

Council of Europe
Conseil de l'Europe



European Union
Union européenne

**TECHNICAL PAPER:
SUMMARY AND CONCLUSIONS FOLLOWING THE MEETING BETWEEN
PACA TEAM AND HIGH INSPECTORATE FOR THE DECLARATION AND
AUDIT OF ASSETS ON AMENDMENTS TO/COMMENTS ON THE CONFLICT
OF INTEREST AND ASSET DECLARATIONS LAWS**

October 2010

ECD/34/2010

Table of Contents

1	SUMMARY	3
2	THE ASSET DECLARATIONS LAW	3
2.1	Recommendations agreed/resolved.....	3
2.2	Recommendation not reflected.....	4
3	THE CONFLICT OF INTEREST LAW	4
3.1	Recommendations agreed/resolved.....	4
3.2	Recommendations on which opinions diverge	5
3.3	Recommendations needing further research/attention.....	6

For any additional information please contact:

Corruption and Fraud Unit
Economic Crime Division
Directorate of Co-operation - DG-HL
Council of Europe
F-67075 Strasbourg Cedex FRANCE
Tel +33 388 41 29 76/Fax +33 390 21 56 50
Email: lado.lalovic@coe.int
Web: www.coe.int/economiccrime

This document has been produced with the financial assistance of the European Union. The views expressed herein can in no way be taken to reflect the official opinion of the European Union or the Council of Europe

1 SUMMARY

This paper summarizes the discussion, outputs and PACA conclusions from a working meeting held with representatives of the High Inspectorate for the Declaration and Audit of Assets (HIDAA) on 14 October 2010. The purpose of the meeting was to discuss the opinions and recommendations of PACA concerning the Law on the Prevention of Conflict of Interest in the Exercise of Public Functions, Law on the Declaration and Control of Assets and Financial Obligations of Elected Officials and Certain Public Officials, and proposed amendments to these laws provided to PACA in May 2010.

The conclusions of the discussion and meeting were that a number of PACA comments and recommendations had already been taken into account in updated draft amendments completed since the initial proposals. Concerning other recommendations, there were differences of opinion, which is a natural state of affairs given the absence of any detailed international standards or requirements on conflicts of interest and the fact that methods of regulation differ across countries. Despite this, PACA recommends that the authorities revisit and reconsider certain issues.

- Concerning the Asset Declarations Law, the comments of PACA were limited to the draft amendments and have been reflected in the updated draft with the exception of the recommendation to narrow the range of officials under the obligation to declare assets.
- Regarding the Conflict of Interest Law, one PACA recommendation had been reflected in the updated draft (concerning gifts and the establishment of declaration duties for officials after leaving public office). In two areas the explanations provided by HIDAA appear to meet/resolve PACA concerns (definition of 'decision-making' and whistle blowing obligations). In certain key areas PACA and HIDAA representatives appear to hold legitimately differing opinions (for example on the issue of regulation of elected officials), although PACA recommends that these issues are revisited in the future. Two issues appear to require further research: the provisions on invalidity of acts/contracts made in conditions of conflict of interest, and the capacity of HIDAA to fulfil its extensive obligations

2 THE ASSET DECLARATIONS LAW

Regarding the Asset Declarations Law, the outcome of the meeting was as follows.

2.1 Recommendations agreed/resolved

PACA's explicit recommendations on the Asset Declarations Law were reflected in the draft, namely regarding the system for selecting officials whose assets are to be

audited (the lottery system) and the recommendation not to establish immunity for the Inspector-General of HIDAA.

Regarding PACA's concern about the necessity of the Assets Declaration Law to spell out its own administrative procedures rather than refer to the generic regulation of the Code of Administrative Procedures (CAP) is deemed to be met/resolved, even though no such regulation is inserted in the text of the proposed amendments. This is on the basis of the explanations by HIDAA (and the verifications by PACA) that the guidelines issued by the HIDAA Inspector General in fact do spell out tailored administrative procedures for the day to day operation of HIDAA based on the generic model of the CAP.

