Analysis of the Montenegro Law on Prevention of Corruption

Kingdom of the Netherlands

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Acronyms

APC	Agency for Prevention of Corruption
CoE	Council of Europe
CoI	Conflict of interest
IT	Information technologies
LPC	Law on Prevention of Corruption
PEP	Politically Exposed Person
TI	Transparency International
TP	Technical Paper

Executive Summary

The present analysis of the Law on Prevention of Corruption was commissioned by the NGO Mreža za Afirmaciju Neprofitnog Sektora (MANS) within the framework of the project "Fighting Conflict of Interest and Unexplained Wealth of Public Officials."

The Law on Prevention of Corruption (LPC) [1] is but one segment of the Montenegrin anti-corruption system. It establishes the Agency for Prevention of Corruption. It lays down common conflict of interest-related obligations and restrictions (incompatible functions, gifts, assets declarations) for a set of higher level officials working or acting in the public sector. It also addresses corruption risk management systems in public institutions ("Integrity Plans") and elements of whistle blower protection for corruption-related "threats to the public interest".

As the law does not seek to regulate all anti-corruption thematic policy areas; for instance, rules on lobbying or political party and campaign finance, etc., are to be found in other legislation. More problematically, however, it addresses only partially the select policy areas which is does attempt to regulate, most notably, the conflict of interest regime, which is the focus of this analysis.

This report nevertheless reviews all the provisions of the LPC to some extent. It aims to consolidate existing analyses and offer additional insights and recommendations on a way forward. It is organized to broadly follow the sequence of issues laid out in the law, but it also endeavors to address discernable thematic wholes—the distinct anti-corruption regimes and institutions addressed by the law. Consequently, it is structured in the following main sections:

- Definitions (section 2);
- The conflict of interest regime, including incompatibilities, and management of gifts/donations/sponsorships, and the asset declarations regime (section 3);
- Procedure for determining violation (section 4);
- The rules governing the establishment and mandate of the Agency (section 5).
- Reporting corruption and whistleblower protection (section 6);
- Integrity plans, or corruption risk management regime (section 7); and,

While the full range of **recommendations related to the observed limitations and challenges is laid out in section 8**, and summarized here as follows.

[1] Link to law text: https://www.antikorupcija.me/media/documents/Law_on__Prevention_of_Corruption_uhpeSyH.pdf

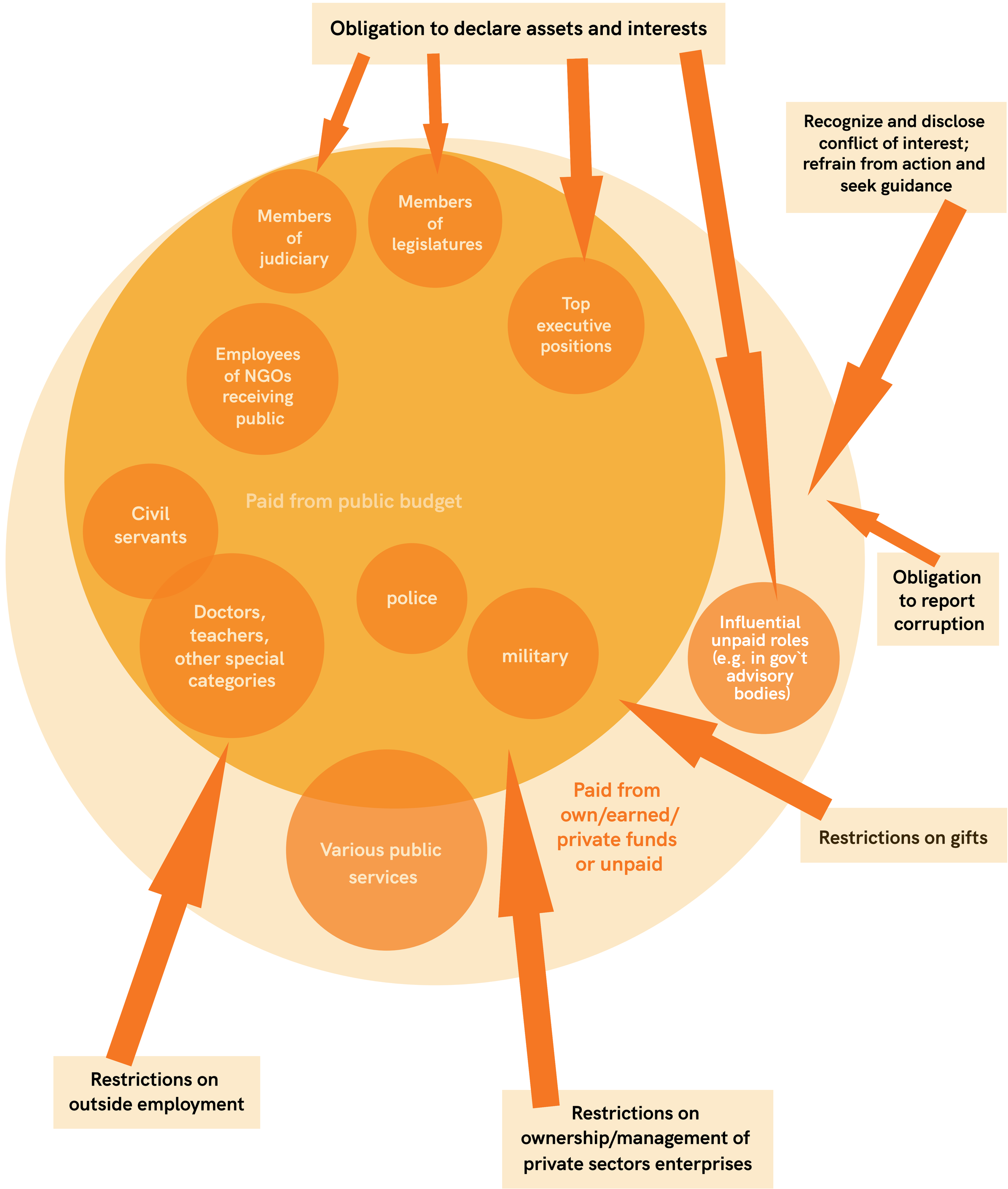
Key conclusions and recommendations

1. Overall, this analysis finds that the extent of **required interventions goes beyond minor changes of specific articles of the Law on Prevention of Corruption**. Instead, it recommends comprehensive "system reviews" of the distinct anti-corruption regimes which the law attempts to address.

2. The reform of the national conflict of interest prevention and management system should be considered a priority intervention. It is recommended that Montenegro **formulate a comprehensive conflict of interest *policy* applicable for all public sector actors**. Such a policy should specify a core set of obligations—on managing *ad hoc* conflicts of interest; on gifts; on outside activities and other "structural" incompatibilities, etc.—which would apply most broadly. Beyond that, it would list specific additional obligations for clearly-defined groups of public sector actors, such as law enforcement officials, members of the judiciary, procurement officials, high-level decision-makers, etc. The policy should address the gaps noted throughout this and other international analyses of the system, and most importantly, redefine implementation and oversight arrangements to, among others, enhance the role for institutional management. The comprehensive and clearly articulated vision should guide future legislative changes, to achieve a unified and harmonized system.

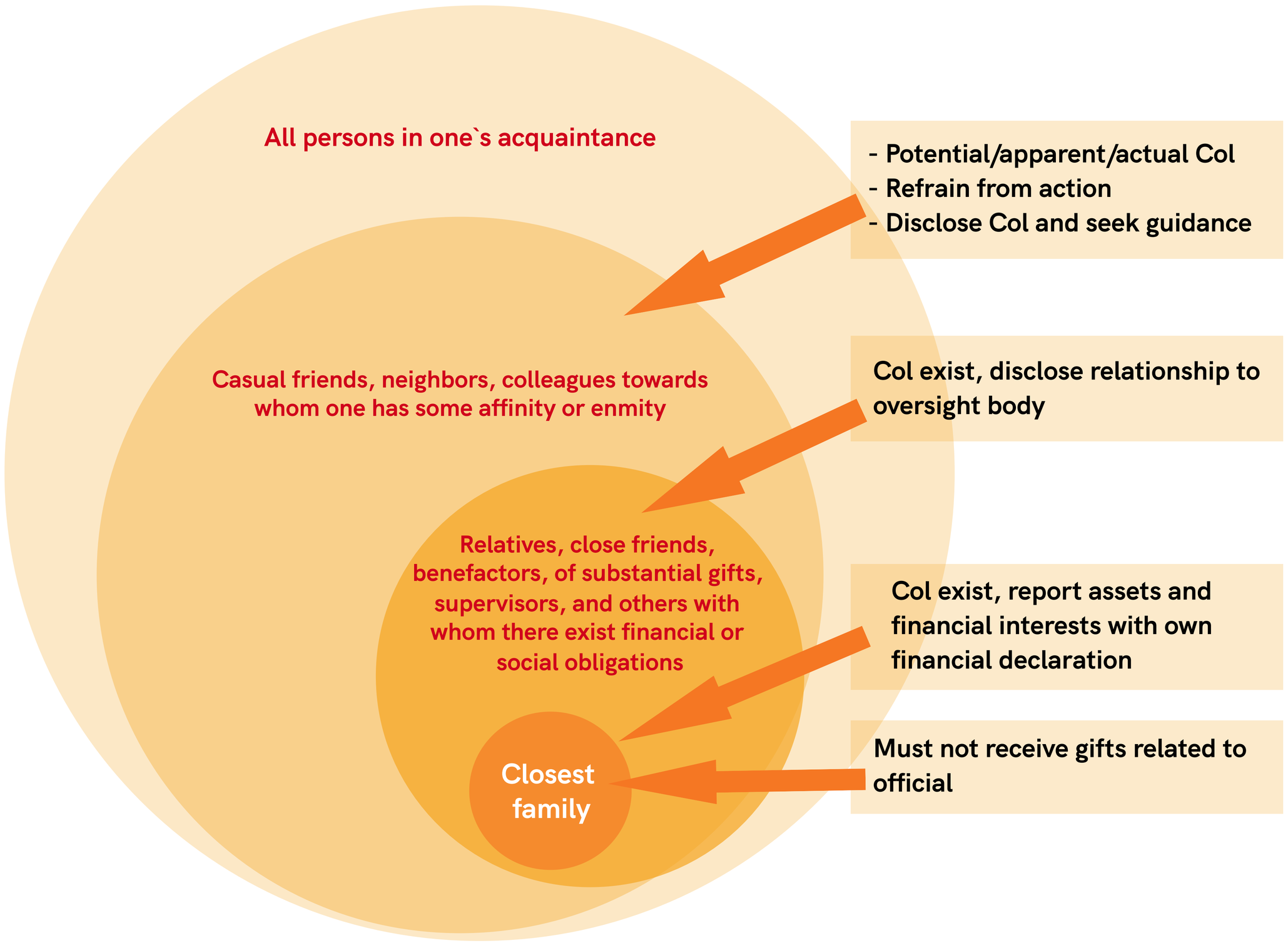
   The **policy should place particular attention on clearly defining the respective groups of public sector actors in connection with specific anti-corruption obligations** to close all the existing lacunae, as illustrated below.

Figure 1: Example of mapping of anti-corruption obligations



Equally critical is to similarly **define groups of related persons and close associates**, in connection with various anti-corruption obligations.

Figure 2: Conceptualizing related persons and associates



3.

Key definitions should be reviewed and revised in line with observations in this and other international analyses. In particular:

- Consider whether the definition of “corruption” can potentially impact the admissibility/relevance of reports/complaints submitted to the Agency under Article 31;
- Improve the definition of “gain” to encompass the broadest possible scope of material and non-material benefits;
- Expand the definition of “gift” to include all types of benefits and all situations; restrictions on gifts should be elaborated in the articles defining the gifts regime.

4.

The incompatibilities rules should be reviewed in line with observations in this and other international analyses, in particular:

- Restrictions on activities outside the principal public sector function should be defined distinctly for each major category of public sector actors;
- Limits on outside engagements should be based on the simple principle that outside activities should not interfere with public office (a) in terms of time expended, and (b) in terms of creating conflicts of interest;
- Rather than attempting to anticipate possible exceptions to the broad restrictions to be included in legislation, it may be more effective to develop a robust, transparent multi-level mechanism for approving exceptions on a case-by-case basis.

5.

Consider Improving enforcement of incompatibilities restrictions through additional strategies such as:

- Extending responsibilities to other actors in the process, beyond the public official and the Agency;
- Considering new tools used in other jurisdictions;
- Further encouraging external, third-party reports of observed or suspected violations by citizens, media, civil society organizations, institutional insiders, or other watchdogs.

6.

In addition to Improving the related definitions per point 3, above, the gifts regime should be further strengthened through:

- Explicitly prohibiting the receipt of gifts provided in connection with the public official or the exercise of public function by related persons;
- Explicitly prohibiting the solicitation of gifts;
- Recognizing the exchange of private gifts and benefits as a criterion for the inclusion of the gift-maker (individual/firm) in the group of related persons and associates about whom decisions cannot be made without disclosure and guidance from a designated authority.
- Providing additional information and guidance on gifts, benefits, and related concepts and restrictions;
- Expanding the monitoring and supervisory requirements for institutional management;
- In terms of penalties, considering adjusting the scale of financial penalties to correspond to the value of an illicit gift.

7. As concerns donations and sponsorships, beyond endorsing Council of Europe recommendations, this analysis emphasizes additional issues, as follows:

- To minimize the widow of opportunity to exercise “undue influence” through donations and sponsorships, require public bodies to update their registers, post the information on their web sites, and notify the Agency within 30 days of the concluded agreement;
- Empower the Agency to subject donations and sponsorships to in-depth due diligence analysis analogous to that applied in connection to asset declarations;
- Require public authorities who are contemplating receiving donations/sponsorship to undertake a due diligence process to identify risks of undue influence, and require Agency approval of the transaction, *inter alia*, on the basis of this internal assessment.

8. As concerns asset declarations, this analysis agrees with Council of Europe recommendations about:

- Possible reduction in scope of persons obligated to declare assets and interest through a risk-based approach;
- The expansion of scope of assets to be declared, including movable property held abroad and assets under beneficial ownership;
- Insertion of more open-ended phrases that would encompass different kinds of rights of use of property, or non-traditional types of assets, like cryptocurrencies, etc.;
- Providing the Agency with banking data for all persons whose assets are reported; and,
- Providing the Agency with key information, which would be kept confidential, of related persons, associates, and other relationships that constitute significant private interests.

