Transparency Serbia

Adress: Palmotićeva 31/III
11000 Belgrade, Serbia
Office: (+ 381 11) 303 38 27
e-mail: ts@transparentnost.org.rs
www.facebook.com/Transparentnost.Srbija
twitter.com/transparencyser
www.transparentnost.org.rs

Summary

Risks of corruption in regulations

On 1 September, 2020, the implementation of the Law on Prevention of Corruption and replaced the previous law on the Anti-Corruption Agency. One of the primary goals of the new law has been to reduce the risk of corruption. Therefore, the competencies of the Agency were specified and expanded in the legal provisions, especially those based on the fact that the Agency is primarily a preventive body. Among them, special attention is drawn to the provision of Article 35, paragraph 2, which prescribes a new obligation for public authorities. According to that provision, all state administration bodies are obliged to submit to the Agency a draft law in areas that are particularly risky for corruption and a draft law regulating issues covered by ratified international agreements in the field of anti-corruption. The Agency then gives an opinion on corruption risk assessment.

During the enactment of this law, the TS made many suggestions for improvement, which also apply to these provisions. We pointed out the following: *The current provision contains useful rules for assessing the risk of corruption and how the Agency gives opinions on some such laws. However, the provision does not cover all situations where such an opinion of the Agency is required. Such situations are when other types of legal acts are passed, starting with the Constitution, then laws that may not contain risks of corruption but contain useful provisions for suppression of corruption, and draft bylaws that may also be important for the anti-corruption policy and risk assessment of corruption. In addition, the provision now focuses on draft laws prepared by state administration bodies. Still, it does not cover those acts proposed by other authorised proposers - e.g. Ombudsman, MPs, the National Bank of Serbia, the Assembly of AP Vojvodina, 30,000 citizens as part of a people's initiative. No less critical are the situations when the government's bill significantly differs from the Draft of the same law on which the Agency has already given an opinion, or when there are amendments in the parliamentary procedure that would introduce new risks of corruption or damage good solutions from the bill.*

Transparency Serbia was looking forward to the first results of the implementation of this provision, bearing in mind that for years it has advocated prescribing this mechanism for preventing corruption and the need for the Agency to develop a new methodology for assessing the risk of corruption. In April 2021, the Agency published the Methodology for Regulating the Risk of Corruption in Regulations, which developed in cooperation with the OSCE Mission to Serbia.

In the past (2013-2018), even before the legal obligation to submit draft laws was established, the Agency, on its initiative or at the request of institutions, analysed certain acts from the anti-corruption angle and published its findings. Analyses were performed in some cases even later but were not published. Unfortunately, the new law, which institutionalised the giving of such opinions, did not provide for the obligation to publish them. This significantly reduced the possible beneficial effects of introducing this measure and gaining the general public's support for solving the problems in the draft laws that the Agency noticed.

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During this research project, supported by the OSCE Mission to Serbia[1], Transparency Serbia collected information from the Agency and individual ministries that prepared draft laws and published the report on its website. The Agency informed us that in the period from 1 September 2020 to 8 September 2021, it received seven draft laws.

Transparency Serbia also used other sources in its research – published information on public hearings, draft laws adopted by the government and laws adopted by the National Assembly. In this way, we found that the competent ministries, in most cases, did not respect even their fundamental obligation to submit draft laws to the Agency for an opinion.

Articles 35 and 2 of the Law on Prevention of Corruption stipulate that such an obligation exists when it comes to draft laws "in the area of particularly high risk of corruption" and those "which regulate issues covered by ratified international agreements in the field of anti-corruption". Since it is prescribed that "particularly risky areas" are determined based on a "strategic document", and currently the only document of its kind is the Revised Action Plan for Chapter 23 negotiations with the EU, there is no doubt that the obligation to seek opinion existed whenever laws were drafted from the eight listed areas: health, taxes, customs, education, local government, privatisation, public procurement and the police.

