

Assessment of the Serbian Anti-Corruption New DRAFT Law

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Disclaimer

The views articulated and expressed in this report are purely those of the author and may not in any circumstances be regarded as stating an official position of any Italian authority, of the Serbian Anti-Corruption Agency or of EU-MSs, of European Commission and of international organizations.

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1. Background

Mr Maurizio VARANESE, in the vest of an anti-corruption independent expert, was designated to comply with the component 2.1 of the Twining Project SR 13 IB JH 04 “*Prevention and Fight Against Corruption*” in order to **preliminary** analyse/assess the Serbian new “*draft*” law on Anti-Corruption.

As per the ToR, some comments were made by ANAC and incorporated in to this report.

Mr Ippolito PUCCI, expert from ANAC pool, contributed to write this report.

The mission took place in Belgrade from 7 to 11 November 2016.

2. Introduction

This report – *in which only the author personal view is expressed* – serves to:

- a. preliminarily describe the outcome of the analyse/assessment of the Serbian new “*draft*” law on Anti-Corruption, that the National Assembly of Serbia intends to adopt in the near future, *in accordance to the National Anti-Corruption Strategy (NACS) and its related Action Plan (AP) 2013-2018 as well as in compliance with the AP-Chapter 23*;
- b. provide a technical support for the on-going public debate;
- c. address to whoever competent preliminary recommendations aiming at improving the Serbian new “*draft*” law on Anti-Corruption.

This report will be making reference only to those relevant provisions that in accordance to the author opinion deserve improvements, particularly in view of its future implementation.

For an easy reading of this report, it is advisable to print colour copies of both the attached **matching table and of this report.**

3. Methodology of the Analysis/Assessment (***IMPORTANT for the readers of this report***)

The method used to conduct the analysis and the assessment of the Serbian new “*draft*” law on Anti-Corruption was based on:

- a. A parallel table of comparison (***matching table***) between the current Serbian Anti-Corruption Law and the Serbian new “*draft*” law on Anti-Corruption.

The attached **matching table** Comparison Table of Current Law and draft, prepared by the author of this report, on the **left column** reports the current law on Anti-Corruption, and on the **right column** it reports the new “*draft*” law on Anti-Corruption with comments/remarks written:

- in **green**, for considering word/sentences to be added;
- in **crossed-out red**, for considering the deletion of words or sentences;
- in **orange** for less important provisions that may need to be reconsidered.

In the **matching table**, Chapters of the current laws and of the draft law have been mostly aligned per legal provision’s typologies. Words or sentences **highlighted** along the texts are mostly intended to stress certain issues;

- b. Interviews conducted with relevant staff members of Serbian Anti-Corruption Agency (ACA) internal units so as to obtain inputs for the present analysis;
- c. The verification whether or not those relevant measures - *referred to NACS and its related AP 2013-2018, into the Serbian AP for complying with the EU Chapter 23 and recommended in the 2015-EU the Progress Report SWD(2015) 211 on Serbia, issued by the European Commission on 10.11.2015* - have been taken into account and/or inserted into the Serbian new “*draft*” law on Anti-Corruption being assessed;
- d. Checking whether or not pertinent provisions of ratified international anti-corruption instruments in place against corruption or containing anti-corruption provisions¹ have been transposed in the Serbian new “*draft*” law on Anti-Corruption in line with pertinent legislative guides and handbooks publicised by concerned international organizations².

¹ International legislative Instruments:

In order to fully comply with the **preliminary** analysis/assessment, it was taken into account the current Serbian Anti-Corruption Law, the Serbian Misdemeanour Law, the Serbian Law on Civil Servants, the Serbian Labour Law as well as the Serbian Law on Public Procurement.

The analysis is made based on the traffic light methodology so as to show at first glance **improvement made**, **improvement to be made** and **consideration for further less important improvement**.

Recommendation will be written - *at the end of each sub-paragraphs of the chapter 4 of this report* - for stressing what needs to be **deleted** or **added**.

Suggestion, if necessary, will be written for addressing issues deserving **consideration for further less important improvement**.

4. **Analysis's Outcome** of the Serbian "draft" new Law on Anti-Corruption

The new "draft" Law is structured into fifteen chapters. Namely:

I. Basic Provisions; **II.** Anti-Corruption Agency; **III.** Main Rules on Discharge of Public Office; **IV.** Conflict of Interest; **V.** Incompatibility; **VI.** Accumulation of Public Offices; **VII.** Gifts; **VIII.** Disclosure of Assets and Incomes; **IX.** Procedure for Deciding on the Violation of this Law; **X.** Acting upon Complaints; **XI.** Prevention of Corruption; **XII.** Records and Registers; **XIII.** Penal Provisions; **XIV.** Transitional Provisions and **XV.** Final Provisions.

At first sight it is noticed that the new "draft" Law is **missing an index**.

4.1.1. Recommendation:

Serbia is encouraged to include in **index**.