9. This analysis particularly supports the notion that the asset declarations regime be enhanced to more effectively track *interests*. This implies declaring include a broader list of family members and associates, including legal entities who provide benefits above a certain threshold (e.g., hospitality such as vacations, travel services, use of cars, yachts or private planes, holiday homes, etc.).

10. While it is beyond the scope of this paper to address enforcement of the asset declarations rules by the Agency, it generally supports the observations and recommendations provided by the Council of Europe, and furthermore recommends a deeper examination of challenges encountered in practice.

11. Considering the value of external reports from journalists and civil society watchdogs, and less commonly insiders or ordinary members of the public in detecting violations of the present law and corrupt practices, it is recommended to:

- Eliminate unnecessary conceptual distinctions in procedures;
- Reduce excessive requirements from the reporting person, e.g., on the content of the "Request" necessary to consider it actionable;
- Introduce an obligation to justify the rejection of an external "Requests";
- Encourage the Agency to continue developing relevant analytical and investigative capacities in line with its mandate.

12. Regarding APC effectiveness more broadly, it is strongly recommended to conduct a functional analysis of the totality of the Agency's administrative procedures from the perspective of necessity and efficiency.

13. The present analysis considers other Agency-related provisions specified in Chapter V primarily in connection with the enforcement of conflict of interest provisions, which are the focus of this analysis. It draws considerably on the Council of Europe analysis, and offers several additional observations, as follows:

- Due attention should be given to the rules governing the appointment and dismissal of the Agency Director;
- Recruitment criteria should be reviewed, for instance the (over-)emphasis on formal education, "anti-corruption experience" versus *relevant* experience; sufficient integrity requirements; the potential exclusion of PEP, etc.
- Further consideration should be given to appropriate performance criteria for the Agency;
- The adequacy of the existing oversight provisions should be reviewed.

14. Because there are compelling arguments about certain Agency procedures and decisions remaining confidential (for instance, in connection with Article 39), there is a corresponding need to elaborate a commensurate accountability mechanism. All options should be discussed, including the possibility of special external oversight committees, which can include representatives of different state and civil society bodies.

Sanctions

15. The present analysis considers applicable sanctions together with the provisions to which they apply. Several common recommendations emerge, however, as follows:

- The appropriateness of financial sanctions should be reviewed by experts familiar with Montenegro's economic and social context;
- In cases where public authorities—i.e., legal entities funded from the public budget—are in breach of requirement of the LPC, the applicable financial penalties should apply only to "responsible persons" (including possibly the Head of the authority), not the Legal Person.
- Sanctions for both officials in questions and legal entities (as appropriate, per above) and/or responsible persons of legal entities should be introduced for failure to comply with Agency Opinions and Decisions.

Missing obligations

16. The LPC should consider referencing or reiterating other essential integrity obligations that apply to all public sector actors. This may include, for instance, provisions prohibiting the use of public property for personal reasons, including office space, equipment, in particular vehicles, information, etc. which are presumably contained in other laws.

17. The LPC should introduce an obligation to report observed/suspected corruption by all public sector actors, and review appropriate corruption reporting mechanisms.

18. The LPC should consider adding an obligation to develop a results-oriented performance monitoring framework for its anti-corruption system, which is at present not foreseen as a competence of the Agency nor any other public body.

Whistleblower protection

19. **The whistle-blower protection regime, which at present excludes reports of threats to public interest that lack a corruption dimension, should be considered another priority for Montenegro. The limited scope of application of whistle blower protection constitutes a massive policy gap that requires urgent attention**.

This initial and fundamental limitation appears to have generated a range of logical and procedural inconsistencies that are near-impossible to untangle and resolve article by article. It is therefore recommended that the intended scope of protection be articulated in a distinct policy document, (similarly to the conflict of interest regime) as a basis for further discussion.

Corruption risk management

20. The overarching recommendation is to undertake a systematic assessment of the challenges encountered in implementation and the results achieved to date. More substantive recommendations would arise from such analysis.

1. Introduction

The present analysis of the Law on Prevention of Corruption (hereafter LPC) was commissioned by the NGO Mreža za Afirmaciju Neprofitnog Sektora (MANS) within the framework of the project "Fighting Conflict of Interest and Unexplained Wealth of Public Officials."

The Law on Prevention of Corruption (Official Gazette of Montenegro 53/2014 and 42/2017), which came into force in 2016 and was amended in 2017 [2] establishes some the main corruption prevention rules for select categories of persons working or acting in the public sector. It excludes, however, analogous obligations for civil servants and certain special categories of public sector actors (e.g., notaries and bailiffs) which are covered in other legislation. Other anti-corruption regimes, e.g., on lobbying, or political party and campaign finance, etc., are also covered by other laws. In sum, the Law on Prevention of Corruption should be understood as addressing but one segment of the Montenegrin anti-corruption system, and as the present analyses is correspondingly focused.

The present inquiry is foremost a legislative analysis, where the legal provisions are examined for internal consistency and for alignment with applicable international standards and practice. The scope of the assignment precluded an assessment of implementation practice; however it draws on such data from past international assessments, which included consultations with representatives of the Agency for Prevention of Corruption on implementation and enforcement. Indeed, two Council of Europe Technical Papers (TP) from 2022 [3] constitute an integral part of this analysis and will be referenced as appropriate to avoid redundancy and repetition. The present paper rather aims to consolidate existing analyses and offer additional insights and recommendations on a way forward.

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[2] English-language translation is available at https://antikorupcija.me/media/documents/Law_on__Prevention_of_Corruption_uhpeSyH.pdf

[3] The most important assessments referenced in this analysis are Council of Europe Technical Papers:

- "Analysis of the parts of the Law on Prevention of Corruption which regulate the setup and functioning of the Agency for Prevention of Corruption" ECCD-HFII-AEC-MNE-TP4/2022, May 2022. **Hereafter CoE TP4**.
- "Analysis of the parts of the Law on Prevention of Corruption which regulate conflict of interest, restrictions in the exercise of public functions (incompatibilities of functions), assets declarations, gifts, donations and sponsorships" ECCD-HFII-AEC-MNE-TP9-2022, September 2022. **Hereafter CoE TP9**.

Structure of the law and the report

The Law on Prevention of Corruption contains provisions for several key anti-corruption regimes that could have been segmented into several distinct thematically-homogeneous laws. It is an unusual piece of legislation—not in the inclusion of multiple anti-corruption themes *per se* (omnibus laws are fairly standard practice), but rather in its rather limited attention to many of the topics covered. As this and other analyses have shown, regulating corruption-relate matters can seldom be accomplished thoroughly through one or two articles of the law, and hence many issues have been left insufficiently elaborated.

The Law on Prevention of Corruption is organized in six substantive chapters with several subsections, as follows:

Chapter I "Basic Provisions" outlines main concepts, definitions, and institutions;

Chapter II "Prevention of Conflicts of Interest in the Exercise of Public Functions, Restrictions in the Exercise of Public Functions, Gifts, Sponsorships and Donations and Reports on Income and Assets by Public Officials" specifies various mechanisms to prevent and manage conflicts of interest and corruption. It includes:

- Subsection 1 "Prevention of Conflict of Interest in the Exercise of Public Functions" addresses the obligation to disclose *ad hoc* conflict of interest (Article 8);

- Subsection 2 "Restrictions in the Exercise of Public Function" covers
  - restrictions on accumulation of public functions (Articles 9 and 12);
  - incompatibilities in connection with private sector engagement (Articles 10, 11, 13 and 14);
  - post-employment restrictions (Article 15);

- Subsection 3 "Gifts, Sponsorships and Donations" provides relevant rules (Articles 16 – 22);

- Subsection 4 "Report on Income and Assets of Public Officials" outlines the asset declarations regime (Articles 23 – 27);

o Subsection 5. “Procedure of Giving Opinions” describes main implementation procedures for the regimes in question by the Agency for the Prevention of Corruption (Articles 28 and 29);

o Subsection 6. The Process of Verifying Data from the Report addresses verification of asset declarations (Article 30);

o Subsection 7. “The Procedure for Determining Violation of the Provisions of this Law that are related to the prevention of conflict of interest in the exercise of public functions, restrictions in the exercise of public functions, gifts, sponsorships and donations and reports on income and assets of public officials” outlines the process of determining and sanctioning violations of the regimes described by the law (Articles 32 – 43), including through external reports (“Requests”).

In Chapter III “Whistleblowers”, the law further describes a limited whistle-blower protection regime (Articles 44 – 70), applicable only in connection with “threats to the public interest that indicate the existence of corruption”.

Chapter IV “Prevention of Corruption” (Articles 71 - 77) contains the requirements for applying a corruption risk management approach throughout the public sector (“Integrity Plan”).

Chapter V of the law “The Agency” (Articles 78 – 101) lays out the provisions on the mandate, structure, governance and other key characteristics of the Agency for the Prevention of Corruption.

Chapter VI The final substantive Chapter VI lists applicable penal provisions in Articles 102 – 104.

While this report broadly follows the sequence of the issues as laid out in the law, it nevertheless attempts to addresses the discernable thematic wholes—the distinct anti-corruption regimes and institutions addressed by the law—to the extent possible. Consequently, for instance, the final section of the law on sanctions is not considered independently, but rather, the applicable sanctions are reviewed together with the thematic provisions to which they apply.

In line with this approach, the report is organized in the following main sections:

- Definitions (section 2);
- The conflict of interest regime, including incompatibilities, and management of gifts/donations/sponsorships, and the asset declarations regime (section 3);
- Procedure for determining violation (section 4);
- The rules governing the establishment and mandate of the Agency (section 5);
- Reporting corruption and whistleblower protection (section 6); and,
- Integrity plans, or corruption risk management regime (section 7).
- Overall conclusions and recommendations related to the observed limitations and challenges is laid out in section 8.

2. Definitions

Chapter I of the Law on Corruption Prevention contains introductory provisions; most importantly, the definitions and concepts used in the legislation. It is a vital part of the law, as the terms set here determine the scope of application and the potential efficacy of the remaining provisions.

Most of the terms used in regulating corruption prevention lack a single universally-accepted definition. For this reason, special attention will be given to the terms used and this analysis will introduce specific elaborations to ensure clarity. For instance, to start, it will employ the phrase “public sector actors” to designate the widest possible scope of individuals who could be subject to various obligations set out in this law. This concept differs from the narrower notion of “public official” defined by the Law on Corruption Prevention, which will be discussed below. All the relevant phrases will be fully explained in the corresponding sections.

2.1 Definition of corruption

Article 2 the Law on Corruption Prevention defines corruption as “any abuse of official, business or social position or influence that is aimed at acquiring personal gain or for the benefit of another”. It is a fairly comprehensive definition that approximates in many respects the conceptual definition favored by the anti-corruption expert community: Transparency International’s (TI) “abuse of entrusted power for private gain.”

On the positive side, the inclusion of the notion of “influence” in the definition is a helpful elaboration on the TI’s notion of “power”, and quite a good idea as it more obviously incorporates the act of influence peddling. The definition nevertheless requires further scrutiny.

One, it is useful to consider whether the notion of “official, business or social position” “služben[i], poslovn[i], odnosno društven[i] položaj ili uticaj” is as comprehensive as “entrusted duty”, or whether it implies significant exclusions—and whether such exclusions have been observed in practice.

Two, the notion of “personal gain” has been superseded within the anti-corruption expert community by the phrase “private gain”, as reflected in the TI definition. [4] The potential limitation may be addressed by the notion of “benefit of another”, if “another” could include entities such as political parties.

Both outstanding questions should be validated by national legal experts’ reading of the definition in the Montenegrin language, in line with the ***purpose*** of the definition. If it is meant to be used by the Agency for Prevention of Corruption to, *inter alia*, determine the admissibility/relevance of received complaints/reports about corruption, then it may be insufficient. A review of Agency practice in this domain would be important in reaching definitive conclusions.

2.2 Definition of public official

The deficiencies of the definition of public official [5] (*javni funkcioner*) in Article 3 have been extensively discussed in recent expert analyses of the Law on Prevention of Corruption. [6] The CoE TP9 assessments also provided a good comparative overview of international standards and practice in this domain, which will not be repeated here. Instead, the present analysis supplements the previous ones in applying a complementary perspective in examining the issue—namely, the question of the ***purpose*** of the definition, following the line of reasoning established in the previous section, above.

Presumably, the definition of “public official” is meant to designate the scope of “public sector actors” subject to the requirements of the law. We introduce the notion of “public sector actors” at this point to highlight the distinctions necessary for further analysis.

The term “public sector actor” will be used in this report to designate the widest possible set of individuals that could be subject to obligations contained in the present law. This notion covers every individual that performs a function/service on behalf of the state. It includes civil servants, special categories of public sector employees such as members of the judiciary, members of the military, the police, teachers, doctors, etc., all elected, appointed, or recruited positions, and all types of engagement—paid or voluntary, part time or full-time, short-term or permanent. It also includes persons working in bodies funded from the public (state, local) budget. In short, it includes all individuals who either have a role in public sector work processes, or receive public funding.

