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OSCE/ODIHR URGENT OPINION ON THE DRAFT AMENDMENTS TO THE INTEGRITY AND PREVENTION OF CORRUPTION ACT

Slovenia

This Opinion benefitted from comments made by Lolita Cigane (OSCE/ODIHR Core Group of Experts on Political Parties) and Francesco Clementucci (Senior Integrity Advisor, Independent)

Based on an unofficial English translation of the Draft Law.



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

EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

At the outset the Law and the Draft Amendments Law and the Draft Amendments bestow upon the Commission for the Prevention of Corruption the most crucial tools to efficiently address and work on preventing corruption both in terms of the substantive mandate and the technical tools, means and resources to effectively implement it, making the Commission vital for the prevention of and fight against corruption in Slovenia. At the same time, aspects of the Draft Amendments and the Law could be improved to allow the Commission to act more independently and effectively in the fulfilment of its mandate. In particular, the nomination and removal procedure for Commissioners should be further developed, care should be taken that effective, proportionate and dissuasive sanctions are available and employed and certain aspects of the Commission's work on conflicts of interest, asset declaration or lobbying could be reconsidered.

More specifically, and in addition to what was stated above, OSCE/ODIHR makes the following recommendations to further enhance the Draft Law:

- A.** Throughout the Amendments and the Law: to consider reviewing provisions in order to simplify and reorganize lengthy provisions, and consider the superfluous items for permanent deletion or reallocation into other more specific acts; [pars 15-17]
- B.** In Article 5 of the Draft Amendments: to redesign the selection procedure for Commissioners in a way to provide the power to the nomination committee to indicate a binding ranking based on the candidates' qualifications and allow only for a very limited amount of rejections of proposed candidates with justified decisions, based on motivations related to objective qualifications; [pars 28-29]
- C.** In Article 18 of the Draft Amendments: to redesign the dismissal/removal procedure for Commissioners in a way to require a

qualified majority of the National Assembly to cast its vote for the removal of Commissioners and to include an appeal procedure (either to the competent court of appeal for administrative decisions or Constitutional Court) in case of institutional dispute arising; [par 30]

D. In Article 9 par 6-9 of the Draft Amendments: to review if publication of a proceedings' acts, conclusions and statements for the purpose of deterrence is an appropriate, effective and proportionate sanction in all cases of minor offence; [par 32]

E. In Article 24 of the Draft Amendments as well as Article 29 of the Law: to ensure that the Law contains a list of mitigating solutions in the case of conflicts of interest as well as ensure that a list of effective, proportionate and dissuasive sanctions is available for all types of public office holders; [par 40]

F. In Article 19 of the Draft Amendments: to provide an extended definition of gift, as to include goods, objects or services, but also rights, benefits, favours or significant discounts (for example loans at suspiciously low rate) and to establish an aggregated threshold, for the value of all the gifts combined, received by a public official during a given period; [par 41]

G. In Article 1 of the Draft Amendments: to reconsider the definitions of lobbying to ensure also public lobbying is covered and that the Law makes a clearer distinction between professional and occasional lobbying [pars 43-46].

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 10 August 2020, the Chief Commissioner of the Commission for the Prevention of Corruption of the Republic of Slovenia sent to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) a request for a legal review of the Amendments hereinafter (“the Draft Amendments”) to the Integrity and Prevention of Corruption Act (hereinafter “the Act” or “the Law”)
2. On 12 August 2020, the OSCE/ODIHR responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of these draft amendments with international human rights standards and OSCE human dimension commitments.
3. Given the short timeline to prepare this legal review, the OSCE/ODIHR decided to prepare an Urgent Opinion on the Draft Act.
4. This Urgent Opinion was prepared in response to the above-mentioned request. It primarily aims to clarify and elaborate on certain recommendations or statements made in the Preliminary Opinion.
5. This Opinion was prepared in response to the above request and in accordance with the OSCE/ODIHR’s mandate.

II. SCOPE OF REVIEW

6. The scope of this Opinion covers only the Draft Amendments submitted for review. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating the prevention of and fight against corruption in Slovenia. Due to its urgency, the Opinion focuses only on the main areas of concern in the Draft Amendments. While the focus of the Urgent Opinion lies on the Draft Amendments, it is necessary and prudent for the Urgent Opinion to also, in instances, comment on provisions in the Law that would benefit from further improvement.
7. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on areas that require amendments or improvements than on the positive aspects of the Draft Act. The ensuing recommendations are based on international standards, norms and practices as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, the OSCE/ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.
8. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities,

programmes and projects, the Opinion's analysis takes into account the potentially different impact of the Draft Act on women and men.¹

9. This Opinion is based on an unofficial English translation of the Draft Act commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result. This Urgent Opinion is also available in Slovenian, the English version shall prevail.
10. In view of the above, the OSCE/ODIHR would like to make mention that this Opinion does not prevent the OSCE/ODIHR from formulating additional written or oral recommendations or comments on respective legal acts or related legislation pertaining to the legal and institutional framework in the field of anti-corruption in Slovenia in the future.

III. ANALYSIS

1. INTERNATIONAL STANDARDS AND OSCE COMMITMENTS ON THE PREVENTION OF AND FIGHT AGAINST CORRUPTION

11. The most prominent anti-corruption standards on a global level derive from the United Nations Convention against Corruption² and the OECD Convention against Bribery of Foreign Public Officials in International Business Transactions.³ The Council of Europe's Criminal Convention on Corruption⁴, the Civil Law Convention against Corruption⁵ and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime⁶ are standard-setting regional conventions.
12. These standards are also contained, reiterated and expanded in a number of soft-law standards, including the United Nations Declaration against Corruption and Bribery in International Commercial Transactions,⁷ UN General Assembly Resolution 51/59 on Action against Corruption,⁸ Council of Europe Committee of Ministers Recommendation

¹ See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), <<http://www.osce.org/mc/23295?download=true>>.

² UNGA Res 58/4, *United Nations Convention against Corruption* (hereinafter "UNCAC"), adopted 31 October 2003, entered into force 14 December 2005, GAOR 58th Session Supp 49 vol 1, 4. Slovenia acceded to the Convention on 1 April 2008.

³ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted 17 December 1997 <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>; Slovenia joined the Convention on 6 September 2001 (hereinafter "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions").

⁴ *Criminal Law Convention on Corruption*, adopted on 27 January 1999, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=173&CM=8&DF=2/20/2008&CL=ENG>; Slovenia ratified the Convention on 12 May 2000 see also the *Additional Protocol to the Criminal Law Convention on Corruption*, adopted on 15 May 2003, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=191&CM=8&DF=2/20/2008&CL=ENG> (hereinafter "Criminal Law Convention against Corruption"); Slovenia ratified the additional protocol on 11 October 2004.