4.2. Articles 1 & 2 - Chapter I. - Basic Provisions

By comparing the Basic Provisions of the current law and the new draft law, it is noted an **improvement** as the purpose of the law has been clarified by adding the article 2. In addition, the title of the article 1, which defines the scope of the law, has been positively added and it has also been rewritten in a much clearer way. Now, the article 1, clearly refers to the competences, organization and operation of the Anti-Corruption Agency (ACA) and to the rules preventing the conflict of interest in the discharge of public offices, accumulation of public offices, disclosure of public officials' assets and incomes, procedure aimed at deciding on the violation of this law, and other issues of importance for the prevention and suppression of corruption. **Despite to the referred improvements, Serbia may consider to add explicitly that the ACA has also competence on financing of political parties too in accordance to the law on political financing.**

4.2.1. Recommendation:

Serbian Authorities could consider **including an additional paragraph in the article 1 of the draft law so as to state the competence of ACA on financing of political parties in accordance to the Serbian Law on political financing.**

1. United Nations instruments:

The United Nations Convention against Corruption, The United Nations International Code of Conduct for Public Officials, The United Nations Declaration against Corruption and Bribery in International Commercial Transactions, The United Nations Convention against Transnational Organized Crime

2. Instruments and documents of the Organisation for Economic Co-operation and Development (OECD):

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Revised Recommendations of the OECD Council on Combating Bribery in International Business Transactions and Recommendation of the OECD Council on the Tax Deductibility of Bribes to Foreign Public Officials

3. Council of Europe Instruments and Documents:

Criminal Law Convention on Corruption (1998), Civil Law Convention on Corruption (1999), The Twenty Guiding Principles for the Fight Against Corruption (1997), Model Code of Conduct for Public Officials (2000)

4. European Union Instruments and Documents:

Convention of the EU on the Protection of its Financial Interests (1995) and Protocols thereto (1996 and 1997), Convention of the EU on the Fight against Corruption involving Officials of the European Community or officials of Member States (1997) and Joint Action of 22 December 1998 on Corruption in the Private Sector by the Council of the European Union.

² Relevant Publications: The UN Legislative Guide for the Implementation of the United Nations Convention Against Corruption (UNCAC); the OECD 2011, Asset Declarations for Public Officials: A Tool to Prevent Corruption; the World Bank, Income and Asset Disclosure - Case Study Illustrations (*A companion volume to Public Office, Private Interests: Accountability through Income and Asset Disclosure*); World Bank, Income and Asset Disclosure Systems: Establishing Good Governance through Accountability; the STAR (WB & UNODC) - Asset and Income Declaration - Guide Concept Note; the U4, Expert Answer - Foreign exchange controls and Assets Declarations for Politicians and Public Officials; the OECD, Public Sector Transparency and the International Investor; the OECD, Fighting Corruption and Promoting Integrity in Public Procurement; the OECD, Managing Conflict of Interest in the Public Service - Guidelines and Country Experiences; the EPAC-Setting Standards for Europe.

4.3. Article 3 - Chapter I. - Basic Provisions

The **article 3** of the draft law records **improvements though adjustments are indeed necessary**, particularly in view of its future implementation. International reflections to better define terms have been positively taken into account. A part a few exceptions, definition of terms listed in the article 3 and used along the draft law are mostly well defined and aligned to each other. The notion of a “**public authority**” is now encompassing a much wider range of Serbian Authorities/Institutions as well as legal entities. However, it was noted that **the “City of Belgrade” is still missing in the definition of “public authority”**.

The terms of “**public official**” and “**public office**” is fully aligned to the meaning of the term “**public authority**”. “**Related person**” and “**family members**” of “**public official**” have been strictly interlinked to the figure of “**public official**” and in turn to “**public authority**”. **Nevertheless, the definitions of both “Related person” and “Family members” of “public official” need to be reformulated and reordered. Moreover, the definition of “Related person” surprisingly does not encompass “person to whom the public official has transferred his managerial right”**.

The necessity to amend the article 3 of the new draft law is of great importance. Along the text and in particular, for instance, in **articles 79, 80 and 90**, reference is made to both related persons and family members. Even though this should not be needed in accordance to the current formulation of the draft, the proposed amendments would avoid misunderstandings whether the provision is to be enforced to both “**Related person**” and “**Family members**” of “**Public Official**” or only to one of them.

4.3.1. Recommendations

- Serbia could consider to **rewrite the items 5 and 6 of article 3** as follows:
 - a. 5) A “**related person** is ~~a public official's spouse or common-law partner, his blood relative in the direct line, or collateral blood relative to the second degree, his sufficient adoptive parent or adoptee, his in-laws to the first degree, as well as~~ any other natural person or legal entity which, according to other grounds and circumstances, may be reasonably regarded as someone who shares a common interest with the public official, **or a person to whom the public official has transferred his/her managerial rights**”;
 - b. 6) A “**family member** is a public official's spouse or common-law partner, parent or adoptive parent, child or adoptee, **his blood relative in the direct line, or collateral blood relative to the second degree, his in-laws to the first degree**”;
- Serbia could consider reordering the items by **switching item 5 and 6**.
- For an accurate uniformity of the entire text, Serbia should in turn consider to **add** along the text the term “**related person**” and “**family member**” as indicated in the attached matching table and **delete** from the **article 134, paragraph 1**, the last sentence “~~but not a family member~~”

These amendments if made as proposed, would surely have a positive impact on the implementation due to the unequivocally interpretation of terms and in turn will confidentially facilitate the effort of the ACA and of the Misdemeanour Court when called to decide on the imposition of fines in accordance to Chapter XIII.