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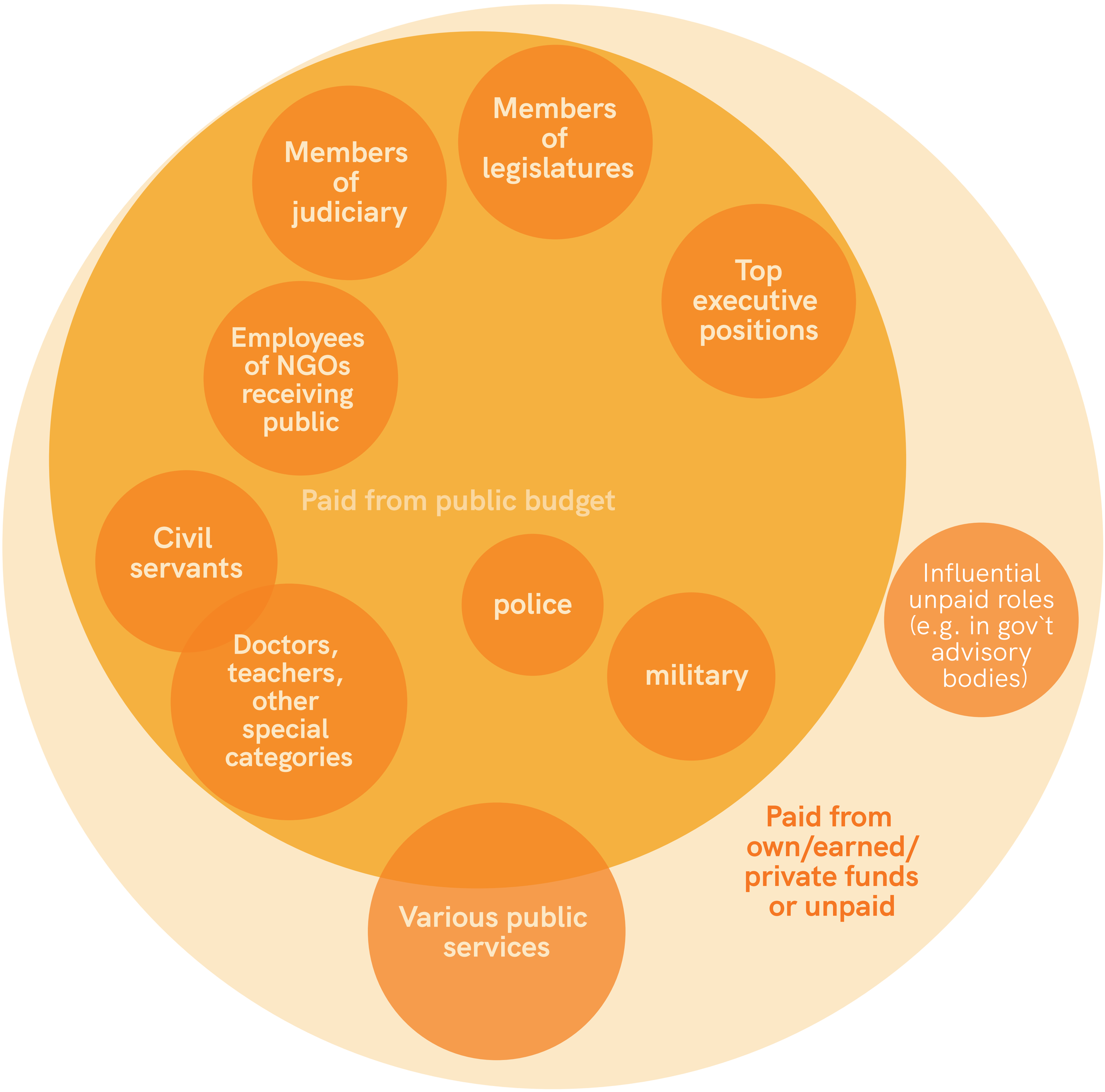
[4] The latter is preferred because it is more inclusive of “communal” benefits gained by entities like political parties, or to cover less “personal” expenses like electoral campaigns. It is an important omission because undue “rewards” of donors to political campaigns and parties is probably the dominant form of corruption in Europe, as recent scandals in France, Germany and Israel, among others, readily attest.
[5] “Public officials shall refer to the persons elected, appointed or assigned to a post in a state authority, state administration body, judicial authority, local self-government body, local government body, independent body, regulatory body, public institution, public company or other business or legal person exercising public authority, i.e. activities of a public interest or state-owned (hereinafter: authority), as well as the person whose election, appointment or assignment to a post is subject to consent by an authority, regardless of the duration of the office and remuneration.”
[6] The Council or Europe September 2022 Technical Paper ECCD-HFII-AEC-MNE-TP9-2022 “Analysis of the parts of the Law on Prevention of Corruption which regulate conflict of interest, restrictions in the exercise of public functions (incompatibilities of functions), assets declarations, gifts, donations and sponsorships” [CoE TP9] consulted several earlier assessments since the establishment of the Agency for Prevention of Corruption, including a Council of Europe Technical Paper from October 2018 (ECCD-HF-AEC-MNE-TP 11/2018) (p.9), as well as the April 2021 findings of the EU Peer Assessment mission on the functioning of the Agency (p.10).

Figure 3: Public sector actors



The persons to whom the restrictions laid out in the Law on Prevention of Corruption apply are contained within this broader universe of public sector actors, however, as previous assessments have also observed, the notion of “public official” as defined in the LPC is insufficiently precise and open to contradictory interpretations as to which categories of public sector actors are subject to its provisions.

The LPC in fact implies a relatively limited scope of public sector actors in the notion of “public official” because all its provisions—including, notably, the obligation to submit asset declarations—apply to all “public officials” defined in the law.

Such an implication arises from a review of international practice, where different categories of public sector actors are typically subject to different anti-corruption obligations, commensurate with their level of influence and responsibility.

International practice recognizes that "basic" or "fundamental" conflict of interest-related rules—those to manage *ad hoc* conflicts of interest, restrictions on gifts, certain secondary activities, etc.—should apply to the widest range of public sector actors: from civil servants, to special categories of public sector employees such as members of the judiciary, members of the military, the police, teachers, doctors, etc., to all elected or appointed positions, paid or voluntary, and to the bulk of other actors carrying out a service or function on behalf of the state (whatever the level, central or local). Some jurisdictions extend to some of these obligations also to individuals and entities receiving state funding—in short, all public sector actors depicted in Figure 3 above.

More rigorous requirements, in particular the obligation to declare assets and interests, are typically reserved for more select public functions with higher levels of authority. The principle of differentiation is simple: the greater the level of power or influence, the greater the corruption risk [7], hence greater scope of preventive requirements and scrutiny.

Following this logic, if the "public officials" are those who are required by the LPC to submit asset declarations, then the notion of "public official" must be limited to the persons with high levels of authority and influence—but as already noted, precisely who is included requires clarification. This conclusion raises the further question of whether and how corruption-prevention obligation of other categories of public sectors are regulated, particularly the "basic" or "fundamental" conflict of interest management requirements.

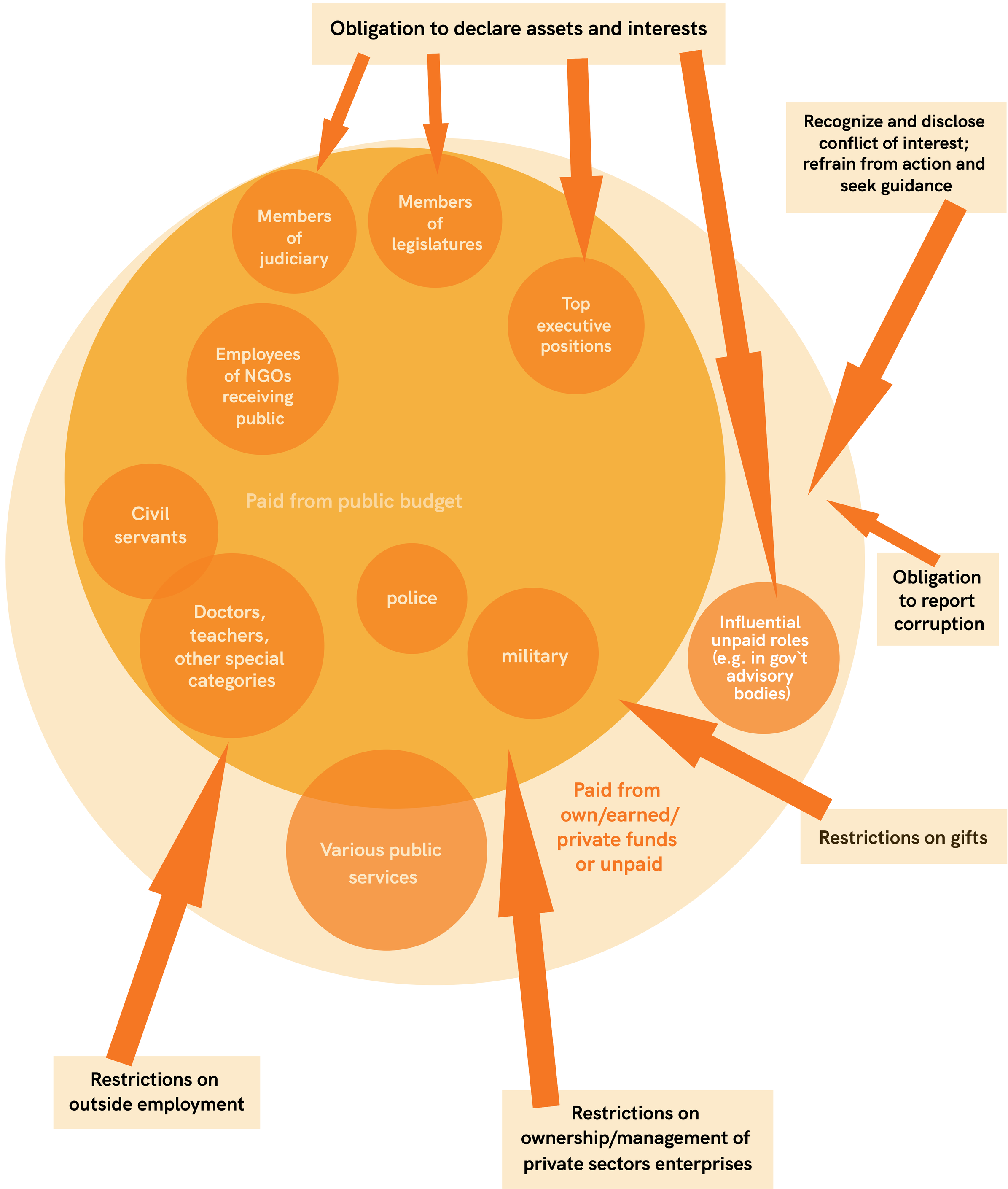
The LPC notes that obligations of certain categories of public officials are regulated by special laws, and some relevant obligations also exist in the Law on Civil Servants and State Employees. It is however unclear (and unfortunately beyond the scope of this analysis to verify) whether the provisions in different laws interlink to form a comprehensive and adequately harmonized system of obligations.

To clarify and resolve any existing gaps or other deficiencies, **this analysis recommends:**

1. **Mapping all relevant categories of public sector actors in unambiguous terms** (following the suggestions of previously cited analyses),
2. **Developing a schematic that clearly designates which categories of public sector actors should be subject to each distinct set of anti-corruption obligations** (particularly those set out in the LPC, Chapters II and III), and in particular,
3. **Providing the rationale for each inclusion/exclusion (*particularly the exclusions*).**

[7] Risk, including corruption risk, is evaluated as a factor of probability and impact. The higher risk inherent in higher level functions relates not necessarily to the greater *probability* that corruption could occur, but rather, to the greater *impact on society* from corruption perpetrated at such a high level of power/influence.

Figure 4: Example of mapping of anti-corruption obligations



2.3 Other definitions (Article 6)

Article 6 paragraph 1 defines **public interest** as “the material and non-material interest for the good and prosperity of all citizens on equal terms”.

The phrase differs from the more elaborate notion introduced in Article 44 [8] in the context of whistleblower protection. The divergences have the potential to create confusion and questions regarding intended inclusions/exclusions by each, and should be clarified. As a general rule, terms are defined in introductory provisions as they should apply for the entire law.

Paragraph 2 defines **private interest** of a public official as “means ownership or other material or non-material interest of a public official or the persons related to him”. It rightly includes both material and non-material interests, however a serious limitation arises with the definition of “related persons”, further elaborated in paragraph 4.

The definition of **related person** provided in paragraph 4—"relatives of a public official in straight line and to the second degree in lateral line, a relative by marriage to the first degree, married and common-law spouse, adoptive parent or adopted child, member of a household, other natural or legal person with which the public official establishes or has established a business relationship”— is both too narrow and insufficiently differentiated.

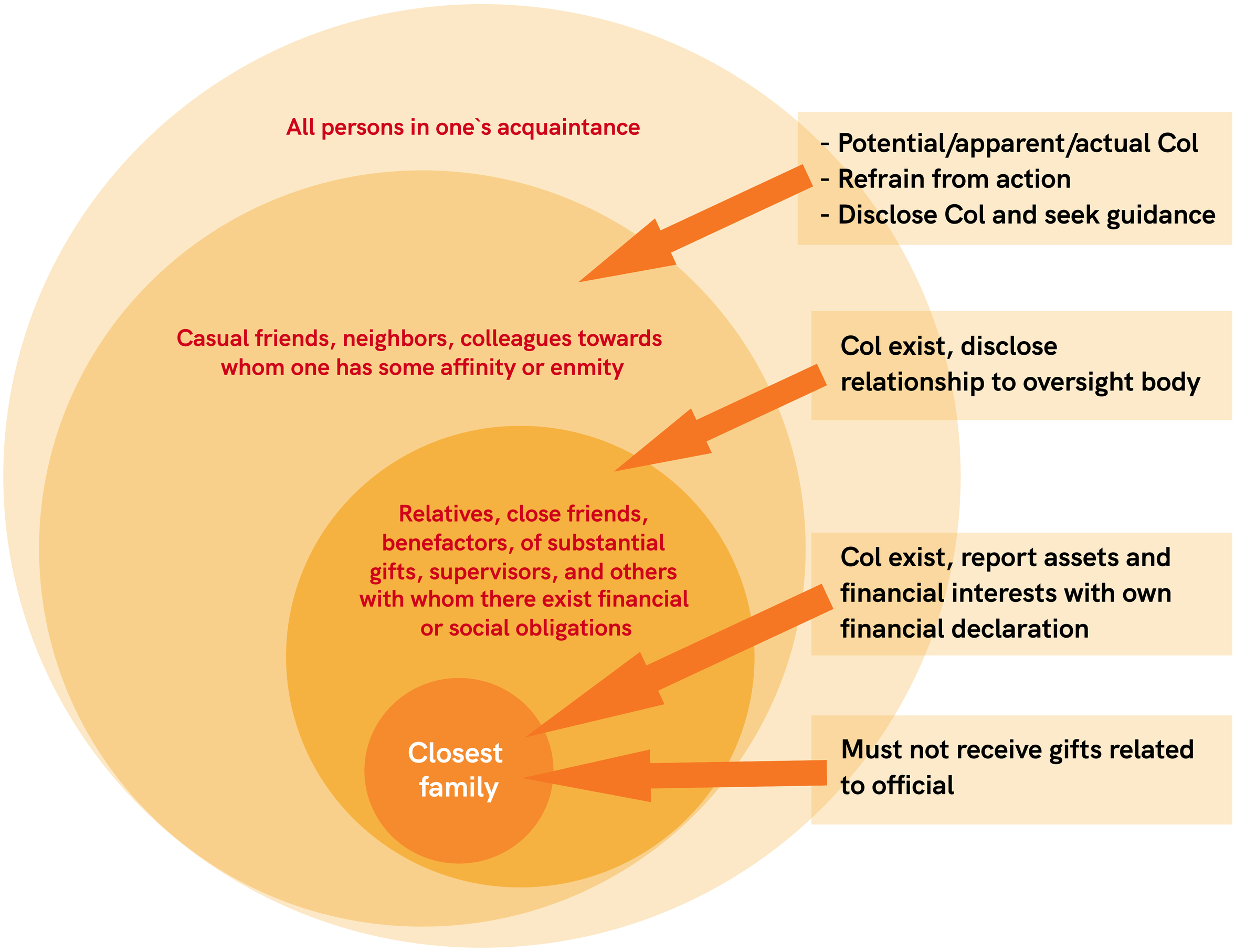
The need to differentiate among different groups of related persons and associates relates to the purpose and logic of distinct anti-corruption obligations (regimes). The Law on Prevention of Corruption contains at least three distinct ones. The first is the regime for managing *ad hoc* conflicts of interest, where a public official is prohibited from taking decisions in situation where a private interest exists (Article 8). Presumably such a relationship arises from private relationships with persons or even legal entities (religious bodies, NGOs, friends’ and relatives’ firms, etc.). This first group of related persons and associates is arguably significantly broader than the group of persons who are prohibited from receiving a gift in connection with the public official (or his/her exercise of public function, Article 16). A further, potentially even narrower group comprises persons whose assets and interests are included in the public officials’ declarations (Article 23). **Specifying these distinct groups should be seen as a priority intervention**.

