, given how crucial it is for the draft law to explicitly include measures for the protection against retaliation and measures for the protection of individuals affected (in addition to the right to compensation for damages resulting from submitting a whistleblower report), the Commission finds that the latest changes to Article 59 of the draft law indicating that the Agency can, at the request of the whistleblower, provide legal, financial, psychological and other support when the whistleblower initiates a judicial process, are particularly welcome. For the heading of the part in the draft Law "*Protection of Whistleblowers and Compensation for damage*" (Articles 64 to 73, draft law), however, it would be advisable, even on a symbolic level, to use the title of Article 19 of the EU Directive "*Prohibition of retaliation*". Furthermore, a provision should be inserted in the draft law stating that the persons who reported or publicly disclose information on breaches anonymously, but who are subsequently identified and suffer retaliation, shall qualify for protection under the draft law, as per Article 6, paragraph 3 of the EU Directive. It is furthermore welcome that the list of potential retaliatory actions against the whistleblowers has been expanded, explicitly mentioning harm to a person's reputation, discrimination and mobbing. In general, the wider and more general wording of the Directive may provide more effective protection, since retaliation may possibly come in other forms than those listed in Article 65 of the draft law. This may however not be an issue if the Agency and the Basic Court use the list of actions in Article 65 as examples only and interpret

[38] *Ibid.,* p. 18.

the first paragraph of Article 65 as a general prohibition covering any direct or indirect action adversely affecting the situation of whistleblowers.

47. Article 66 of the draft law specifies that the whistleblower is entitled to compensation for any damage but does not specify the type of compensation and the manner in which it may be provided, leaving this to "*the law governing obligations*". It would be advisable to clarify this in the draft law. Furthermore, it would be preferable if remedies would be provided to the whistleblower proactively, without judicial proceedings having been initiated, for example, by requiring the whistleblower to be reinstated in their old position, restoring their cancelled license or contract, compensating them for actual and future financial losses, whereby it is made sure that any unfair treatment is made null and void and that financial compensation is paid in proportion to current and future earnings. In this respect, the Commission recommends amending Article 70, to make it clear that whistleblowers may apply for interim measures before the initiation of judicial proceedings.

48. Finally, as regards sanctions, it is positive that, with the latest changes to the draft law, Article 105 now also provides for accountability for retaliation against whistleblowers (paragraphs 22 and 23) and that Article 107 has been amended in a way that a whistleblower can no longer be fined for "*not providing reasons for the grounds for suspecting that there is a threat to the public interest that indicates the existence of corruption when submitting a report*".

F. Institutional set-up

49. Turning to the Agency itself, the Venice Commission recalls that independence with an adequate level of structural and operational autonomy, involving legal and institutional arrangements to prevent political or other influence is a fundamental requirement for specialised anti-corruption bodies.[39] As also outlined in previous opinions, the level of independence and of structural and operational autonomy depends on the type of body, with those in charge of investigating and prosecuting corruption normally requiring a higher level of independence than those in charge of preventive and policy coordination functions.[40] However, specific "preventive" functions, such as the control of asset declarations and the prevention of conflicts of interest involving high-level officials or oversight of the financing of political parties, may require further safeguards for the independence (and thereby the perception of political neutrality) of such a body. This is the case for the Agency, which – in addition to its tasks in the area of conflicts of interest, incompatibilities, gifts (etc.)[41] – also has certain powers as regards the control of asset and income declarations and the financing of political parties (as well as lobbying under the Law on Lobbying). It does not have any investigative powers.

50. Various factors determine the independence of an anti-corruption body: its legal basis, institutional placement, appointment and removal of the director, selection and recruitment of staff, budget and fiscal autonomy, and accountability and transparency.[42] The Venice Commission observes that positive features in the draft law (which have been maintained from the current Law)

[39] Article 20 of the Council of Europe's Criminal Law Convention on Corruption (CETS 173); Principle 3 of the Council of Europe's Twenty guiding principles for the fight against corruption (Resolution (97) 24); Article 6 and 36 of the United Nations Convention against Corruption (UNCAC); as well as Articles 11 and 12 of the aforementioned EU Directive 2019/137, which requires that the competent authorities that function as external reporting channels for whistleblowers are "independent and autonomous".