Even when a number of other acts related (at least in part) to ratified international anti-corruption conventions are not taken into account, it is evident that during this period, ministries did not seek the opinion of the Agency on **at least 12 tax laws**, including amendments The Law on Determining the Origin of Property and the Special Tax, which the representatives of the state bodies claimed was anti-corruption. The opinion was not requested on the amendments to the essential act in this area - the Law on Tax Procedure and Tax Administration. In the area of **education**, the line ministry sought an opinion on some of the laws (e.g. the Law on Higher Education), but at the same time failed to do so to amend the Law on Secondary Education and Upbringing. When it comes to **public procurement**, the opinion was not sought when the Law on Special Conditions for the Realisation of the Apartment Construction Project for Members of the Security Forces was changed. Although **local self-government** was identified as one of the most vulnerable areas, no opinion was sought on amendments to two laws concerning the salaries of civil servants and employees and employees in public institutions, including those established at the local level. The same thing is with the amendments to the **Customs Law**. Without obtaining an opinion, amendments to the Law on Protection of the Population from Infectious Diseases have been proposed in the field of **health**. As for the **police**, during this period, there was a public debate on the Draft of the new Law on Internal Affairs, for which also no opinion on corruption risks was requested. For the area of **privatisation** in the narrower sense, no amendments to the law were proposed, but the regulations related to bankruptcy and the work of bankruptcy trustees were changed, also without seeking an opinion. Finally, as a curiosity, it can be noted that the Ministry of Justice did not ask the Agency for an opinion on corruption risks during **the amendments to the Law on Prevention of Corruption**, which were prepared in August and adopted in September 2021.

This list can be supplemented by the government's proposals for ratification of international agreements that also touch on some of the vulnerable areas, for which no opinion was sought: amendment of Annex 4 of the CEFTA agreement, amendments to the Customs Convention on International Carriage of Goods,

[1] *All opinions and views expressed belong exclusively to Transparency Serbia and do not necessarily reflect the views and views of the OSCE Mission.*

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customs agreement with China, a double taxation treaty with Japan and a similar treaty with the Chinese region of Hong Kong.

The Law on Prevention of Corruption does not stipulate the obligation of the Assembly to request an opinion on corruption risks in the proposed authentic interpretations of the law. During this period, two authentic interpretations were adopted, which were extremely risky from this perspective: Authentic interpretation of the provision of Article 2, paragraph 1, item 3) of the Law on Prevention of Corruption and Authentic interpretation of the provision of Article 64, paragraph 1 of the Law on Higher Education. Similarly, the risk of corruption may have existed in three proposals for authentic interpretation that never saw the light of day: Proposal for the authentic interpretation of Article 1066 para. 2 of the Law on Obligations, Article 41, para. 1 and 2 and Article 43, Art. 2 and 3 of the Law on Consumer Protection and Article 17 para. 1 of the Law on Protection of Users of Financial Services. These acts were on the agenda of the session of the Committee on Constitutional Issues and Legislation of the National Assembly on 5 July 2021, but the proposals were withdrawn. Transparency Serbia unsuccessfully tried to obtain these documents by requesting access to information.

During that period, the Agency gave an opinion on the draft Law on Referendum and People's Initiative (two drafts), amendments to the Law on Higher Education, draft Law on Student Organization, amendments to the Law on Health Insurance, amendments to the Law on Free Access to Information of public importance and the draft Law on the Protector of Citizens.

Through this research, we concluded that the Agency respected the Methodology that it established itself. Thus, among other things, the Agency has always stated what constitutes the legal framework of a specific analysis. The subject of its consideration was, equally, the assessment of the risk of corruption in connection with the legislative process and the detailed analysis of risk factors and the risk of corruption in the individual provisions of the draft law. When it comes to the procedure, shortcomings were considered, and in some cases observed, in terms of transparency standards and public hearings, (in)coincidence between declared and actual goals, the presence of hidden goals and the quality of the given explanations. When analysing risk factors and corruption risks, the Agency cites the considered provision, explains in detail the objections, describes which risks of corruption may arise as a result of perceived shortcomings (specific illicit behaviours, i.e. criminal acts), and finally make recommendations for elimination of observed risk factors.

The scope of compliance with the Agency's opinions and recommendations varied significantly from provision to provision. Thus, in the case of giving an Opinion on the Draft Law on Referendum and People's Initiative from August 2021, the selective approach of the Ministry of State Administration and Local Self-Government is noticeable. For example, through amendments to the provision of Article 25 of the last Draft of that law, which specifies that a group of citizens be formed "in accordance with the regulations governing elections for deputies", the Agency's recommendation was partially respected. On the other hand, the Ministry completely ignored other recommendations of the Agency related to the same article of the law. On the recommendation of the Agency, Article 26, which refers to the implementation of the Law on Financing of Political Activities, was partially improved. However, this was not the case with the recommendation to "prescribe the notion of own funds" in the Law on Referendum, because the Law on Financing Political Activities does not define it, so it cannot be interpreted on the basis of it.