[8] “…threatening the public interest shall mean a violation of regulations, ethical rules or the possibility of such a violation, which caused, causes or threatens to cause danger to life, health and safety of people and the environment, violation of human rights or material and non-material damage to the state or a legal or natural person, as well as an action that is aimed at preventing such a violation from being discovered.” LPC Article 44.

As concerns scope of inclusions for each group of related persons and associates, there is at least one additional crucial relationship that should be recognized in the broadest group defined in connection with *ad hoc* decisions: the institution of ritual kinship (*kumstvo*). While it is commendable to note that the present definition recognizes unmarried ("common law") spouses, it misses various other forms of affinity, like close friends and other types of associates, even legal entities, and well as the opposite—enmity (intense dislike), which could equally constitute a private interest that might be considered. Finally, the definition should take into account hierarchic (power) relationships, which contain dimensions of pressure and private interests that can equally impede impartiality.

As with the definition of public official, different groups/categories of "related persons and associates" should be defined in direct relation to the obligations set out by the law, with the rationale for inclusions/exclusions clearly elaborated.

Figure 5: Conceptualizing related persons and associates



The broadest group of related persons should contain, at a minimum, the categories of "family members and close associates" defined in FATF Guidance on Politically Exposed Persons (recommendations 12 and 22). [9]

Text box 1: FATF guidance on conceptualizing *family members* and *close associates*

For family members, this includes such relevant factors as the influence that particular types of family members generally have, and how broad the circle of close family members and dependents tends to be. For example, in some cultures, the number of family members who are considered to be close or who have influence may be quite small (e.g., parents, siblings, spouses/partners, and children). In other cultures, grandparents and grandchildren might also be included, while in others, the circle of family members may be broader, and extend to cousins or even clans.

For close associates, examples include the following types of relationships: (known) (sexual) partners outside the family unit (e.g. girlfriends, boyfriends, mistresses); prominent members of the same political party, civil organisation, labour or employee union as the [official in question]; business partners or associates, especially those that share (beneficial) ownership of legal entities with the PEP, or who are otherwise connected (e.g., through joint membership of a company board). In the case of personal relationships, the social, economic and cultural context may also play a role in determining how close those relationships generally are.

Article 6, paragraph 3 defines **gain (benefit)** as "property or property and other material or non-material rights". This definition impacts two anti-corruption regimes covered in the Law on Prevention of Corruption. One, in modifying the definition of "corruption" (discussed in section 2.1, above), it can potentially impact the admissibility/relevance of reports/complaints submitted to the Agency under Article 31). Two, in connection with the definition of "gift", in may affect the gifts regime set out under Articles 16-20.

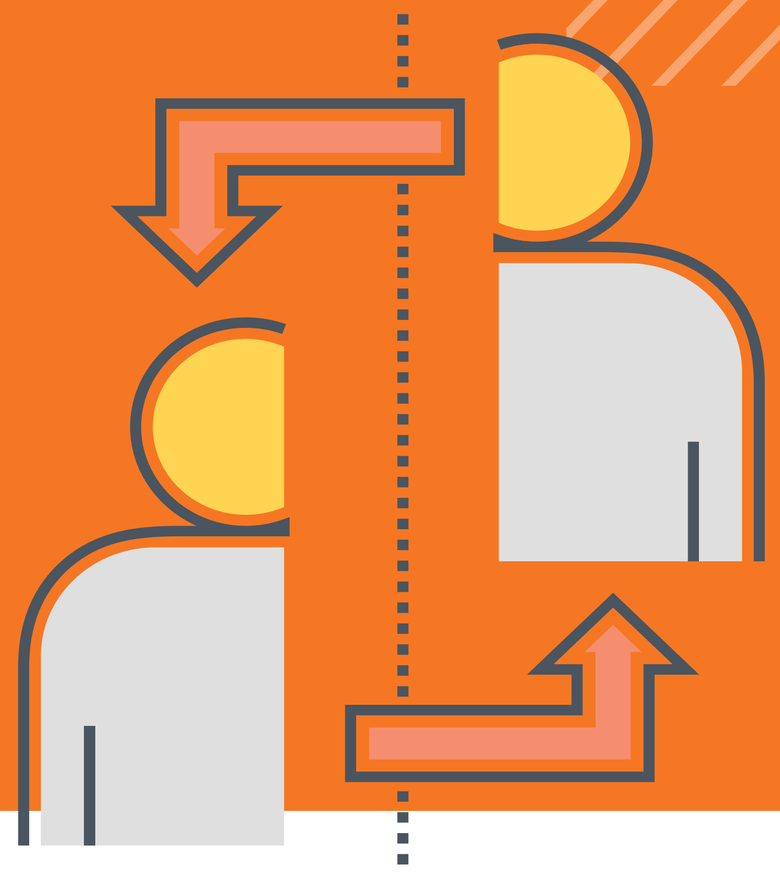
Overall, the definition of gain is rather narrow: the notion is reduced to *property* ("imovina"), or property and other material or non-material *rights*. This framing does not align with international practice, which, by contrast, aims for the broadest possible scope. As observed by the CoE TP9, the present definition excludes "discounts, which exceed normal market practice and are unavailable for other consumers, and releases from obligations" (p. 62), but also other types of material advantages such as loans or credit lines, or non-material benefits such as sexual favors or simply preferential treatment in accessing restricted resources or attractions. **The definition should therefore be amended in line with international practice** and recommendations laid out in CoE TP9.

[9] Financial Action Task Force (FATF) 2013. FATF Guidance on Politically Exposed Persons (recommendations 12 and 22). file:///Users/marijana/Downloads/Guidance-PEP-Rec12-22.pdf

The above deficiencies furthermore impact the **definition of gift** provided in paragraph 5 ("a thing, right or service acquired or performed without compensation and any other gain provided to a public official or a person related to a public official in connection with the exercise of public function"). The notion is furthermore problematic in two other respects: with respect to notion of related persons, and with respect to the idea that the gift be in "connection to exercise of public function". While the limitations in the concept of related persons are discussed above, the notion that any related person should receive gifts on behalf of the public official in connection with exercise of their public function is utterly inappropriate. This analysis fully supports the CoE TP9 **recommendation 27 to prohibit all persons related to a public official from accepting (permitted) gifts provided in connection with the public official or the exercise of public function** (pp. 64 and 90).

The sixth and final paragraph of Article 6 containing the definition **public company/enterprise** does not raise immediate concerns, nor is it seen as deficient in previous assessment referenced above. The only question relates to its harmonization with potential other legal definition elsewhere, which may specify e.g., a different proportion of state/municipal ownership.

3. The Conflict of Interest Regime



Addressing conflicts of interest (CoI) is at the core of any anti-corruption system because a conflict of interest precedes corruption: corruption is an act that prioritizes private interest (or benefit) in violation (abuse) of entrusted power (or public duty/public interest, in the case of public officials). Preventing or managing conflicts of interest appropriately reduces the opportunities for corruption. Conflict of interest-related regimes should therefore constitute the core of corruption prevention efforts.

The Montenegrin conflict of interest regime consists of several sub-regimes, as follows:

- Management of *ad hoc* conflicts of interest (articles 7-8);
- Incompatibilities and restrictions in the exercise of public function, (Articles 9-14);
- Post-employment rules (Article 15);
- Gifts, sponsorships, and donations (Articles 16-22);
- Asset and income declarations (Articles 23-27) and their verification (Article 30).

Implementation provisions include

- The role of the Agency in these regimes, in particular the process of issuing Opinions (Article 7, in part, Articles 28-29 and procedure for violations Articles 31 – 43)
- Sanctions for violations of these provisions are noted in Chapter 6, Articles 102 – 104.

Each thematic group will be discussed in turn, along with implementation arrangements and sanctions regime, as appropriate.

3.1 Prevention of conflicts of interest

To start, the emphasis in the law on *prevention* of conflicts of interest to the exclusion of their *management* suggests a misunderstanding of the challenge. Not all conflicts of interests can be prevented. Most arise in an unpredictable *ad hoc* fashion, and these can only be *managed*. International standards and guidance on the topic clearly and consistently emphasize conflict of interest *management*.

A lack of awareness of this challenge by the drafters of the CPL may be the reason for so little emphasis on the issue, and the impractical, rigid procedure for its management. Only two articles of the law contain relevant provisions (Articles 7 and 8). Some of the provisions are appropriate, others should be reviewed, as follows.

Article 7 stipulates that a public official must not subordinate the public interest to a private one, nor provoke a conflict of interest. It then defines the existence of a conflict of interest when a private interest influences or may influence their impartiality in carrying out their function. These definitions appear to adequately address ***actual*** and ***potential*** conflicts of interest ("may influence"), however they exclude another category recognized in international guidance and practice: ***apparent*** conflict of interest, an issue that is commonly attended by phrases along the lines of "*may give the appearance* that a private interest is influencing the impartiality…" or similar.

Paragraph 3 then goes on to state that "The Agency [for Prevention of Corruption] shall establish the existence of a conflict of interest and implement measures for prevention of conflict of interest" through a cumbersome and relatively time-consuming procedure of issuing Opinions.

The process of issuing of Opinion is described later in the law, in Articles 28 and 29 (inserted between articles describing the asset declarations system and articles describing the process of verifications of these declarations), as follows. In situations where they suspect a conflict of interest or an incompatibility is taking place, officials must (a) take measures to resolve the conflict/incompatibility themselves, and (b) notify APC about their suspicion, upon which, (c) the Agency issues an Opinion within 15 days. The onus on APC appears excessive, as the language appears to obligate Agency action even if the matter is simple to resolve and the official does so successfully.

The mandatory involvement of the Agency stipulated by the LPC relates to the relatively narrow scope of individuals comprised in the definition of "public officials" subject to this law [10], however, in practice, even this number may prove excessive and impractical in cases of *ad hoc* conflicts of interest that routinely arise in the performance of duty.

[10] The CoI TP9 reported that some 5000 public officials and 1500 civil servants that are estimated to be subject to the present law.

It is **advisable to consider other more practical implementation arrangements** even in connection with the key leadership positions subject to the present law. It would be essential to ensure that whatever solution emerges extends to all situations where a private interest arises, including those where an official takes decisions alone, so to complement the sound but limited guidance offered in Article 8 (the obligation to declare the existence of a private interest and refrain from participation) in connection with debates and decision-making within a collective body.

International guidance and good practice calls for empowerment of individual public officials to recognize CoI themselves and take appropriate measures. If an official recognizes they are in a CoI situation and takes appropriate steps (e.g., declaring the CoI, and recusing self, as stipulated in Article 8), there should be no need to involve the Agency. Instead, the Agency should be engaged to solve difficult CoI dilemmas, and otherwise provide less formal guidance to officials unsure of the rules.

Whatever additional procedures may be required for public sector leadership positions, these should be harmonized with a broader set of conflict of interest rules that cover all public sector actors, following international guidance and elaborated by the CoE TP9 (p. 47-48) can be paraphrased for application in *ad hoc* conflict of interest cases as follows:

Public officials:

a) should be alert to actual, potential, or perceived conflict of interest;
b) take concrete steps to avoid such situations, to the extent possible;
c) declare the private interest that creates a conflict of interest and refrain from discussion/action in the matter of concern, to the extent possible;
d) comply with superior's/agency's opinion/decision within defined deadline,
e) take further steps if not received guidance from superior.

It is strongly recommended that the totality of Montenegro's conflict of interest provisions, as they apply to various groups of public sector actors, be laid out in a single policy document to ensure that the system is comprehensive and obligations harmonized. The drafters should furthermore consider integrating an effective **intra-institutional conflict of interest management system, with a more important role for institutional management**. If designed and implemented effectively, such an arrangement would be better placed to both increase awareness of conflict of interest challenges, as well as to promote compliance. In such a system, upon recognizing an actual, potential or apparent private interest, the official would suspend action, inform their superior or another designated instance (e.g., a special Ethics Committee or in select cases the Agency), and follow received advice. As noted earlier, **individualized Agency guidance should be reserved for challenging cases; most cases of *ad hoc* CoI can be resolved through simple measures** such as recusal from decision-making, or transferring the case to another colleague.

Empowering individuals within such a system requires supporting measures, including the development of specialized knowledge and advisory capacities within each public body (e.g. human resource departments or functions similar to Integrity Managers, envisioned by Article 74); clarifying and reiterating the rules through multiple instruments (e.g. Codes of Conduct and mandatory trainings); and encouraging discussion about the challenges in their application (e.g. how to cope with social norms and obligations, e.g. refusing to provide an unfair advantage to a family friend or other "connections" (*veze*)). Such measures are meant to compensate for challenges of enforcement, because there is no practical [11] method for designated authorities to systematically detect *ad hoc* violations: identification of breaches typically happens by chance, and most commonly thanks to a complaint/report of a third party who has observed the problematic transaction.