4.4. Articles 4 & 5 - Chapter II. - Anti-Corruption Agency

The Chapter II of the new draft Law includes 33 articles (*Art. 4-37*) whereas the current law includes 24 articles (*Art. 3-26*). As a result, 10 additional articles have been added. Most of these added articles contain better written provisions previously embedded in single articles.

The provisions stipulated in the article 3 of the current law have been positively rewritten separately in two different articles (*Art. 4 and 5*) of the new draft law. The article 4 stresses that ACA is autonomous and independent and accountable to the National Assembly and that has the status of a legal entity. Whereas the article 5 of the new draft Law refers to the allocation of funds for the operation of ACA. The **article 5** of the new draft law appear better formulated compared to the current provisions stipulated in article 3. **Nevertheless, in the paragraph 4³, the the word “sufficient” is considered inappropriate and vague as it opens to some wide individual interpretations. Additionally, there is not a clear provision stating that ACA budget shall regularly increase. It undoubtedly does not represent an improvement.. The explained provision has neither been written in compliance with international standards⁴ nor in fulfillment with the 2015 EU screening report⁵.**

4.4.1. Recommendation:

Serbia could consider to:

- a. rewrite the paragraph 4 of the article 5 of the new draft law as follows:
*“The annual funds for the operation of the Agency allocated from the budget of the Republic of Serbia should be **sufficient appropriate and adequate to the Agency’s task and responsibility** to ensure its effectiveness and independence”;*
- b. Add a paragraph soon after paragraph 5, which could read, for instance:
“The annual funds for the operation of the Agency allocated from the budget of the Republic of Serbia shall be not less than the previous year budget and in any case increased in line with either the annual inflation rate or the growth of the GDP, whichever the more favorable”.

4.5. Article 7 - Chapter II. - Anti-Corruption Agency

The article 7 of the new draft law in its paragraph 1, lists in 14 items the competence of ACA. The paragraph 2, as a sort of safeguard states *“The Agency also carries out other activities referred to in this, or other laws”*. By comparing the article 7 of the new draft law with the article 5 of the current law still in force, the competences of ACA have been **positively** expanded. **However minor but relevant issues do need improvements.**

Relevant is that now the article 7, in its:

- a. **Item 1, positively** reinforces the ACA task to supervises the implementation of strategic anti-corruption documents as it demands ACA to file reports on their implementation with recommendations to the National Assembly; It also empowers the ACA to address recommendations to responsible entities on how to remove omissions in the implementation of strategic anti-corruption documents and proposes amendments to the strategic documents which, in case of non-compliance may be sanctioned in accordance to the provisions stipulated in chapter XIII;
- b. **Item 4, positively** says unequivocally that ACA can file criminal charges, can submit request for initiation of misdemeanor proceedings and can take initiatives for initiating disciplinary proceedings;
- c. **Item 7, is believed to be incomplete** as it provides ACA only the competence to *“checks asset and income disclosure reports filed by public officials”*. **Since monitoring the property status of the Public Official is equally important such provision could be added as already foreseen in article 47, paragraph 1 the law in force and as indicated in the heading of article 80 of the draft law;**

³ The paragraph 4 of the article 5, of the new draft law reads: *“The annual funds for the operation of the Agency allocated from the budget of the Republic of Serbia should be **sufficient** to ensure its effectiveness”*.

⁴ TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION - Pag 12, reads: **“It is important that the body or bodies be funded appropriately and adequately.** One method for doing this is direct submission of the body’s annual business plan, with full budgetary details, to the appropriate budgetary committee of the Legislature for approval. Where possible, **the funding for the body should be agreed on a multi-year basis. This will minimize the potential for the legislature to use its budgetary approval power to limit the body’s independence or to exercise improper influence in relation to specific corruption cases.** An alternate method would be that the body receives an overall grant and be free from legislative influence over individual items in its budget. [...] Although there are many other arrangements to ensure appropriate resources, the focus should be on maintaining the independence of the anti- corruption body or bodies;

OECD 2008 - Specialized Anti-Corruption Institutions - Page 26 quotes: **“Adequate funding of a body is of crucial importance.** While full financial independence cannot be achieved (at minimum the budget will be approved by the Parliament and in many cases prepared by the Government), **sustainable funding needs to be secured and legal regulations should prevent unfettered discretion of the executive over the level of funding”**.

⁵ COMMISSION STAFF WORKING DOCUMENT - SERBIA 2015 REPORT - Brussels, 10.11.2015 SWD(2015) 211 final which in page 52 reads: **“Overall, it must receive and maintain the capacity, tools and financial resources needed to carry out its mandate”**.