⁵ *Civil Law Convention Against Corruption*, adopted on 4 November 1999, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=174&CM=8&DF=2/20/2008&CL=ENG>; Slovenia ratified the Convention on 17 March 2003 (hereinafter "Civil Law Convention against Corruption");

⁶ *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, adopted on 8 November 1990, available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=141&CM=8&DF=2/20/2008&CL=ENG>; Slovenia ratified the Convention on 23 April 1998.

⁷ *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, A/RES/51/191, 86th plenary meeting 16 December 1996, available at <https://digitallibrary.un.org/record/233080>.

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

- (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption,⁹ Recommendation CM/Rec (2017)2 on the legal regulation of lobbying activities in the context of public decision making¹⁰ as well as Council of Europe Recommendation (2000)10 on Codes of Conduct for Public Officials.¹¹
13. At the OSCE level, the fight against corruption is an integral part of the commitments undertaken by OSCE participating States, as underlined, for example, by the Maastricht Document of 2003¹² and in the 2012 OSCE Ministerial Council's Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism.¹³
14. Standards specific to anti-corruption agencies or authorities can be found in the Jakarta Statement on Principles for Anti-Corruption Agencies (hereinafter "Jakarta Principles"),¹⁴ its 2020 Colombo Commentary¹⁵ and the Anti-Corruption Authority Standards (hereinafter the "EPAC Standards") and Ten Guiding Principles against Corruption (hereinafter "EPAC Principles") of the European Partners against Corruption (hereinafter "EPAC")¹⁶, an independent forum for practitioners aiming to prevent and combat corruption. Specifically regarding Slovenia, the Urgent Opinion refers to the Council of Europe Group of States against Corruption (hereinafter "GRECO"), IV evaluation round for Slovenia, on Corruption prevention in respect of members of parliament, judges and prosecutors.¹⁷ Previous OSCE/ODIHR legal opinions which deal with the subject of anti-corruption will be referred to throughout the Urgent Opinion.¹⁸

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

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

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

¹² Final Document of the Eleventh Meeting of the OSCE Ministerial Council, Maastricht, (2003), available at <https://www.osce.org/de/mc/40535>; par 2.2.7 states: "We agree to make the elimination of all forms of corruption a priority. We will consider accession to, encourage ratification of, and support full implementation of, international conventions and other instruments in the field of combating corruption, in particular those developed by the Council of Europe and the Organisation for Economic Co-operation and Development (OECD). We welcome the adoption of the UN Convention against corruption and look forward to its early signature, ratification and entry into force."

¹³ OSCE Ministerial Council, *Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism*, 7 December 2012, available at <http://www.osce.org/cio/97968?download=true>.

¹⁴ *Jakarta Statement on Principles for Anti-Corruption Agencies*, 26-27 November 2012, available at https://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf. These principles were developed at a conference organized in Jakarta, Indonesia on 26-27 November 2012 for this purpose, which was attended by current and former heads of anti-corruption agencies, anticorruption practitioners and experts from around the world. The event was organized by the Corruption Eradication Commission of Indonesia, the United Nations Development Programme (hereinafter "UNDP") and the United Nations Office on Drugs and Crime (hereinafter "UNODC").

¹⁵ *Colombo Commentary to the Jakarta Statement on Principles for Anti-Corruption Agencies*, available at https://www.unodc.org/documents/corruption/Publications/2020/20-00107_Colombo_Commentary_Ebook.pdf (hereinafter "Colombo Commentary").

¹⁶ Available at http://www.epac-eacn.org/downloads/recommendations/doc_view/1-anti-corruption-authority-standards (the EPAC Guiding Principles can be found in the annex to the EPAC Standards).

¹⁷ GrecoRC4(2018)3, [Second Compliance Report](#).

¹⁸ E.g. *OSCE/ODIHR Urgent Comments on the Draft Decree of the President on Measures to Improve the Anti-Corruption System of Uzbekistan* (10 July 2020), available at https://www.legislationline.org/download/id/8729/file/379_CORR_UZB_10July2020_en.pdf (hereinafter "2020 Uzbekistan Opinion"); *OSCE/ODIHR Opinion on the Law on Prevention of Corruption of Montenegro* (29 October 2018), available at https://www.legislationline.org/download/id/8123/file/331_CORR_MNE_29Oct2018_en.pdf (hereinafter "2018 Montenegro Opinion"); *OSCE/ODIHR Opinion on Two Draft Anti-Corruption Laws of Ukraine* (18 July 2014) available at <http://www.legislationline.org/documents/id/19137>; *OSCE/ODIHR Opinion on the Law on the Bureau on Prevention and Combating of Corruption of Latvia* (17 November 2014), available at <http://www.legislationline.org/documents/id/19392>.

2. GENERAL REMARKS

15. At the outset, the lawmakers are commended for seeking to further improve the procedure and strengthen the mandate of the Commission for the Prevention of Corruption, which is a vital tool in the prevention of corruption and without which an efficient fight against corruption would not be possible. It is clear that the law seeks to further refine the procedure according to which the Commission operates. Often, higher quality of laws can be achieved by using clearer, simpler and more consistent wording.
16. Laws are used to regulate complex, uncertain or probable situations. According to the principle of legal certainty, they must be clear and precise so that individuals may ascertain unequivocally which rights and obligations apply to them and regulate their conduct accordingly.¹⁹ “Corruption-proofing”²⁰ is a particularly useful tool in this respect aimed at removing corruptive-prone weaknesses in the legislation. Its main goal is to prevent corruptive use of “bad” legislation.
17. The Draft Amendments contain examples of articles that appear over detailed, unnecessarily lengthy or complex. For example, Article 13 of the Draft Amendments (on New Articles 15a, 15b) lists a series of administrative steps, phases or actions, in such depth of details that appear inappropriate for a text of law. Typically, the goal of a law, even for those regulating very specific and complex sectors or activities, is to provide a clear and sufficient number of detailed provisions, instructions, including examples and scenarios, useful for the individual to understand and comply with the rules. However, anything above or beyond the “clear and sufficient” extent of provisions may soon become unnecessary, and possibly redundant, repetitive or even inconsistent, confusing and misleading. While detailed rules and procedures to some extent might be useful and even necessary in order for the Commission to effectively fulfil its mandate, overly detailed regulations may have negative impact. And indeed, some of the rules, for example on the form of the invitation and what exactly it should contain in new Article 15a of the Law would more typically be found in a by-law or other secondary document. In light of basic principles and best practices of law-making, and while taking care not to, by generalization, opening new loopholes” **it is recommended to review the Law and the Draft Amendments, in order to simplify and reorganize lengthy provisions, and consider the superfluous items for permanent deletion or reallocation into other more specific acts (for example in Commission’s standard processes or procedural manuals).**

¹⁹ See e.g. *OSCE/ODIHR Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (as of 26 September 2017) (13 November 2017) par 40 and fn 41, available at <https://www.legislationline.org/documents/id/21444>; see also Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, 18 March 2016, pars 15-17 available at <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)>, as endorsed by the Parliamentary Assembly of the Council of Europe (PACE) on 11 October 2017 (see PACE Resolution 2187(2017) available at <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24213&lang=en>>); see further, for example “Legistic” (also called law-making or legislative drafting) as a science and field of study which seeks to define the best way for planning, developing, drafting and implementing laws, regulations, orders and decrees, https://www.legifrance.gouv.fr/Media/Droit-francais/Guide-legistique/Guide_Legistique_2017_PDF (in French).