As concerns sanctions, the LPC stipulates financial penalties for breaches of the above provisions in Articles 102 and 103: for the official in question (500 -2000 EUR); for the legal entity (i.e., public body) that fails to record a conflict of interest declaration (1000 – 20.000 EUR), and the responsible person within the legal entity (500 – 2.000 EUR). The CoE TP9 notes an apparent lack of deadlines for compliance and sanctions for officials' failure to comply with Agency Opinions per Article 7 (p. 49). **This analysis agrees with the CoE TP9 recommendation that the compliance/sanctions regime should be extended in this respect.**

Persons familiar with the current economic situation in Montenegro are better placed to comment whether the amounts of these financial penalties are proportional and dissuasive, particularly for high level officials that are covered by the LPC. A comprehensive conflict of interest policy might also include differentiation on the type and amounts of penalties between different categories of public sector actors and different provisions of the law. Higher fines and further disciplinary sanctions, including dismissal, could be contemplated for repeat offenders.

On a different note, this analysis questions the wisdom of imposing financial penalties on a "public enterprise" when it is a state body funded from the public budget. Such a penalty is appropriate for the private sector and/or other entities covered by this provision that are not publicly funded**. Instead, it seems more sensible to limit the fines to responsible individuals: the public official breaching the rules and the responsible manager from the entity who failed to uphold them.**

While it is beyond the scope of the present analysis to delve into the effectiveness of the sanctioning regime, it does note that other assessments have raised concerns in this respect. [12] It is therefore recommended that future revisions of the LPC also consider the entire enforcement chain beyond the mandate of the Agency.

Overall, this analysis finds that "tinkering" with specific articles of the present law would be insufficient a response, because a more comprehensive system review is needed. Instead, it recommends laying out a comprehensive conflict of interest policy (above) that furthermore includes institution-level supervision and enforcement mechanisms, and a range of supporting/reinforcing measures and mechanisms required to promote officials' comprehension of and compliance with conflict of interest rules (e.g., trainings and other). The possibility of integrating all such requirements in legislation should also be considered, to ensure that they are implemented as envisioned.

[11] In-depth scrutiny is reserved for high-value cases such as public procurements of concessions.
[12] The Council of Europe May 2022 Technical Paper "Analysis of the parts of the Law on Prevention of Corruption which regulate the setup and functioning of the Agency for Prevention of Corruption" ECCD-HFII-AEC-MNE-TP4/2022 pp. 13-14.

3.2 Restrictions/incompatibilities in the exercise of public function

Article 9 (“Performance of other Public Affairs”) addresses two issues: one, a variety of permitted (potentially) income-earning outside engagements; and two, participation in various working bodies associated with their official duties. These are substantively distinct issues and would have merited separate articles of the law.

As concerns the former, the CoE TP9 finds the present restrictions appropriate (p. 55). This analysis however returns to the previously-noted insufficient distinction between various categories of public sector actors (addressed in section 2.2 above). Full-time engagement in the public sector certainly merits considerable restrictions on outside activities. Status of “public official” by virtue of an unpaid advisory or oversight position in a state/public agency does not.

Restrictions based on types of activity “artistic, scientific, etc.” do not appear particularly useful in restricting incompatible activities. For instance, a tax inspector lecturing on the tax code (educational activity) could, at a minimum, create the appearance of a conflict of interests if potential auditees attend the lecture. An alternate, common-sense approach on limiting outside functions/employment/ engagements is the simple principle that outside activities should not interfere with public office on two grounds: one, in terms of time expended; and two, in terms of creating conflicts of interest. This alternate approach is to essentially prohibit all outside activities by default and allow for exceptions on a case-by-case basis through a series of approvals by higher-level instances. **It is recommended that the applicability such alternate approaches be considered for Montenegro, as well.**

As concerns the second issue, Article 8 paragraph 2 attempts to resolve challenges arising from restrictions on the accumulation of public functions (prohibited by Article 12), which is a recognized means of surreptitiously rewarding cronies. The provision attempts to eliminate the perverse incentive of multiple functions by allowing compensation for only one such role, while at the same time allowing officials to take part in multiple necessary working groups and similar engagements. The CoE TP9 highlights several difficulties in the current phrasing. The first cites the findings of the 2021 Peer Review which point to a conflict in interpretation that arises from a lack of harmonization with special legislation applying to judges (p.54). A second concerns the need to clarify the wording around the notion of a single source of remuneration (p. 56). **This paper finds the suggestion useful but advocates further analysis of implementation practice to assess additional potential challenges that have arisen.**

Articles 10 and 11 appear to sufficiently restrict managerial rights and functions in private companies.

As already-noted above, Article 12 prohibits public officials from membership in management or supervisory bodies, or the management team, of public institutions or other legal persons owned by the state or a municipality, with exceptions. The conditions for the "exceptional" appointments are not specified however, leaving scope for interpretation and potential abuse of this provision. Paragraph 4 does not resolve the ambiguity; it addresses a different set of permitted engagements. **Needed are simplified and clearer distinctions between permitted and prohibited engagements in the public sector, and in particular, what constitutes "exceptional" circumstances.**

Furthermore, the prohibition of on acquiring income "or other compensation" in the final paragraphs **may be an overly restrictive**: compensation of expenses for travel on behalf of the body may be appropriate, subject to safeguards from abuse.

Paragraph 3 of this article also prohibits carrying out executive and legislative functions simultaneously, which is sound, and presumably a reiteration of provisions set in a more fundamental law.

The intention of Article 13 is unclear. It is interpreted by experts in the CoE TP9 as an unnecessary repetition of obligations in articles 11 and 12, however, the obligations are framed differently in the two articles. Articles 10 and 11 require a newly appointed official to transfer rights/resign private sector positions upon assuming public office. Article 12 does not specify resignation, but Article 13 appears to not only cover that "gap" but furthermore to introduce a punitive dimension. Namely, it specifies not only an obligation to resign the function that is incompatible with public office; more than that, it stipulates the resignation of the public function (presumably as a penalty) if an incompatible function is assumed *during* the exercise of public function. If this is indeed the intention, the provision is insufficiently elaborated: is there a time period during which the culpable official may not resume the resigned function? Can they be simply reappointed immediately following the resignation? **Such issues require clarification.**

A notable aspect of Article 13 is the contrast in approach to the *ad hoc* conflict of interest regime discussed in section 3.1 above: here, the responsibility for avoiding incompatibilities lies with the public official, who may optionally seek Agency Opinion. While, as already discussed, empowering officials and unburdening the Agency should be the overall objective of these regimes, an alternative system must adequately support officials with sufficient and accessible awareness and advisory services.

Article 14 prohibits public official from concluding service contracts with public companies or entities that have a contractual relationship with the public body in which they serve, with an exception of compensation below 1000 EUR per annum. Normally, such transactions are prohibited altogether due to risk of abuse: it could mask a kickback scheme where multiple companies rendering services to a public body are obligated to buy bogus services of an official as an informal condition of their contract. The CoE TP9 presumably advocates eliminating the provision altogether for that very reason (p. 59). This expert however has witnessed extraordinary situations where ground for exceptions exist: e.g., if the service is so unique that it would be difficult to find another individual to render it. It is not unimaginable that other situations arise with *bona fide* reasons for exceptions that cannot be foreseen by the drafters. Allowing for such possibilities is discussed further below.

Article 14 further prohibits public authorities from contracting an entity where a public official has a private interest. The restriction is sound in principle—although practical and well-scrutinized exceptions could be contemplated—however there are important challenges inf enforcement ("enforceability") that will be also discussed below.

Post-employment restrictions stipulated in Article 15 appear sound and largely in line with international practice, which is equally the assessment of the COE TP9 (p. 60-61). Nevertheless, a few questions arise, for instance, in connection with paragraph 2, where the notion of "acquiring gain" is insufficiently clear—for instance, in connection with international organizations (i.e., what is the "gain" of international organizations?). While the intention of the limitation appears sound—presumably to limit "poaching" of employees in the public service—the current phrasing may be too sweeping. Even in connection with the private sector, there are grounds to question restrictions on employment in firms of who have provided services to a public body where an official had been employed, if that official had no connection to the transactions that benefited the firm. For instance, there may no inappropriate exchanges in a public sector IT manager being hired by a company that provided cleaning services to the public body where they were employed—particularly when it is a question of large entities on both ends).

Furthermore, there are logical gaps in the provisions, for instance in prohibiting a public official from rendering services to their former agency post-employment, when it had been permitted during the term of employment (up to 1,000 EUR value per annum, per Article 14 above—an exception that should be scrapped).

Overall, the above provisions may prove too restrictive in practice, precluding valid exceptions that are impossible to predict in advance. **This analysis therefore recommends an alternative strategy: legislating broad restrictions while formulating an extensive, transparent, multi-layered process for approving exceptions** (e.g., official's immediate supervisor, head of public body, and final authorization by the APC or another supervisory body).

Of course, **the greatest challenge with incompatibilities regimes—in particular post-employment restrictions—lies with enforcement**. Detection of violations is a well-recognized challenge, however, there may exist strategies to overcome them and improve enforcement.

For instance, as concerns restrictions on the accumulation of public functions (Article 12) and related exceptions (Article 9 para. 2), enforcement could be enhanced by extending responsibilities to the appointing bodies as well. The law at present stipulates no obligations for public companies or institutions to verify the eligibility of persons whom they appoint to their supervisory/management bodies. **Introduction of due diligence procedures in this respect—similarly to the due diligence required to avoid signing contracts with companies where a public official has a private interest (Article 14)—could be considered**.

Similar approaches could potentially be contemplated in connection with post-employment restrictions, for instance, transparency/disclosure requirements for private sector actors hiring former public sector employees.

New tools, such as the Application ERAR advocated in the CoE TP9 (p. 59) could likewise be contemplated.

In addition—as with other corruption-related issues—**external, third-party reports of observed or suspected violations by citizens, media, civil society organizations, institutional insiders, or other watchdogs, should continue to be encouraged**. They will likely remain a key source of information about violations.

As concerns sanctions, the bulk of applicable penalties are noted in Articles 103 and 104. An additional provision (annulment of contracts arising from breaches of Article 14) is specified in Article 14, paragraph 4). The appropriateness of the amounts of financial penalties should be reviewed by a national expert. Adoption of additional due diligence requirements in connection with Articles 9(4) and 12 would necessitate an expansion of sanctions for the responsible person in a public body. As before, this analysis does not support sanctioning public sector institutions, only the responsible persons.

One uncertainty arises in connection to the apparent ban of 6 months to 1 year on performing an activity prohibited by post-employment restrictions (Article 104, paragraph 7[2]). The **phrasing should be reviewed to clarify the scope of the prohibition**: whether it concerns a certain type of professional activity altogether or simply with the firm in question. The former appears too sweeping (how is the official to earn an income), while the latter redundant.

3.3 Gifts regime

The main concern with the gifts regime is the definition of gift, limited by the restricted notions of both gain and gift under Article 6, paragraphs 3 and 5 respectively, and as discussed in detail in section 2.3 above. The restrictions under Article 16 paragraph 1, such as the prohibition of cash, are quite positive and in line with international practice. An apparent gap is the omission of prohibition of anonymous gifts (which cannot be refused or returned), however this situation appears adequately covered by Article 17 later on. More crucially, missing is the prohibition to solicit a gift for oneself or related persons/entities. And most problematically, the scope related persons prohibited from accepting gifts in connection with the public official's duties is far too narrow, and narrower than the definition offered in Article 6, discussed earlier in section 2.3 above.

Gifts to related persons instead of the official themselves is a well-recognized method of concealing bribes. The restriction should therefore encompass a broad range of individuals: at a minimum all first-degree relatives regardless of whether or not they live in the same household, but even broader/stricter rules should be contemplated. **This analysis fully supports the CoE TP9 recommendation to prohibit all persons related to a public official to accept gifts provided in connection with the public official or the exercise of public function**.

A further challenge arises in determining whether a gift is connected to the exercise of public function, or whether it is of purely private character. While "private gifts" (i.e., gifts given/received in personal capacity, unconnected to the exercise of public function) cannot be reasonably prohibited, they can be considered **an indicator of a meaningful personal relationship, hence a private interest.** Providers of substantial gifts (i.e., benefits in the broadest sense of the terms as advocated in section 2.3 above, including hospitality) should at a minimum be defined as related persons about whom decisions in connection with the exercise public function cannot be made without disclosure of the private interest and guidance of relevant authorities.

The CoE TP9 highlights additional lacunae and makes other useful suggestion with regard to minor internal redundancies and inconsistencies (pp. 63-64), which this analysis supports. It particularly supports the **recommendation to enhance implementation through interpretation/ implementation guidelines that would clarify what constitutes a gift (gain) and other awareness-raising measures**.

The appropriateness of limits on the value of gifts set in Article 16 paragraph 4 (a maximum of 50 EUR per gift, with multiple gifts not to exceed 100 EUR per annum) should be evaluated by persons well-acquainted with Montenegrin economic situation, standard of living, etc. It may be noted that when limits are set as absolute values rather than, e.g., as a proportion of average salaries or other economic indicators, there will be a need for their adjustment over time. Additional guidance may be needed on how to determine the market value of a gift (or hospitality offer), however that is a matter for interpretation/implementation guidelines discussed above.

The gift management procedures prescribed in Articles 18–20 appear broadly satisfactory, with relatively minor gaps covered in sufficient detail by the CoE TP9 (pp. 65-68), whose recommendations are fully supported by this analysis. The process may be bureaucratically cumbersome, however the obligation of state bodies to keep a register and then annually report to APC contains an educational dimension. As concerns the administrative burden, the Agency has presumably developed software that renders the updating/uploading of gift registers nearly automatic—if it hasn't, it should invest in relatively simple IT solutions to facilitate this task. As concerns education, and compliance—which has been reported by the Agency as insufficient—this report can only reiterate the above-recommended additional guidance and other supporting measures.

The main limitation of the procedure is the fact that the prime responsibility to monitor illicit gifts falls on APC, which is limited in doing so proactively, and essentially can only react based on external reports. **It would be beneficial to consider how to place greater monitoring responsibility on the individual public bodies and their management, which are closer to individual officials.** It is arguably the next logical step from the present obligation to maintain registers and transmit the information to the Agency.