- d. **Item 9**, stipulates **positively** that ACA “checks information on the participation of a legal entity in which a public official or his family member has an interest or shares exceeding 20% in public procurement, privatization or other procedures resulting in the conclusion of a contract with a public authority”;
- e. **Item 10**, is considered **incomplete** too. In fact, it states that the ACA “Acts on complaints of natural persons and legal entities with the aim of detecting corruption”. **This provision appears excluding that ACA could act upon its own initiative. Additionally, it is not aligned with article 82, paragraph 2 of the draft law;**
- f. **Item 11**, **positively** strengthens further the ACA role in the legislative process as it requires ACA to issue opinions on draft laws prepared to challenge high risk from corruption and draft laws aiming at transposing provisions stipulated in ratified international anti-corruption treaties;
- g. **Item 12**, **records positive improvements too** as ACA competence is expanded for conducting analyses of corruption risks in the operation of public authorities and making reports with recommendations for the removal of these risks.

Although the **article 7** ends with the **paragraph 2** saying “The Agency also carries out other activities referred to in this, or other laws”, **it would be wise to list at least another two items as part of the article 7, paragraph 1. One for stating clearly that the ACA should be empowered to promote Public Authorities’ media communication on issues related to the anticorruption law; One additional item for referring to the ACA competence on financing of political parties shall also be added for the sake of clarity as already stated into the law in force.**

4.5.1. Recommendations

- a. Serbia could consider to rewrite the following items of **article 7, paragraph 1**, by inserting sentences written in **green** and by **adding** two more items (15 and 16):

The Agency:

- 1); 2); 3); 4); 5); 6)
- 7) Checks asset and income disclosure reports filed by public officials **and monitors their property status;**
- 8); 9)
- 10) “Acts on complaints of natural persons and legal entities with the aim of detecting corruption” **and upon its own initiative;**
- 11); 12); 13); 14)
- 15) Promotes Public Authorities’ media communication on issues related to this Law;**
- 16) Performs tasks in accordance with the law governing the financing of political entities**

- b. In consistency with the proposed amendment of article 7, paragraph 1, item 7, the **article 80 should accordingly be amended** so as to read: “Checking the Report **and monitoring property status**, the Agency assesses whether there is a discrepancy between the data from the Report and the real situation or discrepancy between an increase of the value of assets and incomes and the legitimate, declared income.”

4.6. Article 11 - Chapter II. - Anti-Corruption Agency

The article 11 of the new draft law mostly mirrors the article 9 of the current law with the exception that paragraph 3 of article 9 of current law is not replicated in the article 11 of the new draft law. The deletion of paragraph 3 appears to be irrelevant.

On the contrary, what may be deserving particular attention for a solution is the article 11, paragraph 2, item 6 and 9, of the new draft law. Both items are referring to a “joint agreement” of two bodies (more than two in case of item 9) that will have to jointly propose a potential Board member to the National Assembly for his/her election. To this degree, it is noted that the wording “joint agreement” may lead to problems as to in case a joint agreement is not reached, a proposal to the National Assembly is not submitted and as a consequence the National Assembly will not be able to elect up to two members of the Board. This situation may have a strong negative impact on decisions the Board is expected to take in view of the fact that the balance of powers within the Board, as designed by the article 13, paragraph 3, will be compromised. In addition, if the members of the board are 8 - as it is the current situation – it may happen that a decision could not be reached in the event of a tie.

4.6.1. Suggestion

Though the above mentioned argumentation is marked as less important, Serbia could consider to find a solution by rewording the sentence “**joint agreement**” transcribed in article 11, paragraph 2, item 6 and 9. One of the many solutions in case of lack of mutual agreements in proposing the person to be elected as member of the Board, could be - *particularly for the item 9 referring to several bodies* – that the decision on “*proposing*” should be taken by a third independent subsidiary body. Another possible solution could be - *at least for the item 6* - to have every second time one of the two bodies “*proposing*” the person to the National Assembly for his election.

4.7. Article 27, paragraph 4 & 5 - Chapter II. - Anti-Corruption Agency

The article 27, paragraph 4, stipulating provisions on the suspension of the ACA Director, which reads “*The Board may suspend a director against whom the removal procedure has been initiated until the end of the procedure, but not longer than six months from the beginning of the procedure*”, **may need to be improved**.

A reasonable time limit to finalize the removal procedure and a connection between the maximum suspension period of the ACA Director to the above mentioned time limit, **should be clearly stated**.

The *ratio* of these amendments is on the one hand to assure that such a delicate issue as the dismissal of the ACA Director does not last indefinitely; and on the other hand that the ACA Director who is undergoing a dismissal procedure and who’s been already suspended, could be put back in power until the finalization of the removal procedure that is, as said, indefinite.

In addition to further protect the Director from unfunded initiation of procedure for dismissal, the paragraph 2 of the draft law could be amended by deleting the word one and adding the word three.

4.7.1. Recommendation

In view of the analysis’s outcome, Serbia could consider to:

- a. amend the paragraph 2 of the draft law by deleting the word one and adding the word **three**;
- b. rewrite the **paragraph 4 of the article 27** by **adding** after the word “*...procedure*” the following sentence “**that cannot last longer than 4 months**” and as a consequence by **deleting** the following sentence: “~~but not longer than six months from the beginning of the procedure~~”.

The article 27, paragraph 5, stipulating provisions for the dismissal of the ACA Director which reads “*The Board’s decision on the dismissal of the director is final in the administrative procedure*” **seems not complying with international standards and as a concern it may need important improvements**.