²⁰ Anti-Corruption Assessment of Laws (“Corruption Proofing”), RAI (http://rai-see.org/wp-content/uploads/2015/06/Comparative_Study-Methodology_on_Anti-corruption_Assessment_of_Laws.pdf);

RECOMMENDATION A.

Throughout the Amendments and the Law: to consider **reviewing provisions in order to simplify and reorganize lengthy or redundant provisions, and consider the superfluous items for permanent deletion or reallocation into other more specific acts.**

3. DEFINITIONS

18. Article 4 of the Law includes a definition of corruption that covers “any violation of due conduct by officials and responsible persons in the public or private sector, as well as the conduct of persons initiating such violations or of persons benefiting from it, for the purpose of undue benefit promised, offered or given, directly or indirectly, or for the purpose of undue benefit demanded, accepted or expected for one's own advantage or to the advantage of any other person”. Furthermore, the Law introduces definition of “international corruption”, which means corruption involving at least one natural or legal person from abroad.²¹ **It is important to ensure that these definitions reflect international standards. The above-mentioned definitions of the law appear to appropriately reflect the essence of corruption.**
19. Additionally, the definition of “interest groups” for the purpose of lobbying oversight could be reconsidered, as an “interest group” may or may not have a lobbyist acting on its behalf, this should not serve as the only qualifying factor (Article 1 of the Draft Amendments amending Article 4 par 13 of the Law).

4. Mandate and Functions of Effective Anti-Corruption Bodies

20. At the outset, the Law and the Draft Amendments bestow upon the Commission the most crucial tools to efficiently address and work on preventing corruption both in terms of the substantive mandate and the technical tools, means and resources to effectively implement it. An institution like the Commission is vital for the prevention of and fight against corruption in Slovenia.
21. The sources of international standards, although different in scope, contents and objectives, define a clear international obligation for the countries to ensure institutional specialization in the area of corruption. According to UNCAC, prevention needs to be addressed at the institutional level, by creation or dedication of a specialized body (or bodies) with prevention and coordination functions. In accordance with international standards, the main benchmarks for specialization are the following: independence and autonomy; specialised and trained staff; as well as adequate resources and powers. When considering establishing or strengthening anti-corruption bodies, countries need to take into consideration the full range of anti-corruption functions, including the following:
 - Policy development, research, monitoring and co-ordination.
 - Prevention of corruption in power structures.

²¹ Article 4 of the Integrity and Prevention of Corruption Act.

- Education and awareness raising.
 - Investigation and prosecution.
22. In order to ensure that the specialised anticorruption bodies are effective in their operations, the State authorities must ensure that they have all the necessary means. The most relevant criteria for an effective body are therefore:
23. I) proper independence and specialisation: Those in charge of prevention, investigation, prosecution and adjudication of corruption offences should enjoy the *independence* and autonomy appropriate to their functions, be free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations²². Additionally, these bodies, including corruption-repression agencies²³, should reach a high degree of *specialisation*²⁴ of the persons in charge of fighting corruption and provide them with appropriate means and training to perform their tasks. States shall adopt the necessary measures as to ensure that persons or entities are *specialised*²⁵ in the fight against corruption (i.e. with the necessary independence, in order for them to be able to carry out their functions effectively and free from any undue pressure). The State shall ensure that the staff of such entities has *adequate training and financial resources* for their tasks, including the necessary material resources as required²⁶. Similar requirements are found in several international treaties²⁷.
24. II) appropriate and significant tasks: State are called to ensure²⁸ the existence of a body or bodies, as appropriate, that prevent corruption by such means as: (a) Implementing the prevention policies (...) and, where appropriate, overseeing and coordinating the implementation; and (b) Increasing and disseminating knowledge about the prevention of corruption. Law enforcement agencies should also have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations.²⁹
25. The legislative framework should ensure operational independence of the body or bodies so that they may determine its or their own work agenda and how it or they perform their mandated functions.³⁰ Independence should not be perceived as contradictory to accountability. Anti-corruption bodies should operate within an established governance system that includes appropriate and functioning checks and balances.³¹

²² *Op. cit.* fn 9 Principle 3 (Twenty Guiding Principles in the Fight Against Corruption).

²³ *Op. cit.* fn 2 Article 36 (Specialised authorities “Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks. There are other regional instruments that include provisions relating to specialised institutions” (UNCAC)

²⁴ *Op. cit.* fn 9 Principle 7 (Twenty Guiding Principles in the Fight Against Corruption).

²⁵ *Op. cit.* fn 4 Article 20 – Specialised authorities (Criminal Law Convention on Corruption) as well as *op. cit.* fn 2 Article 6 - Preventive anti-corruption body or bodies (UNCAC).

²⁶ *Ibid.* Article 6 par 2 (UNCAC); see also *op. cit.* fn 14 (Jakarta Principles); *op. cit.* fn 18 par 43 (2020 Uzbekistan Opinion).

²⁷ Inter-American Convention against Corruption, Paragraph 9 of Article III (see at http://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp); and African Union Convention on Preventing and Combating Corruption, Paragraph 5 of Article 20 State parties are required to “ensure that national authorities or agencies are specialized in combating corruption and related offences by, among others, ensuring that the staff are trained and motivated to effectively carry out their duties.” (see at <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>)

²⁸ *Op. cit.* fn 2 Article 6 - Preventive anti-corruption body or bodies.

²⁹ *Ibid.*; see also UNCAC Technical guide (https://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf) pp 7-12.

³⁰ *Ibid.* (UNCAC Technical Guide)

³¹ Independence needs to be balanced by mechanisms to ensure the transparency and accountability of the body or bodies, such as through reporting to or being the subject of review by competent institutions, such as parliamentary committees, or by being subject to reporting to parliament, annual external audit and where relevant to the courts through judicial review.