As concerns sanctions for violating gifts restrictions, Article 103 specifies a penalty of 500 – 2000 EUR for the public official and 300 – 500 EUR for related persons, in addition to having to surrender the gift (or compensate equivalent value). Again, the deterrent value of these penalties should be assessed by local experts. It may be interesting to consider financial penalties on a scale that corresponds to the value of the illicit gift.

The final remark in connection with sanctions is reiterate the previously stated support for penalties for "responsible persons" only, rather than public bodies operating from the public budget.

3.4 Donations and sponsorships

The donations and sponsorships regime addressed by Articles 21 and 22 contains some good ideas, or at least good intentions that have been insufficiently developed and are hence challenging to enforce. A case in point is the prohibition of accepting a donation that "affects or could affect the legality, objectivity and impartiality of work of the authority", as if such a determination was always straightforward and not open to interpretation.

The CoE TP9 points to further gaps in regulation, such as a prohibition of donations/sponsorships to public bodies performing "sensitive" functions, and the exclusion of transitions that even create the *appearance* of undue influence (pp. 70-71). This analysis agrees with the recommendations, and furthermore expresses a concern with the timeliness of annual disclosure of information to the Agency. As these reports appear to the basis for Agency review of the transactions (Article 22), the timing could leave a considerable widow of opportunity to exercise "undue influence" before the deal was reviewed. By contrast, public officials have a deadline of 30 days to report any changes in assets exceeding the value of 5,000 EUR (Article 23). **Public bodies should be required to update their registers of donations and sponsorships, to post the information on their web sites, and to notify the Agency within a similar time frame.**

The real challenge is detecting violations beyond missed deadlines for annual submission of registers. An assessment of the Agency's review practices is not available (neither contained in the CoE TPs), however **a purely administrative review of submitted data is inadequate for identifying "undue influence"**. A provision calling for some form/scope of in-depth assessment—analogous to the process of asset declarations—would increase the chances of detecting, at a minimum, *risks* of undue influence.

It is noteworthy that, once again, the apparent onus for identifying undue influence is on the Agency, rather than, e.g., public bodies' internal audit. **It may be appropriate to consider mechanisms that place more responsibility on the public bodies entering into such agreements by requiring due diligence procedures** (e.g., a risk analysis of the proposed donations/ sponsorships), subject to thresholds proportional to the value of the transaction, **which would support the application for Agency approval prior to concluding such agreements**. While the Agency may not be able to detect that relevant data was concealed in such analyses, committing fraud would raise the stakes by providing a basis for holding responsible officials criminally liable. It may also help public bodies to simply get better value from prospective sponsors.

3.5 Asset declarations regime

The asset declarations regime is specified in Articles 23-27 in this law, and applies to some 5000 public officials and 1500 civil servants, according to information from Agency representatives reported in CoE TP9 (p. 72).

The technical paper assessment of the asset declarations regime benefited from consultations with Agency staff that identifies important challenges arising from implementation, and in that respect presents a more comprehensive analysis than the present one, which is limited to the legislation alone. There are no major points of disagreement on CoE observations and recommendations (pp. 76-81), however perhaps there are different points of emphasis.

This report agrees with CoE recommendation about:

- Possible reduction in scope of persons [13] obligated to declare assets and interest, with the comment that the categories should be more rigorously scrutinized and lower-risk categories possibly eliminated;
- The expansion of scope of assets to be declared, including movable property held abroad and assets under beneficial ownership;
- Insertion of more open-ended phrases that would encompass different kinds of rights of use of property, or non-traditional types of assets, like cryptocurrencies, etc.;
- Providing the Agency with banking data for all persons whose assets are reported; and,
- Providing the Agency with key information (names and unique ID numbers) of a broad range of related persons (to be kept confidential by the Agency).

The earlier discussion of "related person" re-emerges in this connection. At present, public officials are obligated to declare not only their own, but also the assets of a limited scope of household members. While the CoE TP9 states that a minimum of relevant persons is included in the present definition, this analysis holds that **the issue could be revisited from the perspective of appropriateness to the national context, as long as the present minimum is maintained.**

Furthermore, this analysis enthusiastically supports the notion that the asset declarations regime be enhanced to more effectively track *interests*. It is **recommended that the scope of information to be declared include a broader list of family members and close associates in line with FATF recommendations and furthermore responsive to the national context in Montenegro**. For instance, as noted in the earlier discussion in section 2.3 above, ritual kinship *kumstvo* should be recognized. The notion of "close associates" should include persons who provide gifts (benefits) above a certain threshold, including hospitality such as vacations, travel services, use of cars, yachts or private planes, holiday homes, etc.). As discussed in connection with the gifts regime in section 3.3 above, extraordinary generosity can create a sense of obligation toward the benefactor—a private interest—and therefore should be recognized and monitored accordingly.

[13] This point raises once again to the previously-discussed ambiguity in the current notion of "public official", which *inter alia* excludes certain special categories of public sector actors whose obligation to declare is regulated by special laws (e.g. notaries and bailiffs, please see CoE TP9 p. 75). This example further underscores the utmost importance of addressing this fundamental deficiency by elaborating a comprehensive categorization of public sector actors subject to obligations under various anti-corruption regimes.

As concerns **enforcement of the asset declarations regime**, there are two dimensions to consider.

The first is formal compliance with obligations, which the existing administrative review processes appear to address adequately. This process also appears capable of uncovering certain more substantial violations of the rules, like incompatibilities (e.g., management positions in commercial entities), or undeclared assets (like property, to the extent that the Commercial Register and Land Registry are complete and support search functions). The Agency has access to both of these data bases, along with several others that may provide similar information.

The more difficult second dimension of enforcement is the assessment of the declarations' veracity, in particular deliberately concealed assets and interests. This is a challenge common to all oversight agencies with this function.

The CoE TP9 provides several useful observations and recommendations on the verification process (pp. 82-83), which this analysis supports in principle**. It recommends, however, a deeper examination of challenges encountered in practice**, including for instance, the usefulness of certain requirements of the procedure for determining violations, described in section 4 below.

The appropriateness of applicable sanctions (the standard 500-1000 EUR fine set out in Article 103) should be assessed by local experts. The fine of 1,000-20,000 EUR applicable to legal persons who refuse to provide Agency with requested information (within limitations prescribed by law) likewise appears adequate in connection with private sectors entities (as stated elsewhere, the penalty should only apply to responsible persons for bodies operating from the public budget).

3.6 Missing provisions

It may be useful for the Law on Prevention of Corruption to reference or reiterate other essential integrity obligations that apply to all public sector actors. This includes provisions prohibiting the use of public property for private purposes, including office space, equipment, in particular vehicles, information, etc. which are presumably contained in other laws.

In line with good practice, the Law on Prevention of Corruption should likewise contain an obligation for all public sector actors to report observed or suspected acts of corruption.

The LPC should furthermore consider adding an obligation to develop a results-oriented performance monitoring framework for its anti-corruption system, which is at present not foreseen as a competence of the Agency nor any other public authority.

4. Procedure for Determining Violation

The procedure for determining violations is the most extensively described process in this law, set out in articles 31 to 43.

The Agency for Prevention of Corruption is responsible for investigating potential violation both based on external reports and *ex officio*. Previous sections of this report highlighted a number of challenges in enforcement procedures, particularly the difficulties identifying breaches of the various rules and restrictions defined in the LPC. Existing monitoring processes in connection with regimes described in sections 3 and 4 above are assessed as, on the whole, having a limited ability to detect violations. To perform this function, the Agency essentially relies on external complaints: reports from journalists and civil society watchdogs, and less commonly insiders or ordinary members of the public. It is therefore a positive feature that the Agency is permitted to consider anonymous complaints (“Requests”).

The procedure of verifying received Requests, however, is limiting. First, the requirements for information that should be contained in a Request outlined in Article 32 are quite extensive, and place excessive demands on the “applicant” (”*podnosilac zahtjeva*”). Article 33 empowers APC to reject as incomplete Requests that do not contain “sufficient facts to be acted upon”. While there are instances where such rejections can be valid, such a provision can also be misused to justify inaction. A lack of information provided by the applicant should not be used as grounds to dismiss the Request; instead, it would be useful to developing guidance on a minimum of information necessary to launch further analysis. Like other bodies responsible for investigating various violations of law, the Agency must not too easily dismiss Requests that require a bit of research. Concurrently, APC should continue to develop relevant investigative capacities in line with its mandate. **Overall, it is recommended that the requirements on the content of the Requests be reduced** (the list in Article 32 can be the suggested information, but not the minimum required), **and two procedural steps be introduced: one, an obligation to justify a rejection of an external Request, and two, a protocol for analytical/investigative scrutiny of the applications in line with Agency mandate.**

Second, the procedure for determining violations should be examined for efficiency. For instance, the requirement to solicit a statement from the official in question within 15 days of the receipt of an external Request specified in Article 34 may be an unnecessary limitation. The timeline is potentially too short for a thorough examination of the circumstances of the complaint, which can then prematurely 'tip off' the suspected official that they are under examination. Any such deadlines should be sensitive to the type of issue as well: research into alleged concealed assets or gifts, for instance, may require a longer time frame than reports of incompatible public functions. **It is recommended that the provision be amended to allow well-justified extensions for demonstrably more demanding of investigations.**

That said, a longer a time frame does not guarantee that a more effective investigation will take place. An analysis of implementation practice (cases) could yield valuable information as to the effectiveness of existing procedures and highlight challenges in law and procedures that hamper optimal results.

Moving on, Article 35 expands to a general principle, the obligation to comply with data requests from the Agency, which was earlier stipulated in Article 30 paragraph 2 in connection with verifying data from asset declarations. It is a repetition illustrative of the blurred rationale for distinguishing between procedurally similar processes inherent in the Agency's various types of verifications/investigations/ determinations of facts and circumstances. These instances and previously observed over-bureaucratization of advisory procedures prompt a **strong recommendation to critically review the procedures in place from the perspective of functional necessity and efficiency.** Streamlining certain processes could contribute to improved compliance and free up Agency resources to conduct more meaningful investigations or other substantive tasks.

Article 37 obliges the Agency to forward the case to responsible authority, when circumstances so warrant, and the responsible authority to notify the Agency on the outcome of the procedure. The latter provision is particularly useful in allowing the Agency to monitor and assess their effectiveness, however no deadlines are stipulated. If practice has shown that timely notification is an issue**, it may be useful to introduce additional requirements like quarterly or semi-annual reports to the Agency on the status of transferred cases**.

The decision-making process described in Article 38 appears to require responsible officials to propose a decision to the Agency Director within 15 days of the receipt of a Request (the reference point is Article 31 which describes only the receipt of complaints, not the investigation phase). This is an extremely brief time frame for investigative work, as noted previously in connection with Article 34. It is similarly recommended here to amend the provision to permit well-justified extensions for demonstrably more demanding of investigations.

Article 39 provides for confidentiality of decisions that absolve the investigated official from any wrongdoing, and the intention is clear: why expose an innocent person to the notoriety of public exposure. The shortcoming of this solution is that it precludes a review of the quality of Agency decisions in this domain. If confidentiality is to be preserved, then **an alternative performance assessment mechanism should be considered**, for instance, by a parliamentary or other committee bound by confidentiality, as discussed in section 7.2 below.

The final relevant articles specify that Agency Decisions may be subject to administrative procedure, which is correct.

According to Article 42, a final, legally-binding Agency Decision that a public official has violated the above-note provisions of this law indicates that the official will be deemed as guilty of "negligent discharge of public functions" subject to disciplinary penalties from their supervisors. This sanction appears applicable in addition to the financial penalties specified in connection with violations of specific measures. Both the supervisory body and the official in question are responsible for notifying APC of the measures taken. If the penalty is dismissal, the official is banned from public service for a period of 4 years, apart from directly elected officials, for obvious reasons. The Article also introduces the obligation of public agencies to vet future appointments to ensure that a prohibition of public service is not current. All these provisions appear quite sound in principle; due diligence prior to hiring and appointments is particularly useful. **The application of these provisions in practice should be reviewed for potential challenges, however**.

The final provision of this section requires closer scrutiny. Article 43 specifies individuals' or legal entities' right to claim damages based on the violations of this law, however its phrasing is quite vague, open to broad interpretation, and very likely unharmonized with e.g., public procurement legislation. **There should be further analysis of broader implications of this provision, and at a minimum, additional guidance on its scope of application to prevent misinterpretation or abuse**.

5. The Agency for Prevention of Corruption

Chapter V of the LPC, Articles 78 through 101, sets out the Agency's mandate and powers, structure, manner of appointment and employment, and other matters. The present analysis considers these issues primarily in connection with the enforcement of conflict of interest provisions discussed in the previous sections of this paper, and with reference to the findings of the May 2022 Council of Europe Technical Paper "Analysis of the parts of the Law on Prevention of Corruption which regulate the setup and functioning of the Agency for Prevention of Corruption" ECCD-HFII-AEC-MNE-TP4/2022 (CoE TP4).

5.1 Functions

Articles 78 and 79 set out the Agency's mandate as consisting of some 14 specific functions, some of which are more extensively described in earlier passages in the law (for instance on issuing Opinions, Articles 28 - 29). Interestingly, Article 79 limits the Agency's mandate to issue "opinion for the purpose of improving the prevention of corruption, reducing the risk of corruption and strengthening of ethics and integrity in authorities and other legal persons" to situations where it is a criminal matter, where it has already initiated proceedings, or where, "same request is handled by another competent authority". Coupled with other passages of the law (Articles 18, 22, 26, and 49), stipulating that policy details are elaborated by the "state administration body in charge of anti-corruption (hereinafter: the Ministry)", it becomes clear that the Agency was **not** intended as the body "in charge of anti-corruption", i.e., **not** be the primary anti-corruption entity in the state. Instead, its role appears conceived as the procedural and bureaucratic machinery necessary to implement several corruption-related regimes. Yet even a purely administrative mechanism ***can*** have teeth, if the relevant procedures are efficient, and impartially and rigorously applied.

This analysis has commented in several instances about the deficiencies of existing mechanisms in *detecting* of violations. External reports represent a vital source of information, hence the procedures relating to receiving and processing external report deserve consideration.

