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ADVISORY PAPER

ON THE DRAFT AMENDMENTS TO THE

LAW ON PREVENTION OF CONFLICT OF INTERESTS

IN DISCHARGE OF PUBLIC FUNCTIONS

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1 This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

Background

On the occasion of the Interagency Workshop on progress made by Kosovo institutions in the implementation of the recommendations from the 1st assessment cycle and launching of the 2nd assessment cycle for the Anti-Corruption (AC) and Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) components, which took place in Pristina on 3-4 December 2013,the PECK Project Assessment Team discussed *inter alia* with beneficiary institutions a draft law aimed at amending the existing law on prevention of conflict of interest (CoI).

Given that the draft law has entered the phase of parliamentary procedure, the project found it useful to use the opportunity of the Interagency Workshop and discuss some issues of concern first in a bilateral meeting with the Director of the Kosovo Anti-corruption Agency (KAA) and subsequently submit the written comments which are of technical nature.

The main issue at stake is the harmonisation of the above law with the new Criminal Code of Kosovo, which entered into force on 1 January 2013 and which criminalises the offence of conflict of interest, but also to point out other potential problems in the implementation of the law, should it be amended as initially proposed.

The present advisory paper focuses only on some specific issues of concern related to the draft amendments to the law on conflict of interest, as well as certain issues that have emerged during the implementation of the current law, and does not examine the amendments or the law in their entirety. It is aimed at assisting Kosovo authorities with the implementation of the relevant recommendations from the PECK 1st assessment cycle[2] and aligning the draft law with international standards.

1. *Definition of "Official Person" and extension of conflict of interest rules to other levels of official persons*

The scope of the current law on prevention of conflict of interests is limited to "senior public officials", whose list is precisely determined in Article 4.

The proposed amendments introduce a new term - "official person", which is contained in the Criminal Code (Art.120, para.2 and Art. 424), thus defining any person "elected" or "appointed" to a state body, or "authorised person" in accordance with the law.

First, it can be noted that the scope of the definition is broadened to all levels of official persons. In such a way, the amended law on CoI:

a) Applies to all civil servants in public administration (several dozens of thousands) or ordinary police officers who operate as "authorised persons" under the law.

b) applies by analogy the concept of "official persons" as defined under and for the purpose of the Criminal Code, while the Conflict of Interest as defined in Art. 20 of this law[3]is not only the criminal offence. This would render the two definitions contradictory and prone to ambiguities in interpretation.

[2] The recommendations in question reads :
(i) "to streamline the legal framework related to prevention of the conflict of interest, by harmonising relevant legislation with the newly adopted Criminal Code" (p. 29 of the Detailed Assessment Report for the Anti-Corruption component – AC DAR);
(iii) an adequate and enforceable conflict of interest standard, including improper migration to the private sector ("pantouflage") be extended to every person who carries out a function in the public administration (including managers and consultants) at every level of government (p.98 of the AC DAR).

In general, relevant international standards refer to the concept "public official" instead of "official person" in order to include persons employed by a public authority as well as persons employed by private organisations and performing public services.

Therefore, it is advised that the definition of the scope of the Law on CoI corresponds more to the intention of the legislator. In trying to define the "official person", for the purpose of this law on CoI specifically, the legislator could look into the definition of "public official" under Art.2 a) of the UN Convention on Corruption (UNCAC)[4]. Although broadly proposed, the UNCAC's definition is limited to what is contained in the "domestic law".

The extension of CoI rules to other levels of public officials raises concerns with regard to the implementation and implementing bodies. First, there is a risk that the implementing body – the Kosovo Anti-corruption Agency (KAA) becomes responsible for every single appointee in the public sector of Kosovo institutions. Second, there is not a single provision requiring a clear definition of the role and responsibilities of public institutions towards other different categories of public officials that would become subjects of the law after these amendments become effective.

In such context, it is strongly advisable to complement the extension of CoI rules to other lower levels of public officials by adequate provisions clearly defining the role of respective public institutions (supervisors and supervisory institutions) in terms of detection, support, reporting, etc. under general coordination of the central implementing body – the Kosovo Anti-corruption Agency. With regard to the KAA, new supervisory responsibilities should be followed by additional adequate resources; otherwise putting the exclusive burden on one institution for all public officials in Kosovo would seriously compromise the adequate implementation of the new rules.

In another context, authorities may consider necessary to clarify in the future the definition of CoI which appears to create ambiguities in different pieces of legislation (CoI law, Art. 424 Criminal Code, Law on police Art. 49, law on civil service where there is a reference to CoI without defining it).

2. Definition of "Trusted Person"

The current law defines "trusted person" (Art. 3, para. 1.5) as the one who has or used to have property or business relations with the official person or any other relation that will bring in question impartial decision making of the official person.

During implementation of the law, in particular when it comes to the transfer of managing rights upon taking public office, the question was raised whether the "trusted person" excludes or includes the "related persons", i.e. members of close or larger family.

A thorough comparative research of similar laws that address the "blind trust" mechanism or as it is called in the law "passive ownership" (USA, Canada, Australia, Albania in the region, etc.) in fact concludes that such category should not include family members, i.e. related persons. It is generally admitted that the trusted person should not be a relative, a subordinated employee or any affiliated person having some business relations with the

4 Art 2 a) of UNCAC states that for the purpose of the Convention "public official" shall mean "any person holding a legislative, executive, administrative or judicial office (…), whether appointed or elected , whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority (…) **as defined in domestic law**". However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law (…).

public official such as joint venture or common investment. The idea is to manage the trust independently without control and influence from the official person[5].