26. Independence (political, financial and technical) of the Commission stems from the capacity and independence of its senior management, starting from the Chief Commissioner and the two deputies. In this view, it is necessary that both the Chief Commissioner and the Board members (deputy Commissioners) bring in the highest level of expertise, combined with extended experience at managerial level and sector proficiency. Having clear and specific qualifications for high-rank officers is crucial in avoiding that inexperienced or unfit professionals are appointed to the highest positions of the Commission. Traditionally, these roles are both executive and managerial, in that they set the tone (from the top) of the principles and strategy that must be followed by the entire Agency/Commission, and its stakeholders. For this reason, **it is recommended to include advanced experience in anti-corruption work and prevention, proven by both advanced qualification and sufficient field experience, in the range of professional and education qualifications for at least the Chief Commissioner and the two deputies.** This improves the professionalism of the executives of the Agency and its capacity to resist undue influence and, consequently, lower the chances of political affiliation.
27. Commendably, the Commission which is exclusively tasked with *prevention* of corruption and cooperation with *other institutions* in its combating, is mandated by Article 8 of the Draft Amendments (amending Article 12 par 2 of the Law) to receive information from courts, police and State Prosecutor's office on "completed proceedings related to criminal offences of corruption". Consideration, however, should be given to providing information also on "suspected, denounced, accused" (the same Article) as at least some corruption cases tend to be complicated, complex and long-term, especially until all avenues of appeal are exhausted. This appears to be mandated by the amendments to Article 12 par 4 "by requiring the statistical data on procedures related to criminal offences of corruption". **However, for a more meaningful oversight, disaggregated data reflecting such cases and others, should be made available on a case –by-case basis to the Commission by the respective institutions.**

5. APPOINTMENT AND REMOVAL PROCEDURES

28. It is crucial to ensure that the appointment and removal procedures of the Commission are clear, fair and inclusive. From the outset, the shape and independence of a Commission may well be determined by how the office-holder is appointed or removed. If the appointing or dismissal mechanism for the Chief of the anticorruption Commission requires support from Parliament, rather than the Executive, and an accountability mechanism exists to monitor performance (e.g., a Parliamentary Select Committee on which all major parties are represented), the space for abuse or partisan activities can be minimized. In order to ensure that an anticorruption agency head demonstrates impartiality, integrity and neutrality throughout the term, good practice supports a recruitment and dismissal process that require demonstrated support from across the political spectrum.³² In case of appointment, good practice also suggests that the head should be endorsed by both the ruling and opposition parties³³. The involvement of the opposition in selecting the head reinforces its (perceived and actual) objectivity and

³² See *op. cit.* fn 15 II Leadership, pp 23-36 (Colombo Commentary).

³³ In Bhutan for example, the Constitution requires that the Chair and members of the ACA are selected from a list of names recommended jointly by the Prime Minister, the Chief Justice of Bhutan, the Speaker, the Chair of the National Council and the leader of the opposition party (see Constitution of Bhutan of 2008, art. 27.2).

impartiality, as the agency should not be perceived a biased in favour of the ruling majority. The same is true, *mutatis mutandis*, for the procedure to remove the Commissioners, since they “*need to have security of tenure and sufficient time to succeed without the risk of being removed arbitrarily*”³⁴. Conversely, giving one political figure, fraction or committee preponderant control (or even *de facto* veto power) over the appointment, operations or removal of an anticorruption agency might be considered a significant flaw. This could place the Chief of the agency in the position of deciding whether or not to prosecute political individuals that can decide on his/her appointment, or have some power of removal. It is therefore important that the mandate procedures guarantee the immediate and future independence of the agency, including its executive and non-executive members, in carrying-out all the functions, including checks and inspections over government, judiciary and/or legislative powers and representatives.

29. Pursuant to Article 5 Draft Amendments introducing a new Article 9a of the Law, in the appointment phase, a nomination committee is tasked to pre-screen the candidates for the positions of Commissioner and two deputies. The members of the committee seem to guarantee institutional and sectoral diversity and therefore sufficient distance (i.e. independence) from any State power. However, following this filter on the qualification, the nomination committee does not seem to assign a ranking to candidates. In other words, provided that minimum requirements are in place, any qualified candidate (even the least qualified) could become the appointed leader. Equally troubling seems the fact that the President of the Republic can freely pick and choose the preferred candidate among those that have passed the desk-review of the selection committee, regardless of any level based on qualifications. Additionally, the President of the Republic may not only choose discretionally within the proposed list but, s/he can also refuse countless times and without giving any justification, to appoint any of the candidates. International standards recommend to ensure independence and impartiality of the anti-corruption agencies and their leadership. In particular, according to the Jakarta principles “ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence”.³⁵ The current procedure shows serious deficiencies that may hamper the fairness of the appointment, the independence and professionalism of the Commissioners, and therefore undermine the trust of the public in the Commission. These parts of the selection process seem incompatible with the Jakarta principles.

RECOMMENDATION B.

In Article 5 of the Draft Amendments: to redesign the selection procedure for Commissioners in a way to:

- **provide the power to the nomination committee to indicate a binding ranking based on the candidates’ qualifications**
- **allow only for a very limited amount of rejections of proposed candidates with justified decisions, based on motivations related to objective qualifications.**

³⁴ *Op. cit.* fn 15 par 35 (Colombo Commentary).

³⁵ *Op. cit.* fn 14 (Jakarta Principles), In particular the point on “Appointment: ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence.

30. Concerning the removal procedure (see Article 18 of the Draft Amendments amending Article 22 Law), the President of the Republic can, solely or with the indication of another political group (the National Assembly), decide to remove the Commissioners. Although the reasons for removal are listed in the law and its amendments (namely: resignation; failure to perform in accordance with the Constitution or the law; final criminal conviction; loss of capacity to perform; and finally, failure to perform “in accordance with paragraph three of Article 7 of this law”), this article shows deficiencies that may impact the independence of the Commissioners from the influence of political will.

RECOMMENDATION C.

In Article 18 of the Draft Amendments: to redesign the dismissal/removal procedure for Commissioners in a way to:

- **Require a qualified majority of the National Assembly to cast its vote for the removal of Commissioners and**
- **include an appeal procedure (either to the competent court of appeal for administrative decisions or Constitutional Court) in case of institutional dispute arising.**

6. Transparency and Publicity of Proceedings and Sanctions

31. By nature of its competence and operations, the Commission collects, manages, uses, analyses and may exchange or publish large amounts of strategic or otherwise sensitive data.³⁶ Pursuant to Article 10 of the EU’s General Data Protection Regulation³⁷, processing of personal data relating to criminal convictions and offences or related security measures “shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects.” The European Court of Human Rights has also ascertained that the submission and publication of the type of data the Commission collects (in the case at hand asset declarations), and the enhanced transparency it results in are in the public interest.³⁸ However, overall the Law and the Draft Amendments seems to pay insufficient attention to certain requirements stemming from the EU relevant legislation, as well as the European Data Protection Board (EDPB).³⁹ In order to reach the right balance between assuring transparency, flow of information and protection of privacy, **it is recommended that the Commission considers appointing a responsible person or function for the compliance of the institution’s policy with data protection related standards, in coordination with both the national and the European competent authorities.**
32. Closely related to this, it is useful to analyze the functioning of the Commission’s proceedings, related to minor offence (see Article 9 of the Draft Amendments amending

³⁶ For example, see Article 75 and onward of the Law.