To this degree the last part of the said paragraph, **by impeding the director to challenge the Board decision before a third independent judicial body, could constitute a violation of his fundamental rights** and at the same time **threaten the independence of the ACA**, as guaranteed by the law in compliance with the article 6 of UNCAC and other international instruments.

Therefore, a **6th paragraph should also be added** to make sure that the ACA Director is provided with the possibility of appealing the decision on dismissal issued by the Board before the administrative court. This proposed provision would reinforce independency and guarantee the office of the director from potential abuses and unfunded dismissals⁶.

4.7.2. Recommendation

In view of the analysis’s outcome, Serbia could consider to rewrite the paragraph 5 by deleting the sentence “**in the administrative procedure**” and adding after the word “*...final*” the following sentence: “**and an administrative dispute may be initiated against it**”;

⁶ OECD 2007 Publication – Specialized Anti-Corruption Institutions – Review of Models – Page 18 reads: “*The director’s tenure in office should also be protected by law against unfounded dismissals*”.

4.8. Article 31 - Chapter II. - Anti-Corruption Agency

The article 31, paragraph 1 of the new draft law **positively** clarifies that the ACA Staff, though considered Civil Servant shall be - *as per the provision stipulated in the paragraph 2* - subject to the prohibitions and obligations applicable to Public Officials with the only exception of the restrictions that apply after the termination of office foreseen by the **Article 55**. Additionally, ACA Staff in case violating the new draft Law – *contrary to other Civil Servant* – due to their particular status and in accordance to the Law governing Civil Servants that makes a differentiation between minor and serious violation, are always subject to disciplinary sanction for serious violations, independently whether the violation is minor or serious.

However, despite the **positive** provision stipulated in article 31, it is noted that **Article 32 proves to be strongly inconsistent with regard to the balance** between remuneration and the compliance with prohibitions and obligations applicable to Public Officials and - *as per the provision stipulated in paragraph 2 of the article 31* – to the ACA Staff too.

In addition, the provision stipulated in the Article 32 of the new draft law, disregarded:

- a. The Action Plan for complying with Chapter 23, which in page 142 the activity n. 2.2.1.1 in its last item states “*define in a special way rights and obligations of employees*” implying – *as for consolidated international standards* - a balancing with remuneration of ACA employees;
- b. International standards⁷, including the article 6, paragraph 2, of UNCAC Convention that with the wording “specialised” implicitly indicates that HR specialization is strictly interconnected to an higher remuneration;
- c. The recommendations from the European Commission Screening Report referring to the need for *ensuring that the Agency's staffing level matches the tasks it is asked to perform...*”.

4.8.1. Recommendation

In view of the analysis’s outcome, Serbia could consider to **rewrite the article 32 of the new draft law** in order to make sure ACA employees are **entitled to an adequate salary**. **For instance, it could be granted 30% higher salary compared to the correspondent Civil Servant, as it was originally stated in the version of the draft law upon which the WG had agreed**; this in consideration of the tougher selection process and consequent degree of specialization, of the nature of the institution and in view of the strict rules and obligations of the civil servants working at ACA.

This amendment is crucial so as to comply with international recommendations, studies and guidelines, with the Serbian AP chapter 23 and with the recommendation of the EU screening report.

4.9. Article 40 - Chapter IV. – Conflict of Interest

The **article 40**, is well structured. In the **1st paragraph** the burden to notify the ACA in case of conflict of interest is put on the Public Office. Whereas **paragraph 2**, defines the time limit of 15 days within which the ACA shall presents its opinion on whether a conflict of interest exists. The **paragraph 3**, reduces to eight days the time limits to present the requested opinion in case the public official is acting in a public procurement procedure.

However, since this prevision has a direct impact on the responsibilities and duties of ACA it **is absolutely necessary that in anti-corruption related topics an explicit decision is always adopted by the ACA**. **This is considered a minor but relevant improvement that is categorically necessary**.

⁷ OECD 2007 Publication – Specialized Anti-Corruption Institutions – Review of Models – Page 18 reads: ACA staff “.....Salaries need to reflect the nature and specificities of work.....”;

EPAC/EACN 10 Guiding Principles and Parameters on the Notion of Independence of AC Bodies² – page 22, reads: “In summarizing and in compliance with all major international conventions and recommendations, anti-corruption bodies shall be granted”: “1.....”, “2. *Appropriate allocation of highly qualified personnel, sufficient (public) funds and resources (including remunerations and incentives)....*”;

TECHNICAL GUIDE TO THE UNCAC - pag. 11 quotes: “*suitable financial resources and remuneration for staff*”.

In view of the binding prescribed time limits, it would be useful to **add** a paragraph in order to make sure that the **principle of silent consent is not applicable to the anticorruption law** or, alternatively, if more convenient, it may be worth considering to add such a provision as a standalone article so as to be applied for any kind of decision.

