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REGIONAL ANTI-CORRUPTION INITIATIVE

REGIONAL ACTIVITY: DEVELOPMENT OF NATIONAL METHODOLOGIES ON ANTI-CORRUPTION ASSESSMENT OF LAWS

**Draft Law on the Serbian Anti-Corruption Agency,  
Provisions on Corruption Proofing**

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The views expressed in this document are solely those of the author and do not necessarily reflect the views of the Regional Anti-Corruption Initiative or its member States, or of the Austrian Development Agency.

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## 1 Summary

In the context of a larger revision of the Law on the Anti-Corruption Agency, it is foreseen to strengthen the legal basis for corruption proofing. Therefore, the Agency has asked RAI to review the draft provisions related to **corruption proofing**.

The proposed provisions will significantly strengthen the regulatory framework for corruption proofing by

- obliging **all** state entities to conduct corruption proofing when **drafting** regulations (Section 102 para. 2);
- obliging state entities to submit draft laws for sectors of heightened corruption risk to the Agency for **review** (Section 103 para. 1);
- obliging state entities to submit the Agency's opinion together with the draft law to **Parliament** (Section 103 para. 2);
- providing the Agency with the **power** of carrying out corruption proofing of draft laws for sectors of heightened corruption risk and defining a **methodology** to this end.

It seems worthwhile reviewing whether the draft provisions would benefit from being expanded as follows:

- The Agency could have the power to provide opinions on **any draft** law even if it is not included in the predefined list of sectors of heightened corruption risk – this would enable the Agency to intervene, if resources permit, should the need arise in an individual case;
- The term “draft law” could include not only statutes, but also **sub-statutory** laws – this would enable the Agency to intervene, if resources permit, should the need arise in an individual case;
- Legal drafters should have a **duty to consider** recommendations by the Agency and to provide explicit feedback to be submitted also to Parliament;
- Legal drafters should have a **duty to consider** recommendations by civil society organisations (to the extent not already foreseen by other laws).

For all other issues, a future methodology by the Agency could define procedure and substance, taking into account the Regional Methodology by RAI.

## 2 Terms of Reference

In 2014, RAI/RCC developed and published the **Regional Methodology** on Anti-corruption Assessment of Laws (corruption proofing of legislation).<sup>1</sup> Following up on the Regional Methodology, RAI intends to facilitate the introduction or strengthening of anti-corruption assessment of laws in at least three beneficiary countries until end of 2018.

The Serbian Anti-Corruption Agency has reviewed corruption risks in a number of draft laws in the past. The reviews were based on Article 4 of the Anti-corruption Agency Act: The Agency “cooperates with other government bodies in drafting regulations in the field of fight against corruption; [...] launches initiatives for amending and enacting regulations in the field of combating corruption”.<sup>2</sup> In the context of a larger revision of the Law on the Anti-Corruption Agency, it is foreseen to strengthen the legal basis for corruption proofing. Therefore, the Agency has asked RAI to review the draft provisions related to **corruption proofing** (“draft provisions”).

This review will focus only on the question whether the proposed law provisions will provide sufficient basis for a methodology on corruption proofing. The corruption proofing methodology itself will be subject to a **separate** assessment.

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<sup>1</sup> <http://rai-see.org/anti-corruption-assessment-of-laws/>.

<sup>2</sup> Published in the Official Gazette No. 97/08 of 27 October 2008, [http://www.anticorruption-serbia.org/component/docman/doc\\_download/13-anti-corruption-agency-act-english](http://www.anticorruption-serbia.org/component/docman/doc_download/13-anti-corruption-agency-act-english) (English); updated version including Amendments as published in Official Gazettes No. 53/10, 66/11-US and 67/13-US: [http://www.acas.rs/sr\\_lat/zakoni-i-drugi-propisi/zakoni/zakoni-o-agenciji.html](http://www.acas.rs/sr_lat/zakoni-i-drugi-propisi/zakoni/zakoni-o-agenciji.html) (Serbian).

### 3 Assessment of draft provisions

#### 3.1 Scope

On the one hand, corruption proofing should cover the law to the widest possible extent (see Regional Methodology Part 2 no. 1.2). On the other hand, there is always the question of sufficient resources for reviewing all draft laws in all sectors and levels of the state. The draft provisions aim for a mechanism that limits the number of laws subject to corruption proofing by focusing on laws in especially **corruption prone** areas, and on laws incorporating matters under **international treaties** on combating corruption. This seems to be an efficient approach under the assumption that resources for further reviews of laws are not available (see Regional Methodology Part 2 no. 1.3).