³⁷ General Data Protection Regulation (GDPR), the Data Protection Law Enforcement Directive and other rules concerning the protection of personal data (see at https://ec.europa.eu/info/law/law-topic/data-protection_en).

³⁸ ECHR *Wypych v. Poland* (25 October 2005, application no. 2428/05), available at <http://hudoc.echr.coe.int/eng/?i=001-71236> (hereinafter “ECHR *Wypych v. Poland*”).

³⁹ https://edpb.europa.eu/about-edpb/about-edpb_en

Article 13 of the Law). In particular, it seems worth reviewing whether publication of a proceedings' acts, conclusions and statements for the purpose of deterrence (see Article 9 of the Draft Amendments, pars 6 to 10) is an appropriate element of the sanction. In anticorruption and in other sectors⁴⁰, sanctions must be effective, proportionate and dissuasive.⁴¹ In the case of proceedings for minor offence, apart the issues related to data protection and publicity, it is necessary to understand if the publication or disclosure of proceedings' statements and/or conclusions, for that duration (5 years) may or not pose an unjust consequence to the detriment of the holder of a public office. The answer depends on the type of misconduct, the role and ranking of the author, as well as the impact on the integrity and reputation of the institution. Nonetheless, the fact to demand the publication of both the conclusion (for 5 years) and statements of the proceeding, with no possibility of mitigated solutions may appear disproportionate at least in some cases, (i.e. not "commensurate with the gravity of the conduct and its effects") and therefore exceeding "what is necessary to achieve the aim". While firm rules or even exemplary redressing actions may be justified for gross negligence, high-rank officials and violations with large institutional impact, the same may not be true for local or low-rank public officers (i.e. those operating in small institutions or limited interactions with the public, guilty of small minor offences). Therefore, **it is recommended to review the law and the Draft Amendments, in the view to create appropriate rules for the Commission's proceedings, including its publicity and sanctions, that take into due consideration the range of consequences for the public officer, as to pursue their effectiveness, proportionality and dissuasiveness.**

RECOMMENDATION D.

In Article 9 par 6-9 of the Draft Amendments: to review if publication of a proceedings' acts, conclusions and statements for the purpose of deterrence is an appropriate, effective and proportionate sanction in all cases of minor offence.

33. **Additionally, Article 37 Draft Amendments amending Article 77 of the Law enumerates sanctions expressed as fines for the enforcement of CPC's mandate. If not provided for on another legal act, consideration should be given to elaborate appeal mechanism in the instances when the fine is imposed.**

7. WHISTLEBLOWING

34. Reporting corruption and unethical conduct through safe and reliable channels, to professional and qualified complaint receivers is an undisputable element of a solid

⁴⁰ For example see Convention on the Protection of the European Communities' Financial Interests (PIF) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A133019>

⁴¹ See eg Commission Communication, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final, 20.9.2011 (<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0573:FIN:EN:PDF>).

anticorruption policy. Multilateral treaties⁴² are unanimous in recognizing whistleblowers' protection and support, and many international standards⁴³, studies⁴⁴ and recommendations⁴⁵ echo this good practice. Handling reports professionally, assessing the information on its merits and taking the appropriate action to address any wrongdoing is fundamental to building trust and confidence. The same is true for reports dealing with misconduct. Although the complaint may be managed internally, with no need of a specifically devoted external agency, the principles of fairness and separation of the procedure manager must be maintained. In Article 24 of the Law⁴⁶ there seems to be no sufficient separation between the "suspect" of the misconduct, and the person responsible to examine and resolve the complaint. According to Article 24, par 1 of the Law, the public official has no other option than addressing the concern of misconduct to either his/her superior or a person authorized by that manager. In the case that the superior was responsible for the misconduct, s/he would be both the suspect and the case-manager. In light of the standards indicated above, this seems to be a failure to assure that sufficient distance and separation of roles remains between the person accused of misconduct and the person responsible to assess the case. **It is therefore recommended to review Article 24 par 1 of the Law, in view to establish more specialization, professionalism and autonomy of the so-called "responsible person" inside the institution, in order to build trust in the reporting and redressing internal procedure.**

35. **While it is commendable that, in case there is no responsible person within a given institution, if that person fails to respond within a specific timeframe, or if that person himself or herself is implicated in corruption or unethical conduct, such reports fall within the Commission pursuant to Article 24 par 2 of the Law, the Law could be clearer that a whistleblower can in these cases report directly to the Commission. This should also be possible when a person has grounds to believe that his/her complaint would not receive the appropriate scrutiny or handled with sufficient autonomy or professionalism or when an individual, after having reported to the responsible person, found that the response or procedure did not meet the necessary standards. Additionally, the Law would benefit from further details on this procedure to guide a person who wants to report corruption or unethical conduct to the Commission.**
36. In addition to the management of the reporting procedure, it is important that the redressing measures are applied in a just manner, balancing the rights and interests of all the parties involved. This is the main reason behind the fact that, for example, once an employee demonstrates a prima facie case that he or she made a public interest report or disclosure and suffered a detriment, the burden of proof shifts onto the employer, who must then prove that any such action was fair and not linked to the whistleblowing report.

⁴² *Op. cit.* fn 2 Articles 8- Codes of conduct for public officials, 10 - Public reporting, 32 - Protection of witnesses, experts and victims) and 33 - Protection of reporting persons (UNCAC); *op. cit.* fn 3 (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions); *op. cit.* fn 5 Article 9 – Protection of employees (Civil Law Convention against Corruption) and *op. cit.* fn 4 Article 22 – Protection of collaborators of justice and witnesses (Criminal Law Convention against Corruption).

⁴³ European Union Directive 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 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937&from=EN>)

⁴⁴ The UNCAC Resource Guide on Good Practices in the Protection of Reporting Persons, 2015 available at (https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf).

⁴⁵ Council of Europe Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers (<https://www.coe.int/en/web/cdcj/activities/protecting-whistleblowers>, (hereinafter "CoE Recommendation on the protection of whistleblowers").