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Most of the Agency's objections that did not meet with an adequate response from the relevant Ministry were about the Draft Law on Amendments to the Law on Higher Education. The Agency stated that the standards of transparency and public participation were not fully respected because the Ministry did not publish the report on the Public Hearing with an overview of the reasons for accepting or rejecting the given proposals. The Agency also found that the way to achieve the declared goal - the independence of the National Accreditation Body - is not clear. Specific objections to particular articles of this draft law referred primarily to the amendments to para. 2 and 3 of Article 16 of the Law, which prescribes the structure and composition of the Management Board of the National Accreditation Body. Given that "the proposed membership structure of the Board of Directors creates a basis for trading influence outside the academic public in the decision-making process of the Board of Directors, in order to pursue private interests in that process, which may favour abuse of office in exercising the Board's powers, which should be an independent body", The Agency recommended the amendment of this article by "increasing the number of members from the ranks of university professors and vocational studies, as well as to determine the criteria for electing representatives of the Ministry and the Serbian Chamber of Commerce to achieve academic integrity and authority of the Steering Board". The draft law on amendments to the Law on Higher Education, approved by the government on 4 June and adopted by the National Assembly on 30 June 2021, speaks volumes about the Ministry's attitude towards the Agency's opinion. Namely, instead of acting on the Agency's recommendations to increase the number of members with university professors, the Ministry, the Government and the Assembly reduced the number of university professors from the proposed three to two! To make matters worse, this change was accompanied by an increase in other members (from six to seven). As if it wants to additionally demonstrate with what respect it approached the recommendation of the Agency, the Ministry made this increase from the ranks of members proposed only by the Ministry of Education.

As part of this research, we dedicated a particular analysis to one of the draft laws that had to be submitted to the Agency for an opinion, but it did not happen. It is a (withdrawn) draft of the Law on Internal Affairs. In this Draft law, in addition to numerous objections publicly made (biometric surveillance, ban on publishing the identity of officials), we found issues that could create risks of corruption, such as discretion in approving the use of the term "police", deletion of norms of the existing law that refer to the publicity of work (e.g. publication of quarterly reports), and significantly increased discretionary powers in employment, including opportunities for nepotism.

To illustrate that risks of corruption should be sought and eliminated in all laws, not just those related to previously identified "risk areas", we also analysed the amendments to the Bankruptcy Law, the Law on Licensing of Bankruptcy Trustees, the Law on Protection from noise and amendments to the Law on Public Property. Among the critical risks found in these texts are: inconsistent use of the terminology (e.g. instead of "the procedure is urgent", the draft contains a provision according to which "urgent procedures are conducted ..."), which leads to the danger that its application may lead to misuse in interpretation; vague, imprecise and ambiguous formulations (e.g. "in a special procedure" without further specifying a specific procedure in question), due to which this provision has bewildering meaning and thus leaves room for corrupt interpretation; and deficient reference provisions (e.g. "in accordance with other regulations") that refer to other provisions or regulations, in a vague and imprecise manner which could be a subject to different interpretations.

With all that in mind, we can tell that the following is necessary:

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1. That the amendments to the Law on Prevention of Corruption provide for the obligation to seek opinions not only on draft laws in the exhaustively listed areas but for all acts prepared by ministries;

2. That the duty to seek opinions on the risks of corruption must be extended to other phases of the legislative procedure, to other proposers besides ministries, as well as to other acts besides the law, and above all to proposals for amending the Constitution and proposals for adopting authentic interpretations of the law;

3. That the Government of Serbia, in cooperation with the Agency for the Prevention of Corruption, should determine how it will monitor the ministries' fulfilment of the obligations to submit drafts for an opinion;

4. That the Government and the National Assembly, in cooperation with the Agency for the Prevention of Corruption, should determine the manner of monitoring compliance with the recommendations given by the Agency for eliminating risks and the obligation to explain the reasons for non-compliance with those recommendations;

5. To establish the legal obligation or that the Agency on its own initiative starts publishing opinions on the risks of corruption in regulations, as well as information on the actions of ministries on those opinions.

Implementation of the Law on Lobbying

The Law on Lobbying came into force on 14 August 2019, eight months after it was adopted. It happened based on the recommendation of GRECO (a group of anti-corruption countries in the Council of Europe), which in the fourth round of evaluation gave Serbia the end of 2016 as a deadline to adopt this law as the most critical measure to increase the publicity of the work of legislative bodies. Even though GRECO gave the Government of Serbia the worst possible assessment of the fulfilment of its recommendations one more time, the report of this body of the Council of Europe from 2020 also contains some positive assessments of the government's moves for which there were no grounds.