4.9.1. Recommendation

In view of the analysis's outcome, Serbia could consider to:

- a. **either add a 4th paragraph in the article 40 which could read: "The principle of silent consent does not apply to the anticorruption law";**
- b. **or, alternatively, if more convenient, a provision could be added as a stand alone article applicable for any kind of opinion/decision.**

4.10. Article 57 - Chapter VI. – Accumulation of Public Offices

The article 57 appear to be containing well defined provisions about the dismissal from Public Office in case accumulation. In order to be clear this article **should be read in conjunction with the article 92 and 132, paragraph 1, item 5.**

Nonetheless, in order to make this article more efficient and effective the 4th paragraph of article 57 could be improved via minor but still relevant amendments. This amendment is also implicitly requested by the National Anti-Corruption Strategy when referring to "zero tolerance for corruption".

In this view, the limitation period should be suspended as long as the accumulation of offices continues and **start only** when one of the two offices is terminated.

4.10.1. Recommendation

Serbia could consider to amend the **paragraph 4 of the article 57** which could read *"In those cases, the statute of limitations which applies on the violation of the prohibition to accumulate public offices shall expire within two years after the **termination of one of the two accumulated public offices** ~~election, appointment or nomination to the second public office in a row.~~"*

4.11. Article 92 - Chapter IX - Procedure for Deciding on the Violation of This Law

Far relevant is that all the provisions contained within Chapter IX have the scope to regulate **the whole procedure applicable to any violation of the Law**. Namely for:

- a. discharge of a public office (Article 38);
- b. in case of a conflict of interest (Art. 40-43);
- c. incompatibility (Art. 44–52 and Article 55);
- d. accumulation of public offices (Article 57);
- e. acceptance of a gift (Art. 59-64 and Article 67);
- f. disclosure of assets and incomes (Article 69, Art. 70-74. and Article 80).

In particular, **article 92** refers to the subsequent measure of the *"Recommendation for Dismissal from a Public Office"*. This article **should be read in conjunction with article 130, paragraph 1, item 4**, stipulating matching penal provision. **The provisions of article 92 are considered as an improvement compared to the current law in view of the fact that the new draft Law, article 130, paragraph 1, item 4 provides for a fine against the Public Authority failing to inform the ACA on how it acted within 60 days.** Thus, the competent Public Authority is **obliged**, as per the provision stipulated in **paragraph 2**, to inform ACA whether the recommendation has been enacted or not.

Nevertheless, the said provision is considered quite **weak** as it does not even oblige the competent Public Authority to provide **motivation** in case recommendation is discarded. From current practice emerges that some times competent Public Authority do not even respond to the ACA, as sanctions are not foreseen by the current law. **Therefore, even in terms of transparency, there is room for additional improvement.** The improvement should aim at **obliging**, in case recommendation is discarded, the competent **Public Authority to evidence and motivate its decision** and as a consequence extend the already foreseen sanction (*art 130, P.1, Item 4*) to failure to provide motivation. For the same reasons the provided motivation from the competent Public Authority provided to the ACA shall be publicized on ACA Website in accordance to an existing provision (*article 89, P.2*). **Furthermore, it could be also considered to foresee that competent Public Authority publicize both ACA recommendation and the motivated decision on recommendation on its website as well.**

4.11.1. Recommendation

Serbia could consider to amend the paragraph two of the article 92 and add an additional 3rd paragraph. Consequently, a further amendment of the article 130, paragraph 1, item 4 it's needed. Thus:

- a. The article 92, paragraph 2, could read ***“The public authority is required to tell the Agency how it acted on the recommendation within 60 days from its receipt and to provide evidenced motivation in case it decides not to comply with the recommendation for dismissal.”***
- b. The 3rd paragraph to be added under the article 92 could read: ***“the motivation referred to in paragraph 2, is published in the agency’s web presentation according to article 89, paragraph 2”;***
- c. in consistency of the above proposed amendments, the article 130, paragraph 1, item 4 could read: ***“if it fails to inform the agency how it acted or fails to provide evidenced motivation upon the recommendation within the set time limit (article 92. paragraph 2.)”***.

4.12. Article 98 – Chapter IX - Procedure for Deciding on the Violation of This Law

The **article 98**, refers to the competent Authorities to which ACA, in case during proceedings finds that there are grounds for suspicion that a criminal offence prosecutable *ex officio* or a misdemeanor or violation of employment duties have been committed, must file a criminal complaint, request to initiate misdemeanor proceedings or initiative for conducting disciplinary proceedings to the competent authority. **However, this provision though fully shared, is missing an important additional provision related to public procurement.**

In particular, even though other public agencies are especially tasked with the oversight over public procurement, with the new draft law, ACA has been **positively** given more specific powers on procurement proceedings and public contracts (*Articles 4, 52, 122*). This must be seen **as a mayor improvement, though additional effectiveness may be needed, taking into account the spread of corruption in the adjudication of public contracts** and the damages that this can determine on the expenditure of public funds and, ultimately, the citizens.

In this view and in line with the functions and powers normally discharged by ACA, it could be considered to **grant ACA the power to recommend the contracting authority to suspend the procurement proceedings, in order to give to the other competent Authorities time to further investigate and act.** At the same time in order to overcome the critics highlighted in 2014 by OSCE⁸, the law should enable ACA to act in close cooperation with the Public Procurement Office, that can exercise the power of annul the contract according to **article 163 of the Public Procurement Contract**⁹.