⁴⁶ Article 24 "(1) An official person who has reasonable grounds to believe that he has been requested to engage in illegal or unethical conduct, or has been subject to psychological or physical violence to that end, may report such practice to his superior or to a person authorized by the superior (hereinafter: the responsible person)."

A similar approach is taken in anti-discrimination law.⁴⁷ Redressing solutions should therefore aim to delete the discomfort or detriment suffered in the past and, for the future, avoid or deter any continuation or resurgence of discrimination and retaliation. Article 25 of the Law foresees the possibility for the victim to a) receive a sum for reparation and b) request to the employer to be transferred to another post⁴⁸. While the transfer to another post may stop the continuation of an uncomfortable and unbearable situation for the victim, it nevertheless requires the victim to change his/her work and social environment, habits, colleagues, tasks, etc. In other words, in addition to suffer discrimination or retaliation, the victim-employee will have to make the additional effort to move and adapt to another professional and personal life and office.⁴⁹ In order to preserve and correctly support the victim to recover from the suffered misconduct, it is advised to transfer the cause (not the target) of the discriminatory conduct. Therefore, **it is recommended to amend Article 25 par 4 of the Law, in view to foresee the possibility for the victim (not the employer) to decide between his/her own transfer to another job position and the transfer of the person/s responsible for the discrimination (including superiors and directors).**

8. CONFLICTS OF INTEREST AND GIFTS

8.1. Additional work/occupation

37. Regardless of or in addition to the financial aspect of holding external positions or side-activities for public officers, the rules on conflict of interest aim at avoiding the use of public office for private interest. This is to safeguard the integrity, trust, governance and the reputation of the State and its institutions as well as the integrity of public financial resources. In this case, the law (see Articles 26 and 27) lists a long series of situations of incompatibilities, and their single exceptions. Essentially, the provisions seek to avoid a) that public officials hold multiple positions in public institutions or high-rank roles in private companies, and b) perform activities or professions at risk of conflicts (except for “pedagogical, scientific, research, artistic, cultural, sports and publishing activities, manage a farm, and manage their own assets”). It appears that the law does not sufficiently focus on avoiding all actual, potential and perceived conflicts of interest, either personal, functional or organizational.⁵⁰ Therefore, **it is recommended to reassess the Law (including Articles 26 and 27 of the Law) in view to simplify and reorganize the provisions as to more efficiently target the detection, avoidance and mitigation of actual, potential and perceived conflict of interest, either personal, functional or organizational**⁵¹. Simplification could help in managing the workload for the

⁴⁷ *Op. cit.* fn 45 Principle 24 “In legal proceedings relating to a detriment suffered by a whistleblower, and subject to him or her providing reasonable grounds to believe that the detriment was in retaliation for having made the report or disclosure, it should be for the employer to establish that the detriment was not so motivated (CoE Recommendation on the protection of whistleblowers)”.

⁴⁸ Article 28: “(4) If the reporting persons referred to in paragraph one of this Article are public employees, and if they continue to be the focus of retaliation despite the Commission's demand referred to in the preceding paragraph, making it impossible for them to continue work in their current work post, they may request that their employer transfer them to another equivalent post and inform the Commission of this.”

⁴⁹ According to many standards, including the EU Directive 1937 of 2019 the transfer of duties, change of location of place of work are forms of discrimination.

⁵⁰ Among other instruments, see *op. cit.* fn 2 Article 8 (5) and (6) (UNCAC); *op. cit.* fn 11 (Recommendation (2000)10 and Model Code of Conduct).

⁵¹ Good sources of information are: OECD Managing Conflict of Interest in the Public Sector (<https://www.oecd.org/gov/ethics/49107986.pdf>); OSCE Best practices in combating corruption - Chapter: Chapter 3: Conflict of interest and monitoring financial assets (<https://www.osce.org/eea/13761>); UNODC Thematic Compilation of Prevention-related Information (<https://www.unodc.org/unodc/en/corruption/WG-Prevention/conflict-of-interest.html>).

Commission that is responsible of an audience of roughly 158,000 civil servants⁵². To this end, it is also reminded that the human and financial capacity of the Commission has been the object of the evaluation within the GRECO IV evaluation round, 2 compliance report, whose recommendation xix indicated that “in order to ensure that the Commission for the Prevention of Corruption is adequately equipped to perform its tasks with respect to MPs, judges and prosecutors effectively, that its financial and personnel resources in the areas of asset declarations, lobbying and conflicts of interest be increased as a matter of priority”.⁵³

8.2. Business activities

38. Concerning restriction on business activities (Articles 35 onward of the Law), these definitely fall within the purview of conflict of interests, although they are more associated with functional and organizational conflicts. As far as they are compatible, the conclusions of the paragraph above are reiterated. Furthermore, Article 21 of the Draft Amendments, amending Article 35 of the Law indicates that a public institution cannot do business with an entity in which a public officer or his/her family member has a significant interest⁵⁴ or position⁵⁵. It is appreciated that the Law targets organizational conflict of interest of public officials’ family members. However, generally, public officials should not be allowed to have a position (let alone a managerial role) in a private corporation in addition to the public employment. Exceptions can be made for specific types of activities (cultural, artistic, academic, etc.) or for board membership in state-owned enterprises when enhanced measures are taken to ensure conflicts of interest are avoided.⁵⁶ In this view, Articles 21 and 22 of the Draft Amendments (amending Articles 35 and 36 of the Law, respectively) seem incompatible with clear and necessary restrictions on side-activities for public office holders, thus **it is recommended to review the relevant provisions in order to avoid not only actual and potential conflicts of interest, but also apparent or perceived ones, as to prevent any abuse of public office, and possible detriment to the public trust on State institutions.**

8.3. Solutions

39. Concerning the mitigation solutions in case of conflict of interests (see Article 24 of the Draft Amendments, amending Article 38 of the Law), there is a multitude of options that may be applied to different situations, with different consequences which are not mentioned in the Law or the Draft Amendments (notably: divestment or liquidation of the interest by the public official; recusal of the public official from involvement in an affected decision-making process; restriction of access by the affected public official to particular information; transfer of the public official to duty in a non-conflicting function; re-arrangement of the public official's duties and responsibilities; assignment of the conflicting interest in a genuinely 'blind trust' arrangement; resignation of the public official from the conflicting private-capacity function; and/or resignation of the public official from their public office).⁵⁷ In view of these possibilities, **it is recommended to make reference to different options, as to on one hand remove or mitigate the**

⁵² See Eurostat data (https://ec.europa.eu/eurostat/statistics-explained/index.php/Archive:Public_employment_-_Slovenia)

⁵³ at <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16808c1a9c>

⁵⁴ “having more than a 5% share in the founders’ rights, management or capital, either by direct participation or through the participation of other legal persons”.