[40] Venice Commission, CDL-AD(2023)046, Georgia - Opinion on the provisions of the Law on the fight against Corruption concerning the Anti-Corruption Bureau, paragraphs 12 and 17, with reference to Organisation for Economic Cooperation and Development (OECD), Specialised Anti-Corruption Institutions: Review of Models (2008), pp. 31-32.

[41] The full list of responsibilities of the Agency can be found in Article 81 of the draft Law, requiring the Agency also to "*take the initiative to amend laws, other regulations and general acts, in order to eliminate the possible risk of corruption or to bring them in line with international standards in the field of anti-corruption" and "to give opinions on draft laws and other regulations and general acts for the purpose of their alignment with international standards in the field of anti-corruption*".

[42] OECD (2008), pp. 25-26.

in this respect are the provisions on the financing of the Agency, which provide that the budget is proposed by the Council (see below on the Council), the Agency cannot be instructed on the use of its funds, the funds of the Agency amount to no less of than 0,2% of the State budget and if the government diverges from the aforementioned budget proposal it has to provide an official explanation in writing (Article 98, draft law). What is nevertheless missing from Article 98 of the draft law is a more general obligation to provide the Agency with adequate resources to ensure the full, independent and effective discharge of its responsibilities and functions, which would be of practical importance to ensure the efficiency and independence of the Agency. Such a provision would be a natural implementation of Article 20 of the Criminal Law Convention on Corruption[43] and in line with international standards on independent institutions.[44]

51. With regard to the appointment and dismissal of the Director of the Agency, a collective body – the Council – plays a central role. The Council is *inter alia* responsible for electing and dismissing the Director of the Agency, deciding on her/his recusal and adopting the Statute, act on the internal organisation, budget proposal and rules of procedure of the Agency, as well as verifying the asset and income declaration of the Director of the Agency (Article 91, draft law). The Council comprises five members (a part-time, remunerated function), elected by Parliament following a public competition (Article 88, draft Law). This public competition is administered by a special Selection Commission comprising five members (a representative each of the parliamentary majority, parliamentary opposition, Judicial Council, Prosecutorial Council and non-governmental agencies), who – after verifying that the candidates meet the requirements to be elected to the Council[45] and having conducted interviews – submit a reasoned proposal of five candidates to the Anti-Corruption Committee of the Parliament for appointment by the Parliament (Article 88 and 89, draft law).

52. As regards the requirements to be elected to the Council, consideration should be given to explicitly excluding persons who have been convicted for corruption-related offences from being eligible for membership of the Council and to add integrity criteria to the eligibility requirements. Furthermore, the Venice Commission welcomes what appears to be a balanced composition of the Selection Commission, which should allow for a non-partisan appointment of members of the Council or at least one that is not dependent on the political majority of the day.[46]

53. Members of the Council are appointed for a four-year term (renewable once). In light of the fact that there is currently no functioning Council, as its mandate ended in 2023, it is welcome that the draft law now contains a provision requiring members of the Council to remain in function until a new Council has been appointed (especially given that, in the absence of the Council, the Director

[43] Article 20 states: "(…) *The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks*".

[44] See e.g. Venice Commission, CDL-AD(2019)005, Principles on the Protection and Promotion of the Ombudsman Institution ("The Venice Principles"), para. 21.; Appendix to Recommendation CM/Rec(2014)7, para. 55; Recommendation CM/Rec(2021)1 on the development and strengthening of effective, pluralist and independent national human rights institutions, para. 6; UN General Assembly resolution 48/134, Principles relating to the Status of National Institutions (The Paris Principles): "*The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence*."

[45] The requirements pursuant to Article 86 of the draft Law are: a master's degree, ten years' work experience (of which at least five years in the field of the fight against corruption or protection of human rights and at least three professional work references). Article 87 of the draft Law further prescribes that a member of the Council cannot have been a member of Parliament, councillor or member of the government or held certain functions in a political party or coalition of parties, within the last ten years.