It is not fully clear, how the word “zakon” is interpreted in a legal context. It might include only **statutes**, or cover also **sub-statutory** laws, such as ordinances and regulations. It seems worthwhile reviewing, whether the term “zakon” is far-reaching enough to include various forms of legal regulations (see Regional Methodology Part 2 no. 1.2).

It will be necessary to define the **specific areas** covered by international treaties in a list. Otherwise, state bodies will not know how far their obligation goes in having to submit draft laws to the Agency. For example, most legal drafters probably will not realise that a draft law on remuneration of the civil service will fall under the United Nations Convention against Corruption – UNCAC (Articles 7 para. 1c and 12 para. 2f), or a draft law on the internal accounting and auditing of private companies will fall under the Council of Europe Civil Law Convention on Corruption (Article 10).

This aside, the Agency might want to have the possibility of reviewing and providing opinions on draft laws that are **not** included in anti-corruption **policies** or **treaties**. For example, a draft law on the health sector might not necessarily be covered by an international treaty on fighting corruption, or by an anti-corruption policy, or, in the future, there might not be an anti-corruption policy in Serbia at all, as is the case with many European Union member states. In order to avoid any discussion around the Agency’s competency, the draft provisions should probably include a clause empowering the Agency at its discretion with providing corruption proofing opinions on any draft law and regulation of any level of state. The Agency could thus initiate a corruption proofing based on media reports, complaints by state or civil society stakeholders, or based on its own risk assessments. Depending on the public transparency of the legislative process in

Serbia, the Agency could provide an opinion at the latest when a draft is submitted to Parliament.

### **3.2 Obligation for legal drafters**

As a positive feature, the draft provisions foresee an obligation of state bodies to submit draft laws to the Agency for corruption proofing. This is probably the most important part a law needs to spell out.

### **3.3 Defined corruption proofing entity**

By the same token, the draft provisions provide the Agency with the **power** to carry out corruption proofing, and with a power of defining a **methodology**. This will give the methodology a legal basis and thus more regulatory weight.

### **3.4 Timing**

The corruption proofing – as under the draft provision – focuses on assessments after drafting at the **ministry level** and before submission to Parliament. This is the most common approach (see Regional Methodology Part 1 no. 2.3.1).

In addition, Section 102 para. 2 obliges all state entities to apply the corruption proofing methodology already at the **drafting** stage. This appears to cover all draft legislation, no matter whether it belongs to the category (Section 7) that has to be submitted to the Agency for external review under Section 103, or not.

The exact **time** for submitting the draft to the Agency is not defined in Section 103. However, this should be a feasible approach as it gives some flexibility. Naturally, a ministry (for example) would submit the draft to the Agency once it is mature enough internally to be exposed to external review (and possible disclosure); for this, usually a minister would need to sign off on the draft. At the same time, the review needs to take place at a stage where the possible recommendations by the Agency could still be taken into account. Thus, the time for submitting will naturally fall into the time window after internally finalising a first draft and before submitting an updated version to Cabinet.

For draft laws not subject to review by the Agency, the **quality** of the corruption proofing might be an issue. However, apparently the resources at the Agency do not suffice for reviewing all corruption proofing assessments of all laws. Still, the corruption proofing assessments in the reasoning of the draft laws will be **publicly** available information according to general legislative rules (this at least assumed). Thus, potential scrutiny and

pressure from civil society observers will be an incentive for legal drafters to not just tick off the corruption proofing from the legislative checklist too easily.

The draft provisions do not stand in the way to **Parliament** (or Government) inviting the Agency to present its opinion under general procedural rules. Nor do they stand in the way to the **President** refusing signature to any draft law within his/her room of discretion (see Regional Methodology Part 2 no. 1.4).

### **3.5 Compliance**

All state entities are obliged to submit the Agency's opinion together with the draft law to **Parliament** (Section 103 para. 2). This is an important feature for corruption proofing to show impact as it ensures that deputies have an opportunity for reflecting on and discussing corruption risks.

However, before the draft is submitted to Parliament, it would seem important that legal drafters have a duty to **consider** recommendations by the Agency. In this sense, they should be obliged to provide a feedback to the Agency on any recommendation they do not intend to follow and to submit this feedback together with the Agency's assessment to Parliament (see Regional Methodology Part 2 no. 1.9). Otherwise, there is a risk that corruption proofing is a "tedious" exercise to most state entities without much impact.

### **3.6 Civil society**

In this context, the role of **civil society** organisations is relevant. They can also be important stakeholders in submitting corruption proofing opinions. Therefore, it seems worthwhile obliging state entities as well – if not already the case under different laws – to provide feedback to such submissions (see Regional Methodology Part 2 no. 2.1).