Among the identified shortcomings are excessive requirements for the content of external complaints/reports that would trigger the procedure for determining violations, discussed in section 4, above. Chapter III on Whistleblowers, to be further discussed in section 6 below, introduces another, unnecessary layer of categorization of external reports that further obfuscates the system and excludes from whistleblower protection persons reporting violations of e.g. conflict of interest obligations ("Requests" to initiate the "procedure for determining Violation of the provisions of this law that are related to the prevention of conflict of interest in the exercise of public functions, restrictions in the exercise of public functions, gifts, sponsorships and donations and reports on income and assets of public officials").

Agency procedures should be rationalized to improve efficiency of the flow between the work processes related to detection (including external complaints/reports), investigation/verification, and follow-up. The efficiency the Agency's follow-up instruments should furthermore be reviewed, including the scope of application of the (non-)binding character of Opinions and Decisions. Considerable further streamlining of bureaucratic requirements could be achieved, including, for instance, by adopting the Council of Europe TP4 recommendation to specify the Agency's own administrative procedural regulations so that the Law on Administrative Procedure would no longer be applied (p. 22).

As noted earlier, it is beyond the scope of the present analysis to assesses the effectiveness of the Agency's sanctioning powers *vis-à-vis* other bodies in the enforcement chain, however limitations have been observed in past analyses (CoE TP4 pp. 13-14). Further consideration of available options is recommended, including but also extending beyond the powers and procedures of the Agency alone.

5.2 Independence and accountability

As concerns the Agency's "necessary independence", this analysis supports the recommendations of the CoE TP4 on amendments to Article 95 aimed to advance financial independence (pp. 15), clarifications regarding human resource management (pp. 19), and with regard to clarifications on the dismissal of the Agency Director and Council members (pp. 28-29, 32-33). Further attention should be given to the appropriate administrative procedure and the instance where appeals against dismissal would be submitted.

This analysis furthermore broadly agrees on the CoE TP4 commentary on the criteria for the appointment of the Director and Council members, however notes an over-emphasis on formal education ("seventh qualification framework level, sub-level VII-1") and "experience with anti-corruption issues" versus *relevant* experience. The former provides absolutely no guarantee of competence; the latter, if interpreted too narrowly, may disqualify highly relevant experience of auditors, for instance. Corruption-related experience should be considered an advantage, rather than a requirement.

Recommendations from unspecified sources, every recruiter will confirm, are largely irrelevant, however integrity requirements are essential. At a minimum, a candidate should be disqualified due to a criminal record, or a record of other integrity-related violations. The exclusion of persons holding political functions specified under Article 84 is appropriate, and consideration could be given to expanding the exclusion to the broader category of PEP as defined by anti-money laundering laws.

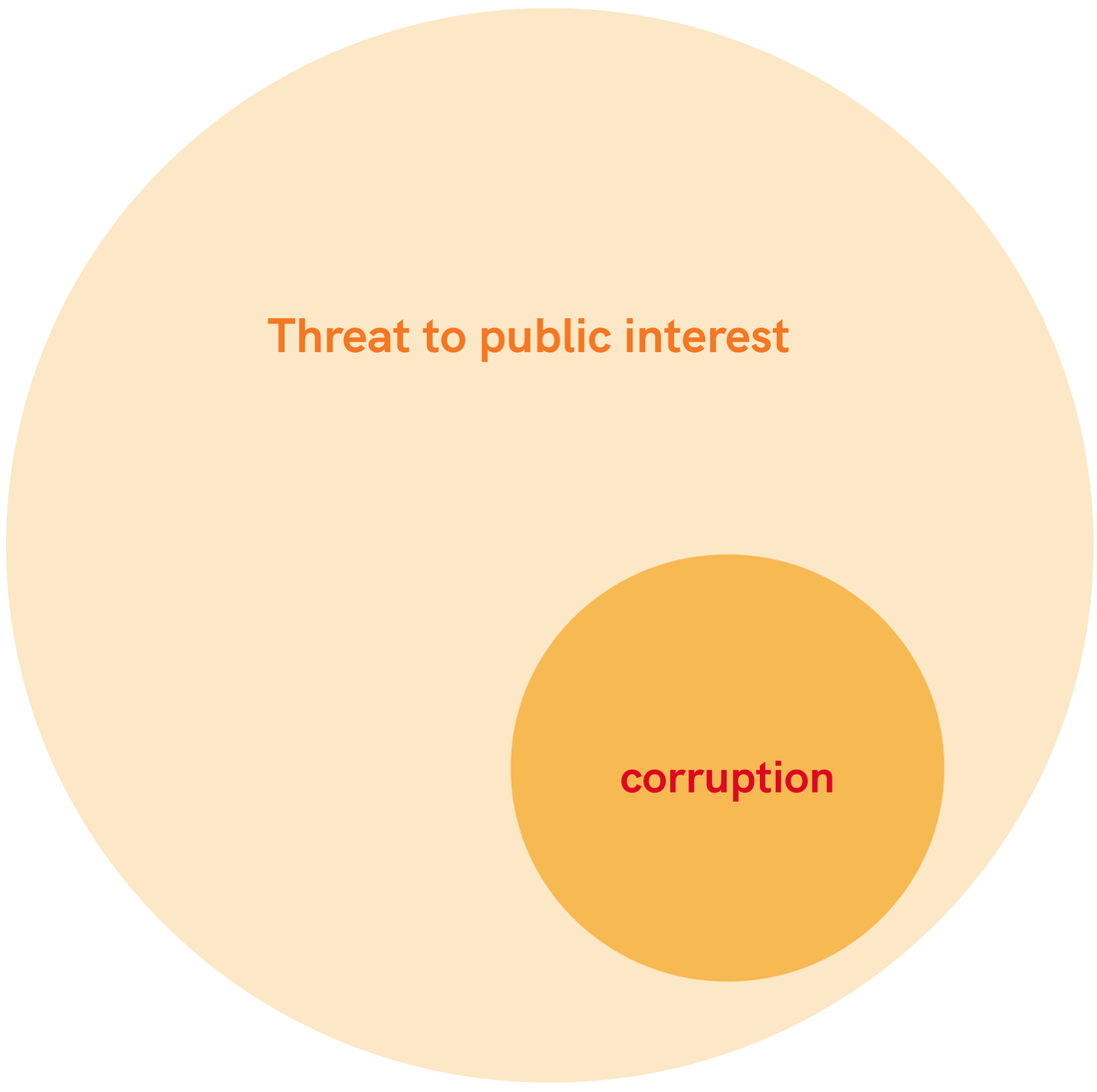
The main competencies of the Council as a supervisory body are summarized in in Article 88, and further detailed in the Statute of the Agency. It is unclear why the LPC specifies the Council's responsibility to approve only rules on the preparation and implementation of Integrity Plans (item 5) as opposed to other rules and instructions. The limited description of its duties in the LPC precludes deeper analysis of the Council's role, however, including its supervision over the Agency's work.

Nevertheless, there appears to exist a gap in the oversight of Agency's performance. The reporting requirements before the parliament under Article 98 are insufficient absent a requirement to include an evaluation of results (as opposed to simply summarizing what activities have been undertaken). This observation relates to a broader systemic deficiency: Montenegro lacks a results-oriented performance monitoring framework for its anti-corruption system, which is not foreseen as a competence of the Agency nor any other public body.

Further oversight of Agency's operations should be considered including by requiring of an external independent audit of operations finances (recommended by CoE TP4 pp. 19), and expanding the existing parliamentary review with "special external oversight committees, which can include representatives of different state and civil society bodies" (CoE TP4 p. 24). While this analysis supports the technical paper recommendation to limit the scope of oversight bodies' requests for special reports (which could be used as an instrument of harassment intended to influence the work/decisions of the Agency), and their ability to request reports on specific cases with personal data (which could be abused in political or personal conflicts), **there nevertheless appears to be a need for an instance to review the merits of particular Agency decisions.** Further analysis is needed to determine whether the administrative dispute foreseen under Article 40 is sufficient in this respect, particularly from a public interest perspective.

6. Reporting corruption and whistleblower protection

Unless complementary whistleblower provisions exist in a separate law, this regime is perhaps the most glaringly flawed segment of the CPL. The principle of whistleblower protection in international standards and practice is quite clear: **the intention is to protect individuals reporting all manner of violation of laws and/or public interest, and not only a narrow category of situations with an indication of the existence of corruption.** The emphasis on the public interest is important for encompassing a wide variety of collective harms, like pollution or unsafe food. In corruption-related matters, the notion is largely redundant.



This error leads to confusion and awkward formulations like “threat to the public interest *that indicates the existence of corruption*”, with the latter phrase apparently inserted as an afterthought, to justify the regime’s inclusion in the present law (because the notion of “threat to public interest” alone arguably includes corruption by definition). **Even more importantly, the resulting reduction in the scope of application constitutes a massive gap in the whistleblower protection regime in Montenegro** and demonstrates that the matter should be regulated by a special law that provides a reporting and assistance mechanism beyond the Agency for cases that do **NOT** “indicate the existence of corruption”. **The whistleblower protection regime should be amended as a matter of urgency.**

While the limited scope of application is the most significant and most urgent issue, there are further observation to be made in connection with corruption-related provisions.

6.1 Qualifying provisions

The incongruity between the definition of public interest in Article 6 and Article 44 have already been noted in section 2.3 above. Further challenges arise the definition of whistleblower in Article 44, which at first glance it appears to cover the entire range of persons who report corruption or breaches of corruption-prevention obligations set out in the LPC, but this is not the case. On the contrary, the qualification that an admissible complaint/report ("Application") "indicates the existence of corruption" actually excludes significant categories of reports ("Requests") to initiate the "procedure for determining Violation of the provisions of this law that are related to the prevention of conflict of interest in the exercise of public functions, restrictions in the exercise of public functions, gifts, sponsorships and donations and reports on income and assets of public officials" under Articles 31-43. It excludes for instance, reports about the existence of a conflict of interest, which is not yet corruption, or the receipt of a prohibited gift which is not a concealed bribe, rendering the reporting individuals ineligible for protection.

It is unclear whether the intention of the drafters was inclusion or exclusion. Whatever it may have been, the definition invoking both corruption and the public interest is overly complicated and difficult to interpret—a trend that can be observed throughout the section on whistleblowing.

The approach should be quite the opposite: being as clear and precise as possible. Before redrafting the law, the intended scope of protection should be articulated unambiguously. From an anti-corruption perspective, it should be remembered that third party complaints/reports are an indispensable mechanism for detecting of breaches of various corruption prevention regimes specified in this and other laws; if this is to be encouraged, it is essential to protect them from reprisals—this is the central logic of whistleblower protection. Consequently, **from an anti-corruption perspective, persons reporting all manner of violations of anti-corruption regimes should be eligible for protection. The same applies for related persons and/or related legal entities**, for instance NGOs or others who support whistleblowers. The latter is currently missing from the LPC.

There are numerous other points of confusion in the whistleblowing segment of the LPC. For instance Article 45 stipulates that a report of "a threat to public interest that indicates the existence of corruption" should be made to the entity where the breach was detected, but the requirement is later qualified in Article 51, which stipulates that an individual may report relevant cases to the Agency if they are unsatisfied by the response of the relevant body, or for no particular reason at all. There is no good reason for segmenting the issue across articles in this manner. The same article further specifies additional categories of information that a complaint/report should contain, in addition to the data specified in an earlier Article 46. **The structure of these obligations is circular, repetitive, and confusing, and it requires reformulation. Different points which should be logically and simply organized**: manner of submitting complaints, altogether in one place; content of the complaints, altogether in one place; etc.

The requirements about the content of complaints should furthermore be harmonized with requirements set in connection with Requests to initiate the Procedure for Determining Violation (Articles 31-33) discussed above, including ensuring safeguards against inappropriate rejection of complaints/reports—for instance, requiring convincing justification for such rejections.

Another problematic segment concerns obligations of the private sector. For instance, there are unenforceable obligations, e.g., Article 48 which requires legal entities receiving complaints to investigate the veracity of the complaint and undertake appropriate remedial measures, but specifies no mechanism to monitor compliance unless further complaints are made, and no corresponding penalties.

There are also seemingly excessive obligations. Article 49 lays out an obligation for all legal entities in the country to appoint a person responsible for receiving complaints and investigating their veracity. There do not appear to be exemptions to this obligation. It goes on to state that the responsible Ministry will prescribe a more detailed procedure for taking action following a complaint. The relevant entities are also required to inform the whistle blower/reporting person of the measures undertaken (Article 50), unless of course the complaint/report was anonymous. Under Article 57, they are furthermore obligated, based on the undertaken investigations—to report suspicions of corruption and all collected evidence to the state prosecutor, or other responsible bodies.

While it is important to extend whistleblower protection obligations to all legal entities in Montenegro, including enterprises and entrepreneurs (“preduzetnik”), the proposed solutions appear excessively demanding for many private sector entities, particularly small business or individual entrepreneurs. A **fundamental review of private sector requirements is required.**

Ironically, at the same time, **there is no general obligation for public officials to report corruption. Yet this should be a core obligation for the widest possible set of public sector actors, integrated into this law and all related/special legislation.**

Also absent is a provision seen in many jurisdictions that penalize knowingly false/malicious reports of corruption, intended to injure a party. International guidance and practice should be further analyzed in order amend the existing corruption reporting rules.

The most confusing part of the whistleblowing section of the LCP, however, arises at the juncture of corruption reporting protocols and institutional responses, which attempts to link whistleblower complaints/reports with previously-defined Agency procedures. The logic is quite difficult to follow. For instance, Article 52 reintroduces the instrument of Agency Opinions previously described in Article 28 (also raising the question of the appropriateness of Opinions in such cases), while Article 55 directs attention back to Articles 33 to 36 that specify the Agency verification procedure. Similar circular references abound. The apparent difficulty in harmonizing essentially identical procedures reiterates the need to review these Agency operations comprehensively. A functional analysis might be good start, where a map of key work processes can be examined for opportunities to simplify and rationalize them, thereby increasing efficiency and potentially effectiveness.

6.2 Protection

Apart from the glaring absence of protection for persons reporting damage to the public interest unrelated to corruption noted above—which needs urgent attention—there are some positive aspects of the protection regime.

The procedure for requesting protection appears reasonable. It is furthermore positive that the Agency should provide support to persons suffering retaliation, including support in seeking damages through the courts (articles 66 and 68). A similar system of support and protection should be offered to individuals reporting harm to the public interest unrelated to corruption when the scope of protection is expanded in line with previous recommendations.