[46] In other opinions, the Venice Commission recommended that the head of an anti-corruption agency or members of a conflicts of interest commission were appointed by qualified majority in Parliament to ensure broad, cross-party agreement on such an appointment (see, for example, CDL-AD(2023)046, paragraph 42; CDL-AD(2021)024, para. 67 and CDL-AD(2010)030, Final opinion on the third revised draft act on forfeiture in favour of the state of assets acquired through illegal activity of Bulgaria, para. 15). In the case of Montenegro, given that the Parliament does not have a direct role in appointing the Director of the Agency, but only appoints members of the Council (on the basis of the proposal of a selection commission with a balanced composition) which in turn appoints the Director, the Venice Commission sees less of a danger of politicisation of the appointment of the Director.

of the Agency cannot be dismissed nor can a new director be elected). Members of the Council can be dismissed before the end of their term by Parliament following a proposal of the Anti-Corruption Committee of the Parliament on the basis of an initiative of at least three members of the Council. This can be done at the personal request of a member of the Council, due to permanent loss of working capacity, for failing (retrospectively) the requirements for becoming a member as outlined in Articles 86 and 87 of the draft law (see above) and/or for violating the provisions of the Law and the Rules of Procedure of the Agency. These grounds seem relevant and reasonable with the exception of the violation of the Rules of Procedure. In the view of the Venice Commission, not all infringements of the Rules of Procedure should qualify as a ground for dismissal, and it is recommended to have this amended in the draft law. Even if Parliament decides on the dismissal of a member, given that such a procedure can only be initiated by a majority in the Council and the dismissed member has access to judicial review (as per a new provision in Article 90 of the draft law), there seem to be sufficient safeguards against potential abuse of this procedure.

54. The Director of the Agency is elected by the Council for a period of five years following a public competition and can be re-elected once. The eligibility criteria for the Director are the same as for members of the Council[47] with one additional restriction: The Director of the Agency may not be someone who was appointed or assigned by the Government or Parliament of Montenegro as a public official in the last five years (Article 94, draft law). These criteria are identical to the criteria in the current Law, with one important exception: A candidate for the position of Director of the Agency will now need to have passed a "judicial examination" (which was explained to the Venice Commission as being an exam prosecutors and judges are required to take). Allegations were made that this criterion was added to the draft law with specific candidates in mind. The Venice Commission cannot assess the veracity of such allegations, but it does have doubts about the added value of the above additional restrictive condition for a body that does not have any investigative or enforcement powers, in particular considering that the pool of eligible candidates will be quite small to begin with. As noted earlier by the Commission, having specialised and trained personnel is a key requirement for a specialised anti-corruption body and "*relevant experience is particularly important for the head of the institution, as professional competence reflects the authority of the institution, which enhances its autonomy*".[48] While there is no clear standard on what such experience may entail for a key anti-corruption institution, the Montenegrin authorities may wish to increase the required relevant professional experience rather than adopting a new restrictive condition concerning a "judicial examination".[49] Furthermore, similar to what it said in respect of members of the Council, the Venice Commission recommends giving consideration to excluding persons who have been convicted for corruption-related offences from being eligible to become Director of the Agency and to add integrity criteria to the eligibility requirements for the Director of the Agency.

55. As regards the term of office of the Director, a fixed term with limitations on re-election is quite common and in accordance with international standards for certain independent bodies.[50] For independent bodies, the Venice Commission has on several occasions expressed a preference for a longer, non-renewable term as a safeguard for independence, as the possibility of renewing the mandate may carry a risk of political influence on the person seeking re-election.[51] Whilst formal