For the most part, this is the case with assessments of the alleged increase in the transparency of the legislative process. Namely, when it comes to laws and relevant debates, the National Assembly does not publish more information than when GRECO made recommendations. The implementation of the Law on Lobbying was also given favourable assessments, which was expected since the adoption of this law – which has not been worked on for years - was accelerated due to GRECO's critical evaluations. However, assessments of the application and effects of this law are premature. For example, it is stated that "the effective application of the law is supported by a set of adopted bylaws and other regulations, as well as training and raising the awareness of persons who perform these activities." Although these activities have undoubtedly been carried out, an even more relevant indicator of implementation would be that the activities of registered or unregistered lobbyists have become available to the public. GRECO will consider lobbying, i.e. the influence of lobbyists on the decisions of the highest executive officials in the fifth round of evaluation, which was conducted for Serbia from 6 September to 10, 2021.

As a rule, the Law on Lobbying requires that a lobbyist address in writing an official or functionary working on the adoption of regulation and explain when he works and which act is in question in order to later jointly inform the Anti-Corruption Agency of all contacts.

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As a rule, the Law on Lobbying requires that a lobbyist address in writing an official or functionary working on the adoption of regulation and explain who he/she works for and what is the act in question, so that they both can later jointly inform the Anti-Corruption Agency about all contacts. The main problem is the control of the application of all aspects of the law. When the interested person decides to use informal contacts with decision-makers, it will not be easy to determine that this has happened. The legislator completely excluded such informal contacts from the notion of lobbying but failed to prohibit them explicitly.

It should be somewhat easier to determine whether there have been formal addresses by directly interested individuals, companies, organisations and associations to state bodies, parliamentary groups and "lobbied persons" in general. Such appeals may have the character of contact with "unregistered lobbyists", and the authorities should keep records of them. Most information should be available when stakeholders hire professional intermediaries – registered lobbyists – to represent their interests before general authorities.

During the year 2021, Transparency Serbia has researched the application of laws in institutions that can be expected to be most often exposed to lobbying - the Government of Serbia and ministries, the National Assembly and the President of the Republic. With the request for access to information of public importance, we requested the submission of copies of the records from Article 30, paragraphs 6 and 7 of the Law on Lobbying. These provisions stipulate that a public authority is obliged to keep records of lobbying contacts for officials who have been elected, appointed, nominated, employed or otherwise engaged in that authority. Also, every lobbyist is "obliged to prevent the occurrence of harmful consequences for the public interest that may arise as a result of lobbying."

Although the registered lobbyists did not seem to have work to do in this period either, there was a possibility that state bodies and institutions, in connection with the adoption, amendment or repeal of regulations, addressed directly interested persons, either directly or through their associations. In terms of the law, these persons have the status of "unregistered lobbyists". All authorities that responded to these requests submitted an identical answer: There were no lobbying contacts in terms of the provisions of the Law on Lobbying.

We sent 23 requests, of which we did not receive a response to the letters submitted to the Prime Minister's Office, the Ministry of Finance (last time the only state body that ignored the request), the Ministry of Environmental Protection. The National Assembly and representatives of the executive branch generally explicitly denied the existence of contacts with lobbyists and thus the existence of records that would be kept about it. In addition to the authorities not having any contacts with lobbyists, some do not seem to have a completely clear idea of what should be monitored and recorded. Namely, instead of the lobbyists who contacted them, they pointed out that they and their officials did not "have lobbying activities" or "hired lobbyists".

The probability that none of the interested subjects addressed any ministry, Government, President or Assembly and MPs regarding the regulations during the mid-2021 and the whole year of 2020, is almost nil. During that period, these bodies participated in the adoption or drafting of several hundred laws, decrees, regulations and other general acts that affect the interests of hundreds of thousands of economic entities. It is much more likely that none of them (including those who prepared, proposed and adopted the Law on Lobbying) was aware that new obligations had been established and that the implementation of these obligations by officials and employees in government bodies was not monitored.

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We believe that weaknesses in the law partly cause this situation because there is no explicit obligation for officials and other lobbyists to report such contacts within the body. Also, the possibility of public control is minimal since there is no duty to publish data on working meetings of public officials proactively. Therefore, in addition to improving the law and practice of institutions, the Agency for Prevention of Corruption must pay more attention to the training of public officials and functionaries regarding the identification of potential lobbying activities to which they are exposed and proper recording of such activities.

In the observed period, most of the publicly expressed suspicions about hidden influences during the drafting of general legal acts were related to amending the Law on Civil Procedure (still ongoing), proposing three authentic interpretations of the law that were not considered, and when passing one legal position of the Supreme Court of Cassation (which does not represent a general legal act, so the rules from the Law on Lobbying would not apply to it). In all these cases, in addition to courts and other state bodies, the users of bank loans, lawyers, and banks and their associations were directly interested in the content of the acts, and the channels of influence on decision-makers were not always visible.