⁸ For an analysis of the phenomenon in the Republic of Serbia, see Public Procurement Corruption Map in the Republic of Serbia, OSCE, 2014 - pag.3 where it is stated: *“First and foremost, the trust in the public procurement system in the Republic of Serbia has been **impaired** because competent state authorities have been slow to use their current legal powers. This has resulted in the following consequences: [...] Failure to institute legal proceedings for declaring the contract on public procurement **null and void** after it was signed, which is a very important instrument **for fighting illegal arrangements between the bidder and the contracting authority**, in which case no participant considers their rights to have been violated but it is the state’s interest that has been threatened”*.

⁹ **Article 163 of the of the Public Procurement Contract**, reads: *“The Republic Commission may, on its own initiative, or upon request by claimant or an interested party, annul a public procurement contract where it determines that contracting authority:*

4.12.1. Recommendation

In accordance to the above analysis Serbia could consider to **add** these **2 additional paragraphs after the 1st paragraph of article 98** of the draft law:

- a. *“When the Agency decides that this law has been violated in a procurement proceedings or during the execution of a public contract, it notifies without delay the competent authorities and agencies”.*
- b. *“In case of serious violation of this law, the Agency can recommend the contracting authority to suspend the procurement proceedings and can suggest the Public Procurement Office to act upon article 163 of the Public Procurement Law and annul the contract. In this case the time limit indicated in art. 163, paragraph 3 is extended to 3 years after the contract was concluded”.*

4.13. Chapter XIII. – Penal Provisions

In line with Serbian legislative practice, the Chapter XII of draft law indicates and regulates the penal provision in case of violations.

It could be **positively** observed, from a general perspective, that, in most of the cases, a lower fine can be issued **directly** by ACA in case a public official or a legal entity – public authority **fails** to comply with the provisions of the law within the mandatory time limit (*Articles 126 or 127*), but still becomes compliant within the second time limit of 120 days.

In case this second time limit is also not respected, then the law gives ACA the power to charge a much higher fine (*see art. 129 and 130*) but **indirectly**, throughout the filing of a misdemeanour proceeding.

Although at first sight, this system reveal complexity in its reading, it appears to be sound and reasonable as per the Serbian legislative practice. **Nonetheless, attention should be paid to a careful matching of the relevant articles** (*provisions and sanction*). Referring to art. 49, for instance, no provision regarding the higher fine can be find in the law, in case the public official completely fails to fulfil the obligation to transfer the managerial rights.

For the benefits of the public officials and the other persons falling within the scope of the law, the opportunity to explicate in a clear manner all the **time limits**, the **obligations** and the related **consequences** that can derive from the violation of any single article **should be also considered**.

This would raise the degree of transparency and self-compliance with the Law.

4.13.1. Recommendation

- a. Serbia could consider to **add** an item in the articles listing sanctions in order to make sure that a provision referred to in article 49, **regarding the higher fine can be find in the law, in case the public official completely fails to fulfil the obligation to transfer the managerial rights;**

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1. concluded public procurement contract in negotiated procedure without prior call for competition, in absence of requirements set for applying such procedure by this Law and without publishing notice on initiating the procedure and decision on awarding contract;
 2. concluded public procurement contract before expiry of time limit for filing request for the protection of rights;
 3. concluded public procurement contract after the filing of request for the protection of rights and before the decision of the Republic Commission;
 4. concluded public procurement contract acting in contravention with decision of the Republic Commission under Article 150 of this Law;
 5. concluded public procurement contract by violating provisions and conditions of framework agreement.

Request for annulment of contract is filed together with request for the protection of rights and within 30 days from the day of learning the reason for annulment, but no later than a year after the contract was concluded.

Annulment means that public procurement contract is terminated, and contracting parties are obliged to return what they had received on the basis of that contract.

If whatever that was received on the basis of the annulled public procurement contract cannot be returned, or if its nature is contrary to it being returned, contracting authority shall pay to bona fide supplier for the supplied goods, provided services or performed works.

If the contract annulment would have disproportionate impact on the work or business of contracting authority or the interest of the Republic of Serbia, the Republic Commission will not annul the public procurement contract, but may reduce the duration of contract, or impose a fine referred to in Article 162 of this Law.”

The Republic Commission will file lawsuit for determining nullity the public procurement contract if it learns in any way that the concluded public procurement contract is null and void.

- b. The draft law could have a provision stipulating that ACA adopts, subsequently to the approval of the draft law, a guideline or any other appropriate act (bylaw) so as to explicate in a clear manner all the **time limits**, the **obligations** and the related **consequences** that can derive from the violation of any single article.

4.14. Article 137 - Chapter XIV. – Transitional Provisions

The Chapter XIV looks like covering profusely all issues permitting a smooth transition. **Nevertheless, it does not address the significant issue of the Public Official who has been granted – by the ACA Director – consent to hold two or more public offices in accordance to the Law that is currently in force. This is a significant legislative loophole deserving imperative improvements.**

Since, in accordance to **article 56** of the new draft law **is no longer permitted to hold more than one public office**, there should be a clear provision stipulating the obligation of the Public Officials - *who have been granted the consent under the law in force* - to mandatory choose one of the Public Offices he wants to retain.