[47] See above: A candidate for the position of Director may for example also not have been a member of Parliament or councillor, member of the government or held certain functions in a political party or coalition of parties in the last ten years (Article 94 referring to Article 87, draft law).
[48] *Ibid.*, para. 19.
[49] In opinion CDL-AD(2023)046, the Venice Commission for example considered the minimum requirement of five years' work experience in the system of justice, law enforcement bodies or human rights quite low.
[50] CDL-AD(2019)005, para. 10.
[51] See e.g. Venice Commission, CDL-AD(2015)017, Opinion on the Law on the People's Advocate (Ombudsman) of the Republic of Moldova, para. 45; CDL-AD(2015)034, Opinion on the Draft Law on Ombudsman for Human Rights of Bosnia and Herzegovina, para. 65; CDL-AD(2021)049, Kazakhstan - Opinion on the Draft Law "On the Commissioner for Human Rights", paras. 64-67. See also CDL-AD(2021)046, para. 22, in which the Venice Commission welcomed the non-renewability of the term of office of the Head of the Georgian Anti-Corruption Bureau.

safeguards for independence also depend on the specific political and institutional context in the country and notwithstanding the fact that the Director is appointed by a non-political body, from a general point of view one may ask whether a five year renewable term provides sufficient safeguards for independence for a highly sensitive position as that of Director of the Agency. With this in mind, the Venice Commission recommends lengthening the term in office for the Director of the Agency and removing the possibility of her/his re-election.

56. The Director of the Agency can be dismissed by the Council with a majority of four out of five votes, on the initiative of three of its members (Article 96, draft law), with a new welcome addition made in the draft law on the possibility of judicial review of such a decision. The criteria for dismissal of the Director are the same as for members of the Council, which raises the same concerns as for the Council in relation to the rules of procedure: Not all violations of the rules of procedure would warrant the initiation of a procedure for the dismissal of the Director. Thus, the Venice Commission recommends amending this provision accordingly.

57. Finally, the Venice Commission notes that the draft law does not provide for functional immunity of the Director of the Agency. As indicated in earlier opinions, the Venice Commission considers that "*functional immunity of office holders provides further safeguards for the independence of an institution*".[52] It thus recommends that *functional* immunity (no prosecution in respect of activities and words, spoken or written, when carried out in the official capacity of Director of the Agency) be introduced in the draft law. The Venice Commission underlines that is recommendation refers to *functional* immunity and not personal immunity.

G. Sanctions

58. The provisions on sanctions in Articles 105-107 of the draft law remain essentially the same as those of the current Law with some important additions: Fines in an amount of €1 000 to € 20 000 for legal persons and the responsible person in the legal person or state authority are now also provided *inter alia* for failing to protect personal data from a whistleblower report, causing harm or initiating unjustified actions to the whistleblower, her/his "facilitator" and persons related to the whistleblower and setting clear deadlines for handing over gift a public official could not refuse (Article 105, draft law) and, as indicated before, accountability for whistleblowers for "*not providing reasons for the grounds for suspecting that there is a threat to the public interest that indicates the existence of corruption when submitting a report*" has now been replaced by accountability for knowingly filing a false whistleblower report (Article 107, draft law). The Venice Commission welcomes these amendments.

59. One of the most controversial amendments in the draft law is the inclusion of a limitation period in Article 44, which provides that proceedings for determining violations of the Law cannot be initiated after the expiration of a period of five years. Civil society organisations and some Members of Parliament however fear that selective inaction of the Agency in these five years would lead to impunity of the public official concerned, pointing to the complexity of uncovering financial irregularities and revelations of the Panama or Pandora papers which brought issues to light several years after they had occurred. In the view of the Venice Commission, five years is a reasonable deadline for the *initiation* of administrative proceedings, especially considering that it aligns with requirements in other legislation in Montenegro requiring financial documentation to be kept for a period of five years. Criminal investigations can still be initiated after this time for tax evasion or – as the case may be – corruption and money laundering (or – if Montenegro were to amend its Criminal Code in this respect – illicit enrichment). Nevertheless, considering the unease this amendment has created, it would be advisable to consider extending the limitation period for the initiation of administrative proceedings under the Law.

[52] See e.g., CDL-AD(2023)046, para. 24.