### **3.7 Issues for a future methodology**

The following issues will not depend on the legislative basis, but only on a methodology (see Regional Methodology Part 2 no. 1):

- Definition of corruption risks (and corrupted legislation);
- Sources for making assessments;
- Assessment procedure;
- Report;
- Dissemination;
- Compliance;

- Online publicity;
- Cooperation with other authorities.



## Annex: Draft provisions in original Serbian and English translation

The following are the draft provisions as provided by the Agency. The English version is an unofficial translation done by RAI.

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| <p><b>Značenje pojedinih pojmova</b></p> <p><b>Član 3.</b></p> <p>[...]</p> <p>9) „strateški dokumenti u oblasti borbe protiv korupcije” su Nacionalna strategija za borbu protiv korupcije, Akcioni plan za sprovođenje Nacionalne strategije za borbu protiv korupcije (u daljem tekstu: Akcioni plan) i Akcioni plan za Poglavlje 23 – podpoglavlje „Borba protiv korupcije” (u daljem tekstu: Akcioni plan za Poglavlje 23);</p> | <p><b>Definitions</b></p> <p><b>Section 3.</b></p> <p>[...]</p> <p>9) “strategic documents in the field of combating corruption,” the National Strategy for Anti-Corruption Action Plan for the implementation of the National Strategy for Combating Corruption (hereinafter: Action Plan) and the Action Plan for Chapter 23 - subchapter "The fight against corruption" (hereinafter referred to as the Action plan for Chapter 23);</p> |
| <p>10) „zakon iz oblasti posebno rizične za nastanak korupcije“ je svaki zakon u oblasti borbe protiv korupcije iz područja predviđenih strateškim dokumentima;</p>  | <p>10) “law in sectors of heightened corruption risk” is every law [zakon≈statute] in the fight against corruption in the area of planned strategic documents;</p>  |
| <p><b>Nadležnost Agencije</b></p> <p><b>Član 7.</b></p> <p>[...]</p> <p>13) inicira donošenje propisa, daje mišljenja o proceni rizika korupcije u nacrtima zakona iz oblasti posebno rizičnih za nastanak korupcije i mišljenja o predlozima zakona koja uređuju pitanja obuhvaćena potvrđenim međunarodnim ugovorima u oblasti borbe protiv korupcije;</p>   | <p><b>Powers of the Agency</b></p> <p><b>Section 7.</b></p> <p>[...]</p> <p>13) initiate the adoption of regulations, provide an opinion on corruption risks in draft laws in sectors of heightened corruption risk and an opinion on draft laws governing matters covered by ratified international treaties in the field of combating corruption;</p>   |

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|--|--|
| <p><b>Metodologija za procenu rizika od korupcije u propisima</b><br/><b>Član 102.</b></p> <p>Agencija propisuje metodologiju za procenu rizika od korupcije u claupropisima i donosi uputstvo za njenu primenu.</p>   | <p><b>The methodology for assessing the risk of corruption in regulations</b><br/><b>Section 102.</b></p> <p>The Agency shall prescribe the methodology for assessing the risk of corruption in the regulations and shall issue guidelines for its implementation.</p>   |
| <p>Metodologiju primenjuju svi predlagači propisa, koji u obrazloženju predloga propisa navode da li su procenili rizik od korupcije u propisu u skladu sa metodologijom.</p>  | <p>The methodology applies to all proponents of regulations, who, in the reasoning of the regulation, have to state that the drafters have assessed the risk of corruption in the regulation in accordance with the methodology.</p>   |
| <p><b>Pribavljanje mišljenja od Agencije na nacrt zakona</b><br/><b>Član 103.</b></p> <p>Organ državne uprave nadležan za pripremu zakona iz oblasti posebno rizične za nastanak korupcije ili zakona kojima se uređuju pitanja koja su predmet potvrđenih međunarodnih ugovora u oblasti borbe protiv korupcije dužan je da nacrt zakona dostavi na mišljenje Agenciji.</p> | <p><b>Obtaining the opinion of the Agency on draft laws</b><br/><b>Section 103.</b></p> <p>The government authority responsible for the preparation of laws in sectors of heightened corruption risk or of laws governing matters subject to ratified international treaties in the field of combating corruption is obliged to submit the draft law for review by the Agency.</p> |
| <p>Mišljenje iz stava 1. ovog člana Vlada je dužna da dostavi Narodnoj skupštini uz predlog zakona.</p>  | <p>The Government shall submit the opinion referred to in paragraph 1 of this Article to the National Assembly together with the draft law.</p>  |