The mentioned choice should be made within a definite time limit which could be set, for instance, to 120 days from the entry into force of the new Law. Defining a time limit for the choice is of huge relevance also to avoid violating the principle of impartiality that may lead to lack of citizen trust in the Serbian apparatus.

To this degree, it is worth pointing out that the ACA for the period 2013, 2014 and 2015 has granted the consent to hold two or more position to about 400 Public Officials (*the average of 133 per year*). Considering that the Serbian mandate to discharge Public Office is always set to maximum 4 years, about 130 Public Official, holding two or more Offices, would terminate their Office in 2016. Therefore, the implementation of this addressed amendment would not create prejudice to the ongoing activity of Public Authorities.

4.14.1. Recommendation

The Serbian Authorities could consider to add two paragraphs soon after the paragraph 2 of the article 137, which could read respectively:

- a. **“consent to hold two or more public offices granted to Public Officials in accordance to the article 56 of the previous Law on Anti-corruption cease to have effect within (for instance)120 days from the date of entry into force of this law”;**
- b. **“Public Official who have been granted authorization to hold two or more Public Offices shall – within (for instance)120 days - choose one of the Public Office he wants to retain and immediately notify the Agency about the choice he made”.**

Consequently, the heading of article 137 should be amended to read **“Proceedings on Requests for Consent and Given Consent for Discharging of Two or More Public Offices”**.

4.15. Statue of Limitation

It is noted that the Anti-corruption Law, for the implementation of proceedings, imposition of sanctions and for the statue of limitation refers to the Misdemeanor Law. As far as the statue of limitation is concerned, the article 84, in its:

- **paragraph 1** states *“Misdemeanor proceedings may not be instituted or conducted if one year has elapsed from the date when the misdemeanor was committed”*
- **paragraph 5** dictates **exception** to the provision of paragraph 1 in certain areas including *“Prevention of Corruption”* by stating *“By means of exemption to the provision of paragraph 1 of this Article, for misdemeanors in the areas of customs, foreign trade, foreign exchange operations, public revenues and finances, public procurement, trade in goods and services, environment, prevention of corruption and air traffic, a special law may prescribe a longer statute of limitations for initiation and conduct of misdemeanor proceedings”*

- paragraph 6, states that the “**time limit related to the exceptions reported in paragraph 5 which may not exceed five years**”

Considering:

- the nature of corruption that often implies a directly or indirectly hidden agreement between two or more parties which render the collection of evidence difficult;
- the consequence of corruption on the society, correctly recognized in article 84, paragraph 5 of Misdemeanor Law that rightly prescribes for the area of prevention of corruption a longer statute of limitation up to 5 years in accordance to the paragraph 6;
- the article 84, paragraph 5, clearly states that “a special law may prescribe a longer statute of limitations”;**

It should also be considered to add into the new draft on Anti-Corruption Law a standalone article setting always to 5 years the statute of limitation, so as to avoid impeding an effective implementation of the anticorruption Law.

4.15.1. Recommendation

Having regarded the above argumentation, Serbia could consider to add into the the new draft Law on Anti-corruption a stand-alone article stipulating a statue of limitation of always 5 years, in line with the paragraphs 5 and 6 of the article 84 of the Misdemeanor Law.

4.16. Time Limits

The text copiously and conventionally refers to a wide range of time limits which, often differ depending on the stipulation of the normative provision.

Namely:

- 5 days is the limit set in article 49, paragraph 2, to prove transfers of managerial rights;
- 8 days is the time limit set in articles 40, paragraph 3; 57, paragraph 2; 60, paragraph 3; 63, paragraph 2; 93, paragraph 1; 94, paragraph 2; 100, paragraph 2; 125, paragraph 2; 129, paragraph 1, items 11 and 13;
- 10 days is the time limit set in articles 64, paragraph 1, in conjunction with article 129, paragraph 1, Item 14;
- 15 days is the time limit set in articles 26, paragraph 2; 28 v 2; 40, paragraph 2; 52, paragraph 1; 69, paragraph 1; 79, paragraph 1; 80, paragraph 2; 84, paragraph 1; 86, paragraph 1; 88, paragraph 4; 113, paragraph 1; 121, paragraph 4;
- 30 days is the time limit set in articles 18, paragraphs 1 and 2; 49, paragraph 1; 51, paragraph 1; 70, paragraphs 1, 2 and 3; 71, paragraph 3; 80, paragraph 3; 85, paragraph 1; 94, paragraphs 1; 100, paragraph 4; 101, paragraph 2; 102, paragraph 2; 129, paragraph 1, item 7; 137, paragraphs 1, 2 and 6; 138, paragraph 4;

The highlighted time limits differences could negatively impact, at the same time, on the implementation of the law and could create confusion among the addresses referred to into the draft Law with a further negative impact on its compliance. Thus margins of improvements may be considered.

4.16.1. Suggestion

Thought it seems a minor issue, Serbia - with the purpose of facilitating Public Officials and Public Authorities compliance as well as ACA duties and responsibilities for an effective implementation of the future Law - could consider whether at least some of these defined time limits could be linearly unified to a few time limits.

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The present report has been written by **Mr. Maurizio Varanese** and submitted to the Italian RTE sitting in Belgrade for further distribution to whoever competent on the 17 November 2016.

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