⁵⁵ “participating as a manager, management member or legal representative”

⁵⁶ OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015) p 26 available at <https://doi.org/10.1787/9789264244160-en>.

⁵⁷ See OECD (2003) Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service

conflict and, on the other hand, preserve, as far as possible, the integrity of the operation or transaction at risk.

8.4. Sanctions

40. Redressing consequences are crucial to a credible system for conflict of interest management. The sanctions for disobedience of the codes may vary, ranging from administrative ones (such as reprimands), to dismissal and other disciplinary measures. For certain categories of persons, for instance members of parliament or government, special types of sanctions may apply. While elected representatives remain politically responsible to their electorate and/or to their party, the public interest requires no less from them than accountability, transparency and integrity.⁵⁸ Clear parliamentary standards improve accountability by giving the public and the media clear benchmarks against which to judge parliamentary conduct. Transparency, combined with effective sanctions, is often crucial⁵⁹. Other than informing the public, Article 29 of the Law⁶⁰ does not seem to indicate any serious sanction for the elected officials that disobey the orders of the Commission and continue “to perform the activity, hold a membership or hold an office after the time limit set by the Commission”. While publishing the misconduct may legitimately be one useful element of the procedure, this cannot be the only sanction for violation of orders, because it would be against the criteria of effectiveness, deterrence and proportionality required by international standards⁶¹. **Unless sanctions are indicated in a different piece of legislation, it is therefore recommended to review the parts of the Law related to elected officials and, with due attention given to questions of immunity, foresee effective, proportionate and dissuasive sanctions for violation of integrity provisions, including those related to the conflicts of interest.**

RECOMMENDATION E.

In Article 24 of the Draft Amendments as well as Article 29 of the Law: to ensure that the Law contains a list of mitigating solutions in the case of conflicts of interest as well as ensure that a list of effective, proportionate and dissuasive sanctions is available for all types of public office holders.

8.5. Gifts

41. Gifts, benefits and favors may tempt public officials to disrespect the public interests of their functions. Gifts, hospitality and expenses are vulnerable to being used for bribery.

⁵⁸ See *op. cit.* fn 11 (Recommendation (2000)10).

⁵⁹ Background Study: Professional and Ethical Standards for Parliamentarians, OSCE/ODIHR 2012 (<https://www.osce.org/files/f/documents/7/7/98924.pdf>)

⁶⁰ Article 29 “(2) If the Commission establishes that the holder of public office continues to perform the activity, hold a membership or hold an office after the time limit set by the Commission has expired, it shall inform the relevant authority competent to propose or commence a procedure for the removal of the holder of public office from office. The competent authority shall inform the Commission of its final decision. (3) The provisions of the preceding paragraph do not apply to directly elected holders of public office. If the Commission establishes that the facts referred to in the preceding paragraph in connection with directly elected holders of public office are true, it shall inform the public of its findings and publish them on its website.”

⁶¹ Among others *op.cit.* fn 9 (Twenty Guiding Principles in the Fight Against Corruption); “10. to ensure that the rules relating to the rights and duties of public officials take into account the requirements of the fight against corruption and provide for appropriate and effective disciplinary measures; promote further specification of the behaviour expected from public officials by appropriate means, such as codes of conduct” (https://polis.osce.org/file/8601/download?token=F_dQcgWN).

They can be used to bribe on their own but they also pave the way for bribery by entrapping a person.⁶² The trust of the public would be undermined if the citizen observes or is under the impression that the public officials, whose salary should be paid out of the public budget, receive compensation from private individuals in exchange for the performance of their duties. While a limited type of gifts may be allowed (in respect of conventional hospitality or minor gifts), the general prohibition must remain intact. Often the value of the gift or invitation is used as a criterion, it being understood that whenever the value is lower than the threshold, the gift or invitation could be acceptable. However, low value may not always be a proper criterion. For example, gifts or invitations offered repeatedly, even if of low value, could affect the public official's impartiality in the exercise of his or her functions. Therefore, provided that all gifts (including favors, expenses and hospitalities) should be declared, in addition to indicate a price-threshold for acceptable gifts (in this case EUR 60, see Article 19 of the Draft Amendments, amending Article 30 of the Law), **it is recommended that the law a) provides an extended definition of gift, as to include goods, objects or services, but also rights, benefits, favours or significant discounts (for example loans at suspiciously low rate) and b) establishes an aggregated threshold, for the value of all the gifts combined, received by a public official during a given period (for example annually).**

RECOMMENDATION F.

In Article 19 of the Draft Amendments: to provide an extended definition of gift, as to include goods, objects or services, but also rights, benefits, favors or significant discounts (for example loans at suspiciously low rate) and to establish an aggregated threshold, for the value of all the gifts combined, received by a public official during a given period.

9. ASSET DISCLOSURE

42. Asking public officials to declare their positions and asset is another well-recognized antidote against public corruption and a fundamental element of transparency of public institutions. International treaties⁶³ and recommendations⁶⁴ are clear in recommending disclosure of properties and memberships of public office holders, especially for elected officials (so called politically exposed persons)⁶⁵. With some differences for the publication of data, as to protect sensitive information, provisions should target equally members of the legislative, executive and judicial powers, at the national, regional, local or international level. While listing single categories of office-holders may sometimes improve clarity, it may also create risk of inaccuracy, especially for new or different types of civil servants. In general, in order to prevent discrimination or loopholes, it is advisable to indicate that rules apply to all public officers, including elected officials, above a certain grade or level. In this way, same provisions apply to all equal level officials, and the monitoring agency (in this case the Commission) is facilitated in performing checks. In light of this good practices, **it is recommended to review Article 27 of the Draft**

⁶² See op. cit. fn 11 (Recommendation (2000)10 and Model Code of Conduct).

⁶³ See UNCAC Article 8.5; Inter-American Convention Against Corruption article III.4, among others.