IV. Conclusion

60. At the request of the Minister of Justice of Montenegro, the Venice Commission has assessed the draft law on the Prevention of Corruption. This draft law has been developed urgently to allow for its enactment by Parliament before the European Commission finalises its Interim Benchmark Assessment Report in the context of the EU accession process. For this reason, in parallel to submitting the request for an Urgent Opinion to the Venice Commission, the draft law was published on the Ministry of Justice website for public consultation. While the Venice Commission understands the reasons for the urgency, it regrets that this has not allowed a more inclusive dialogue and thorough consultation process on the draft Law, which would have undoubtedly benefitted the quality of the Law and would have clarified any misunderstandings on the reasons for some of the amendments.

61. Other than in the area of whistleblowers, the draft law remains fundamentally the same as the Law on the Prevention of Corruption currently in force, with a few adjustments throughout the text of the provisions. The current Law has been subject to several assessments by different bodies in the last few years, some of which the above analysis draws heavily on. Given the remarkable similarities in these assessments and in a situation where a majority (if not all) interlocutors seem to agree on the need to change the Law (and to a large extent also seem to agree on the main tenets of the changes that need to be done), it is a missed opportunity that not more extensive amendments of the current Law have been drafted.

62. Such comprehensive amendments should have included the development of a comprehensive, stand-alone Law on Whistleblowing, which is a key recommendation for the Venice Commission. The current solution of limiting whistleblowing to "*threats to the public interest that indicate the existence of corruption*" and the subsequent extending of the definition of such threats to all breaches of regulations mentioned in EU Directive 2019/1937 is untenable. It will lead to confusion, in particular when it comes to reporting breaches of law which do not contain an element of corruption, which is to the detriment of such reports being made. The Venice Commission therefore invites the authorities of Montenegro to develop a separate Law on Whistleblowing at the earliest opportunity.

63. In addition to developing a separate Law on Whistleblowing, further key recommendations of the Venice Commission are:

- Regarding the personal scope of the draft law: to clarify the definition of a public official in order to avoid any ambiguity about its scope and to include a categorisation in the draft law of the obligations and restrictions in relation to the concrete positions occupied, allowing for more restrictive provisions (on incompatibilities, post-employment restrictions and possibly asset and income declarations) to apply to different groups of officials for whom, due to the nature of their functions and responsibilities, the risks and consequences of breaches of integrity are highest, whereby general obligations on avoiding conflicts of interest and the non-acceptance of gifts in connection with the exercise of a public function should apply to all persons working in the public sector;
- Regarding the provisions on conflicts of interest and incompatibilities: to amend Article 10 of the draft law to ensure that a statement or notification of a possible conflict of interest and subsequent recusal of the public official concerned is not limited to participation in "discussion and decision-making" but also covers any kind of other engagement in a matter;
- Regarding the provisions on asset and income declarations: to include the rights of use of property, beneficial ownership of assets, moveable assets above a certain value located abroad, significant transactions and digital assets (or "any other asset" above a certain value) in the items to be included in the asset and income declarations of public officials, to explore avenues to provide the Agency with access to information held by banks and other financial institutions for the purpose of verifying the declarations on assets and income of public officials

and members of their household, and to ensure the development of appropriate information technology tools to allow for an automatic risk-based analysis of declarations and automatic cross-check with other databases;

- Regarding the provisions on whistleblowers: to extend, in a separate Law on Whistleblowing mentioned above, the material scope of the provisions on whistleblowing to include other threats or harm to the public interest than those linked with corruption or breaches of regulations mentioned in the EU Directive, and (also if a separate Law is not developed) to outline the key legal requirements for internal reporting channels and to explicitly foresee in the possibility to provide remedies to whistleblowers without judicial proceedings having been initiated.

64. Further detailed recommendations on conflicts of interest and incompatibilities, gifts, sponsorships and donations, reports on assets and income of public officials, whistleblowers and the institutional set-up can be found in the text of this Urgent Opinion.

65. The Venice Commission remains at the disposal of the Montenegrin authorities for further assistance in this matter.