It is recommended to examine some of the restrictions, like the prescribed deadlines, however: is it necessary to limit the application for assistance to 6 months of the suffered retaliation (Article 60)? More importantly, is it reasonable to expect a whistleblower to provide additional information within 8 days (Article 61)? The latter in particular appears like an **unnecessary bureaucratic constraint that undermines the rationale of a whistleblower protection regime**.

There are also questions as to the effectiveness of the envisioned procedure set out in Article 63. For instance, if the "accused" legal entity has not corrected the retaliatory measures against the whistleblower, the Agency refers the matter to the next instance (supervisory body), submits a special report to the parliament, and makes the information public. Who would be the supervisory organ of a private enterprise? There is no mechanism in place to compel private entities to restore the rights or position of a whistleblower, beyond the administrative penalties outlined in article 102 (1,000 to 20,000 EUR for the legal entity, and 500 to 2,000 EUR for the responsible person within the legal entity).

Some jurisdictions discourage retaliation against whistleblower with much more stringent measures. International practice foresees additional significant penalties for persons who obstruct or otherwise retaliate against a whistleblower, intended as a deterrent. Consider, for instance, the Republic of Cyprus 2022 Law Providing for the Protection of Persons Alleging Infringements of EU and National Law Number 6(I) where a person retaliating against or obstructing a whistleblower is subject to a prison term of up to 3 years and a fine of up to 30,000 EUR. Similar **considerable penalties should be introduced in Montenegrin legislation as well, including possible criminalization of retaliation against whistleblowers**.

Finally, the Montenegrin system foresees the possibility of financial rewards for whistleblowers. International guidance and practice should be further consulted in this respect to consider possible risks in such a system.

7. Corruption prevention

In further conceptual confusion, chapter IV of the Law on Prevention of Corruption entitled “Prevention of Corruption” concerns corruption risk management tools (“Integrity Plans”). Confusion arises in the apparent lack of awareness by the drafters that all the previously laid out provisions regimes likewise aim to prevent corruption, as much as—if not more so—than Integrity Plans.

Integrity Plans were popularized by the Slovenian Commission for the Prevention of Corruption over a decade ago. The regime is at its essence a (corruption) risk management process, comprised of three steps: Risk identification, risk evaluation and definition/implementation of measures intended to eliminate or minimize corruption risks. Risk management is supposed to be a continuous process, that should be repeated at regular intervals to assure that the measures taken produce the desired results.

In Montenegro, the procedure is implemented at agency level, meaning that each public authority is obligate to undertake them (private sector entities are encouraged to undertake such measures). Such a decentralized regime implies significant capacities are needed within each public authority to undertake a quality process, as opposed to, e.g., answering questionnaires mechanically or copy/pasting other bodies’ assessments and plans.

Another possible challenge in the regime the apparent suggestion in Article 74 that an Integrity Manager is the main person responsible for the preparation for the Integrity Plan, with other employees being obligated to provide necessary information. This arrangement is contrary to good practices in corruption risk management, which foresee the process as a collective endeavor. A “collective endeavor” does not mean that every single employee should be involved, but it certainly implies the participation of supervisors of the various sectors to foster *ownership* of the process.

The above point relates to a wider vision of internal capacities necessary for organizations to promote internal integrity. In other jurisdictions, Integrity Managers or equivalent functions often have a wider range of competencies with regard to anti-corruption regimes, in particular an advisory function, so to promote awareness and compliance with the full range of integrity and anti-corruption obligations. This kind of a role could be contemplated in connection with a more extensive conflict of interest regime in section 3.1 above.

Additional minor points on this section of the law, include the following:

- The definition of integrity under Article 72 might be given more prominence as a key definition, which frames all obligations under this law and other laws regulating the conduct of public sector actors.

- Under Article 71 paragraph 4, it may be useful to specify how the costs/expenses related to the service of advising private entities on integrity plans are determined.

- As elsewhere, this analysis recommends against financial penalties for entities operating from the public budget stipulated in Article 102; only the responsible person should be penalized.

Overall, **it is recommended that, after more than five years of implementation, the effectiveness of the Integrity Plans regime be assessed in practice before any changes to the existing obligations are pursued.**

8. Summary of conclusions and recommendations

1. Overall, this analysis finds that the extent of required interventions goes beyond minor changes of specific articles of the Law on Prevention of Corruption. Instead, it recommends comprehensive "system reviews" of the distinct anti-corruption regimes which the law attempts to address.

2. **Conflict of interest prevention and management**

The national conflict of interest prevention and management system should be considered a priority intervention. It is recommended that Montenegro formulate a comprehensive and fully harmonized conflict of interest management ***policy*** that explicitly and unambiguously:

- designates distinct categories of conflict-of interest management obligations;
- designates distinct categories of public sector actors subject to various conflict of interest management obligations;
- defines distinct categories of related persons in connection with various conflict of interest management obligations;
- provides the rationale for the decision made: why various categories of obligations apply to various categories of public sector actors, in particular reasons for exclusions from obligations;
- designates multiple mutually-reinforcing mechanisms for supervision and enforcement, including intra-institutional mechanisms (e.g. Ethics Councils) and a role for institutional management.

3. Key definitions should be reviewed and revised in line with observations in this and other international analyses. In particular:

- consider whether the definition of "corruption" (discussed in section 2.1, above), it can potentially impact the admissibility/relevance of reports/complaints submitted to the Agency under Article 31);
- Improve the definition of "gain" to encompass the broadest possible scope of material and non-material benefits;
- Expand the definition of "gift" to include all types of benefits and all situations; restrictions on gifts (private or in connection with the exercise of public function; permitted or prohibited; prohibition on receipt by family members, etc.) should be elaborated in the articles defining the gifts regime.

4. The incompatibilities rules should be reviewed in line with observations in this and other international analyses, in particular:

- Restrictions on activities outside the principal public sector function should be defined distinctly for each major category of public sector actors.
- Limits on outside engagements should be based on the simple principle that outside activities should not interfere with public office (a) in terms of time expended, and (b) in terms of creating conflicts of interest.
- Rather than attempting to anticipate possible exceptions to the broad restrictions to be included in legislation, it may be more effective to develop a robust, transparent multi-level mechanism for approving exceptions on a case-by-case basis.

5. Consider Improving enforcement of incompatibilities restrictions through additional strategies such as:

- Extending responsibilities to other actors in the process, beyond the public official and the Agency. For instance, requiring due diligence of appointing bodies in connection with restrictions on accumulation of functions (Article 12, Article 9 para. 2);
- Contemplating similar approaches in connection with post-employment restrictions, for instance, transparency/disclosure requirements for private sector actors hiring former public sector employees.
- Considering new tools, such as the Application ERAR advocated in the CoE TP9 (p. 59).
- Further encouraging external, third-party reports of observed or suspected violations by citizens, media, civil society organizations, institutional insiders, or other watchdogs, who are key source of information about violations.

6. In addition to Improving the related definitions (point 3, above) the gifts regime should be further strengthened through:

- Explicitly prohibiting the receipt of gifts provided in connection with the public official or the exercise of public function by related persons;
- Explicitly prohibiting the solicitation of gifts;
- Recognizing the exchange of private gifts and benefits as a criterion for the inclusion of the gift-maker (individual/firm) in the group of related persons and associates about whom decisions cannot be made without disclosure and guidance from a designated authority. More substantial private gifts might be grounds for additional obligations.
- Providing additional information and guidance on gifts, benefits, and related concepts and restrictions;
- Expanding the monitoring and supervisory requirements for institutional management;
- In terms of penalties, considering adjusting the scale of financial penalties to correspond to the value of an illicit gift.

7. As concerns donations and sponsorships, this analysis endorses all the recommendations from CoE TP9 (pp. 70-71), and emphasizes additional issues, as follows:

- To minimize the widow of opportunity to exercise “undue influence” through donations and sponsorships, require public bodies to update their registers, post the information on their web sites, and notify the Agency within 30 days of the concluded agreement;
- Empower the Agency to subject donations and sponsorships to in-depth due diligence analysis analogous to that applied in connection to asset declarations;
- Require public authorities who are contemplating receiving donations/sponsorship to undertake a due diligence process to identify risks of undue influence, and require Agency approval of the transaction, *inter alia*, on the basis of this internal assessment.

8. As concerns asset declarations, this analysis agrees with Council of Europe recommendations about:

- Possible reduction in scope of persons obligated to declare assets and interest, with the comment that the categories should be more rigorously scrutinized and lower-risk categories possibly eliminated;
- The expansion of scope of assets to be declared, including movable property held abroad and assets under beneficial ownership;
- Insertion of more open-ended phrases that would encompass different kinds of rights of use of property, or non-traditional types of assets, like cryptocurrencies, etc.;
- Providing the Agency with banking data for all persons whose assets are reported; and,
- Providing the Agency with key information (names and unique ID numbers, which would be kept confidential) of additional related persons (beyond those whose assets are reported) and other relationships that constitute significant private interests.

9. This analysis particularly supports the notion that the asset declarations regime be enhanced to more effectively track *interests*. This implies declaring include a broader list of family members and associates, including legal entities who provide benefits above a certain threshold (e.g. hospitality such as vacations, travel services, use of cars, yachts or private planes, holiday homes, etc.)

10. While it is beyond the scope of this paper to address enforcement of the asset declarations rules by the Agency, it generally supports the observations and recommendations provided by the Council of Europe TP9 (pp. 82-83), and furthermore recommends a deeper examination of challenges encountered in practice, including for instance:

- the usefulness deadlines specified in Articles 34 and 38; and
- the possibility of allowing well-justified extensions to deadlines for demonstrably more demanding of investigations.

11. Considering the value of external reports from journalists and civil society watchdogs, and less commonly insiders or ordinary members of the public in detecting violations of the present law and corrupt practices, it is recommended to:

- Eliminate unnecessary conceptual distinctions in procedures—for instance, between “Requests” to initiate the “procedure for determining Violation of the provisions of this law that are related to the prevention of conflict of interest in the exercise of public functions, restrictions in the exercise of public functions, gifts, sponsorships and donations and reports on income and assets of public officials” (Articles 31-43) and “Applications” by whistleblowers who have “reasonable grounds to believe that there is a threat to the public interest that indicates the existence of corruption” (Articles 44-55).
- Reduce excessive requirements from the reporting person, e.g., on the content of the “Request” necessary to consider it actionable;
- Introduce an obligation to justify the rejection of an external “Requests”;
- Encourage the Agency to continue developing relevant analytical and investigative capacities in line with its mandate.

12. Regarding APC effectiveness more broadly, it is strongly recommended to conduct a functional analysis of the totality of the Agency’s administrative procedures from the perspective of necessity and efficiency, including addressing he following issues:

- The unnecessary distinctions in the “intake” phase (e.g., above-noted differentiation between “Requests” and “Applications”);
- Clarifying and rationalizing the workflow between the different phases of detection (including external complaints/reports), investigation/verification, and follow-up.
- Reviewing the efficiency the Agency’s follow-up instruments (e.g. the non-binding character of Opinions).
- Specifying the Agency’s own administrative procedural regulations so that the Law on Administrative Procedure would no longer be applied, in line with Council of Europe recommendations (CoE TP4, p. 22).

13. The present analysis considers other Agency-related provisions specified in Chapter V primarily in connection with the enforcement of conflict of interest provisions, which are the focus of this analysis. It draws considerably on the Council of Europe TP4, and offers several additional observations, as follows:

- due attention should be given to the rules governing the appointment and dismissal of the Agency Director, in line with recommendation of CoE TP4;
- recruitment criteria should be reviewed, for instance the (over-)emphasis on formal education, “anti-corruption experience” versus *relevant* experience; sufficient integrity requirements; the potential exclusion of PEP, etc.
- further consideration should be given to appropriate performance criteria for the Agency;
- the adequacy of the existing oversight provisions should be reviewed.

14. Because there are compelling arguments about certain Agency procedures and decisions remaining confidential (for instance, in connection with Article 39), there is a corresponding need to elaborate a commensurate accountability mechanism. All options should be discussed, including the possibility of special external oversight committees, which can include representatives of different state and civil society bodies

Sanctions

15. The present analysis considers applicable sanctions together with the provisions to which they apply. Several common recommendations emerge, however, as follows:

- The appropriateness of financial sanctions should be reviewed by experts familiar with Montenegro's economic and social context;
- In cases where public authorities—i.e., legal entities funded from the public budget—are in breach of requirement of the LPC, the applicable financial penalties should apply only to "responsible persons" (including possibly the Head of the authority), rather than the Legal Person.
- Sanctions for both officials in questions and legal entities (as appropriate, per above) and/or responsible persons of legal entities should be introduced for failure to comply with Agency Opinions and Decisions.

Missing obligations

16. The LPC should consider referencing or reiterating other essential integrity obligations that apply to all public sector actors. This may include, for instance, provisions prohibiting the use of public property for personal reasons, including office space, equipment, in particular vehicles, information, etc. which are presumably contained in other laws.

17. The LPC should introduce an obligation to report observed/suspected corruption by all public sector actors, and review appropriate corruption reporting mechanisms.

18. The LPC should consider adding an obligation to develop a results-oriented performance monitoring framework for its anti-corruption system, which is at present not foreseen as a competence of the Agency nor any other public body.

Whistleblower protection

19. The whistle-blower protection regime, which at present excludes reports of threats to public interest that lack a corruption dimension, should be considered another priority for Montenegro. The limited scope of application of whistle blower protection constitutes a massive policy gap that requires urgent attention.

This initial and fundamental limitation appears to have generated a range of logical and procedural inconsistencies that are near-impossible to untangle and resolve article by article. It is therefore recommended that the intended scope of protection be articulated in a distinct policy document, (similarly to the conflict of interest regime) as a basis for further discussion.

Crucially, the policy should contemplate corruption- and integrity-related reporting mechanisms (covering the full thematic range of anti-corruption regimes) as distinct from the whistle blower protection regime (thematically even broader). Furthermore, protection should be available to related persons and/or related legal entities, for instance NGOs or others who support whistleblowers. Further deficiencies are noted in section 6, all pointing to an urgent need for a systematic rethink of the totality of the current scheme.

Corruption risk management

20. The overarching recommendation is to undertake a systematic assessment of the challenges encountered in implementation and the results achieved to date. More substantive recommendations would arise from such analysis.

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