⁶⁴ OECD Asset Declarations for Public Officials, a tool to prevent corruption (<https://www.oecd.org/daf/anti-bribery/47489446.pdf>)

⁶⁵ Rossi, Pop, Clementucci, Sawaqed "Using asset disclosure for identifying politically exposed persons", WBG, 2012 (<https://www.worldbank.org/en/topic/financialsector/publication/asset-disclosure>)

Amendments (amending Article 41 of the Law) as well as Article 1 par 5 of the Draft Amendments amending Article 4 par 5 of the Law as to have a clearer and shorter definition of categories bound to disclose asset, with explicit indication of elected officials, at all levels. Additionally, following international standards⁶⁶, focus should also be maintained on officials' relatives, spouses and other close associates.⁶⁷ **It is recommended to review the Law (in particular Article 28 and 30 of the Draft Amendments, amending articles 42 and 44 of the Law, respectively) as to allow for a constant (not ad-hoc in cases of suspicion) monitoring of the wealth of the public official and that of close relatives and household members.**⁶⁸ Concerning the sanction in case of illicit enrichment (or unexplained wealth), after examination of the case, the Commission holds no independent power to sanction the misconduct. In fact, the Commission can merely inform the public organization where the officer works, which will decide on the possible sanction. This seems a lost opportunity, for a specialized and competent authority, like the Commission, to bring a satisfying closure to this type of cases. Providing the Commission with the authority to both examine and sanction the case, would centralize the management of all cases, thus bring harmonization and consistency in treating this kind of misconducts. With this in mind, **it is recommended to provide the Commission with the power to impose effective, proportionate and dissuasive sanctions to public officers at all levels (including elected officials) in case of verified illicit enrichment.**

10. LOBBYING

43. Article 1 par 14 of the Draft Amendments defines lobbying as *non-public* contact made between a lobbyist and a lobbied person for the purpose of influencing the content or the procedure for adopting the [...] decisions” (Article 1 of the Draft Amendments amending Article 4 par 14 of the Law).
44. However, lobbying often also includes participation in public hearings, conferences, seminars, issuing of or influencing opinions and publishing reports. For instance, the European Commission defines lobbying as “activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions”⁶⁹ and views it as an important source of expertise. All those registered in the EU Transparency Register co-run by the European Commission and European Parliament enjoy long-term access to the EU institutions’ premises, ability to be a speaker at public hearings held by parliamentary committees and receive email notifications on the activities of Parliament’s Committees. They may co-organise events, attend meetings with Commissioners, Cabinet members and Directors-General, etc.⁷⁰ **It is recommended to review the definition accordingly and to reflect that lobbying can often have a public aspect to it.**
45. In addition, the body of public sector employees approaching whom warrants registration in the Lobbying register does not become clear. Article 34 of the Draft Amendments amending Article 68 par 1 of the Law appears to suggest that “approached persons” might be *all* public employees. More specifics should be considered, as including a too broad group of persons among those who can have contacts only with registered lobbyists might

⁶⁶ OECD Asset Declarations for Public Officials, a tool to prevent corruption (<https://www.oecd.org/daf/anti-bribery/47489446.pdf>)

⁶⁷ *Op. cit.* fn 38 (ECtHR *Wypych v. Poland*).

⁶⁸ See also e.g. *op cit* fn 18 par 23 (2018 Montenegro Opinion);

⁶⁹ European Transparency Initiative, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0003>

⁷⁰ EU Transparency Register <https://ec.europa.eu/transparencyregister/public/homePage.do>

create confusion. This is even more important as Article 37 Draft Amendments amending Article 77 of the Law provides for sanctioning those who have had contact with someone who should have been registered in the lobby register but has not done so. For instance, in Transparency register co-run by the European Commission and European Parliament, all meetings with Commissioners, Cabinet members and Directors-General are required to have a registration (“no registration, no meeting principle”), whereas all civil servants of the European Commission are advised to check whether interest representatives are registered before accepting an invitation to a meeting or to an event.

46. While the Law makes a distinction between registered, professional lobbying and non-registered lobbying on behalf of interest groups (Arts 56 and 58 par 3 of the Law),⁷¹ it would be worthwhile to make a clearer distinction between two types of lobbying. a) professional lobbying (activity done on behalf of a third person against remuneration) which is only allowed after making a declaratory registration; and b) occasional lobbying, which can be done regardless of any habilitation, registration or certification. Irrespective of any corporate structure of the lobbying entity, the distinction between professional (i.e. more convincing and persuading activity) and occasional (i.e. more informative and awareness-raising) lobbying, lays on the fact that while the professional lobbyists are remunerated and do that as a core or main job, the occasional ones lobby sporadically, as one of their many activities and, most importantly, without specific compensation. In this view, Article 33 (amending Article 63 par 4)⁷², seems diverging from the required standards and objectives of a solid and fair policy on lobbying. **It is therefore recommended to review the law with the aim to make a clearer distinction between professional and occasional lobbying, and possibly apply simpler, less stringent rules only to the latter.** In doing, the law-makers should be mindful of the relevant recommendation number 2 issued by GRECO second compliance report on this matter⁷³.

RECOMMENDATION G.

In Article 1 of the Draft Amendments: to reconsider the definitions of lobbying to ensure also public lobbying is covered and that the Law makes a clearer distinction between professional and occasional lobbying.

11. FINAL COMMENTS

11.1. Gender-Neutral Legal Drafting

47. In Slovenian legal texts the masculine form is traditionally used to refer to both men and women. However, in the instant case there is no clarifying note to this effect. Further to adding a specific note, according to international standards on the matter⁷⁴, **it is**

⁷¹ See also, e.g. Lobbyists, Governments and Public Trust, Volume 3 Implementing the OECD Principles for Transparency and Integrity in Lobbying (2014) p 208 available at <https://dx.doi.org/10.1787/9789264214224-en>.

⁷² “Notwithstanding the provisions of the preceding paragraph, a private sector non-profit interest group with no employees shall not report on lobbying.”

⁷³ GrecoRC4(2018)3 fourth evaluation round, Corruption prevention in respect of members of parliament, judges and prosecutors, 2 compliance report (at <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of-16808c1a9c>), “Recommendation ii. GRECO recommended that the implementation of the rules on contacts with lobbyists by members of the National Assembly and of the National Council be subject to a thorough assessment, with a view to improving them where necessary”.

⁷⁴ Convention on the Elimination of All Forms of Discrimination against Women (see at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>).

recommended to make efforts in using gender-neutral terms, such as person, individual, party, stakeholder or in general a terminology with no or at least balanced reference to gender connotations.

11.2. Impact Assessment and Participatory Approach

48. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide sufficient time to prepare and submit recommendations on draft legislation; the State should also provide for an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions.⁷⁵ To guarantee effective participation, consultation mechanisms must allow for input at an early stage and throughout the process,⁷⁶ meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public consultations constitute a means of open and democratic governance; they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted.⁷⁷ Discussions held in this manner that allow for an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence in the adopted legislation. Ultimately, this also tends to improve the implementation of laws once adopted.
49. In light of the above, the Slovenian legislator is therefore encouraged to ensure that the Draft Act is subject to further inclusive, extensive and effective consultations, according to the principles stated above, at all stages of the law-making process.

[END OF TEXT]

⁷⁵ See e.g., Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015, <<http://www.osce.org/odihr/183991>>.

⁷⁶ See e.g., OSCE/ODIHR, Guidelines on the Protection of Human Rights Defenders (2014), Section II, Sub-Section G on the Right to participate in public affairs, <<http://www.osce.org/odihr/119633>>.

⁷⁷ *ibid.*