Therefore, it is advisable that the definition of "trusted person" does not comprise the family members, as defined under "related persons".

3. Multiplication of additional activities of officials

Art. 10 of the current law regulates "other activities" of officials, allowing them to exercise functions within political party or exercise activities in the areas of science, sport, education, culture, etc.

There are cases of certain public officials exercising simultaneously several remunerated functions outside the working hours, either in public or private bodies, which may lead to a series of potential conflicts of interests.

Therefore, it is necessary that the conditions for any "outside" activity are precisely set forth in the law as well as in the codes of conduct for different sectors (judiciary, civil service, education, health, etc.).

In order to avoid multiplication of outside commercial activities potentially leading to the conflict of interests, it is recommended that the Law on CoI specifies that activities in the areas of science, sport, education, etc. are limited to public sector, while similar activities in private sector should be forbidden, unless otherwise provided for by a special law.

It is also strongly recommended to stipulate that conditions for exercise of public and private "outside activities", are further regulated in the respective Codes of Conduct for different areas of activity.

4. "Conflict of Interest" vs. "Incompatibility"

Art. 6 of the current law specifies that the CoI is a situation of "incompatibility" between official duty and private interest. At the same time Art. 15 regulates "incompatibility with discharge of public function". It seems that the law does not distinguish between these two notions, which are quite distinct from each other, thus leading to ambiguous interpretation. The separation of these two situations is particularly important given the fact that the conflict of interest has also become the criminal offence, while the general incompatibility of two or more functions is not.

As a rule, there is a clear distinction between general incompatibilities on the one hand and specific situations of conflict of interest on the other hand.

Therefore, it is advisable to clarify and redraft Art. 6 to clearly keep apart general incompatibilities and specific situations of conflict of interest by, for instance, stipulating that CoI is a situation of "conflict" between official duty and private interest (…). In this regard, it is useful to recall Recommendation R(2000)10 of the Committee of Ministers of the Council of Europe[6] that provides a narrower definition of general incompatibilities:

[5] Usually a trusted person is a financial institution, lawyer, certified accountant, broker or investment counsellor.

[6] Recommendation No. R(2000)10) of the Committee of Ministers of the Council of Europe "on Codes of Conduct for Public Officials", adopted by the Committee of Ministers at its 106th Session on 11 May 2000, Article 13.

"The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto. (…)"

5. Relationship between the CoI as criminal offence and administrative offence

Following the entry into force of the Criminal Code in January 2013, the conflict of interest has become a criminal offence, under specific circumstances defined in the Article 424 of the Criminal Code. The current law qualifies CoI as a minor offence.

The proposed amendments to the Law on CoI specify in Art. 20, para. 1, that Agency shall file criminal charges with the competent prosecutor against an official who violates obligations constituting criminal offences under this law, while Art. 21 stipulates that the Agency shall do so when "there are reasonable grounds" to believe that violation of the law contains element of criminal offence.

At first sight, these two provisions seem contradictory. They leave the possibility for the Agency to choose whether to apply Art. 20 or 21, the latter providing for more "soft" approach. But most importantly, the amendments pose at least two problems:

a) There is no precise list of "obligations constituting criminal offences under this law", in order for the Agency to file criminal charges with the prosecutor. The Agency, in order to do so, must interpret each obligation in line with the new Criminal Code. However, the question to be put to the legislator is whether the Anti-corruption Agency, as an administrative body is entitled to proceed with such interpretation and decide what can constitute criminal offence and what cannot. Depending on the answer the legislator should choose which of the two above-mentioned articles to maintain, as they exclude each other. If the answer is negative, the approach of Art. 21 seems the most appropriate one. This also seems applicable even in the case of positive answer, as the Agency should only "submit" the file to the Prosecutor as it is, without undertaking any sort of interpretation or qualification of offence in question. Since this is already regulated in Art. 21, the new Art. 20, as amended, would be redundant.

b) Last but not least, there is no visible outcome in a situation where the submitted criminal file would be dismissed by the prosecutor, or eventually in the court. Since the conflict of interest as of 1 January 2013 has a double legal nature (criminal and minor offence), dropping the case by the prosecutor or court should in no case result in halting all proceedings against the responsible official person. As a general rule, the use of one procedure should not prevent the recourse of the other one although there is a priority of the criminal procedure in principle. The law should therefore specify that in case the criminal proceedings are suspended or dismissed the initial administrative investigation should continue in perspective of judicial outcome as minor offence. In this way, the risk of impunity for the conflict of interest is reduced, regardless the final sanction in administrative case (minor offence, maximally punishable with 2,500 Euro).

Conclusion

The extension of the scope of CoI rules to other levels of public officials should take into account the implementation modalities related to responsibilities, duties and resources of relevant public institutions, including the Kosovo Anti-corruption Agency as the main coordination body.

The definition of “trusted person” has to exclude related persons in order to ensure independent management and protection from undue influence or control.

The issue of multiple additional activities has to be clearly regulated and adequate references have to be made to relevant by-laws and other ethical rules.

The concept of conflict of interest has to be clearly distinguished from incompatibilities and its definition must be adequately clarified.

Finally, there should be clear delineation and independence between administrative and criminal CoI proceedings to prevent any impunity in relation to CoI violations.