2.2 Recommendation not reflected

PACA's Technical Paper of July 2010 (ECD/22/2010) argued that the effectiveness of the assets declaration law could have been much more significant if the law applied only to high ranking officials, namely to elected officials, officials in top levels appointed by the politicians and a limited number of civil servants which, by the nature of their functions and powers are more exposed to risks of corruption. Consequently PACA's proposal was to reduce the number and the categories of the public officials under the obligation to declare their assets. The updated draft of the Assets Declaration Law does not reflect this proposal.

3 THE CONFLICT OF INTEREST LAW

Regarding The Conflict of Interest Law, the outcome of the meeting regarding key PACA recommendations was as follows.

3.1 Recommendations agreed/resolved

In two areas the explanations of HIDAA met/resolved PACA concerns.

- **Definition of decision making.** PACA's Technical Paper of July 2010 (ECD/21/2010) suggested that the definition of decision-making, while apparently very detailed, might not cover many situations of real-life conflicts of interest in decision-making processes. However, HIDAA representatives stated that HIDAA has issued detailed supplementary guidelines on this matter, their description of which appeared to confirm that the law covers the kinds of situations about which PACA had concerns.
- **Whistleblowing obligations.** PACA was concerned that the law imposed duties on public officials to notify to HIDAA cases or suspicions of conflict of interest, yet does not sufficiently protect officials from retaliation (beyond a prohibition on direct official action against the public official). However, HIDAA pointed out

that there are no sanctions for failing to notify cases of conflicts of interest; in this situation PACA regards its concerns as having been answered.

- **Regulation of gifts.** PACA had expressed the opinion that regulation of gifts should not confuse gifts with the motivation behind offering, providing or accepting them, and that regulation should simply state the size of gifts that may be accepted. HIDAA stated that their new version of the amendments has already taken this recommendation into account.

3.2 Recommendations on which opinions diverge

- **Differing definitions.** The PACA Technical Paper noted that the Conflict of Interest Law provides a different (wider) definition of conflict of interest than the Law on Rules of Ethics in the Public Administration and recommended that the definition be narrowed to harmonise them and ensure that the definition in the Conflict of Interest Law is limited to issues that are clearly conflict of interest-related. HIDAA representatives argued that the two laws have different regulatory purposes, with the Law on Rules of Ethics playing more of a recommendatory role while the Conflict of Interest Law contains provisions to be enforced.
- **Overcomplicated definitions.** PACA has also expressed the opinion that the sub-definitions of conflict of interest are over-complicated, extend beyond conflict of interest to actual misconduct, and make it difficult for public officials to understand the law. HIDAA representatives stated that the definitions have not led to any problems in the practical implementation of the law.
- **Regulation of elected officials.** PACA expressed the opinion that the Conflict of Interest Law imposes excessive restrictions on the private (for example business) interests that elected officials (such as MPs) may hold, and recommended that these are loosened in line with international best practices. HIDAA representatives argued however that stricter provisions have been and are necessary in the Albanian context.

On the three areas described, there is no single or binding international standard for regulation of conflict of interest. PACA also acknowledges that some of the problems regarding definitions may in practice not have had a significant negative impact on implementation of the law. It nevertheless recommends that these issues are reconsidered in the future, not least because PACA believes strongly the following:

- Non-uniform definitions of the same concept in different laws is by definition problematic from a legal point of view and could at least in theory lead to problems such as challenges to the enforcement of the Conflict of Interest Law.

- The conflict of interest law should play as much an educative role as a set of rules to be enforced; for this reason, it is of importance that definitions be kept as clear and simple as possible in order that public officials can understand them.
- ‘Overzealous’ regulation of elected officials remains unadvisable: it will lead to circumvention of the law if it is not fully enforced, or dissuade talented persons from seeking election if the law is enforced fully.

3.3 Recommendations needing further research/attention

- **Invalidity of acts/contracts made in situations of conflicts of interest.** PACA expressed concern that the provisions of the law invalidating administrative acts and contracts reached under situations of conflict of interest could lead to countervailing damages in certain cases and need to be made more flexible. In response to the PACA concern, the HIDAA representative suggested that the official responsible for deciding on the invalidity of such acts may decide not to invalidate them if the consequences of this would be more severe than the consequences of the violation itself. However, the outcome of the discussion appeared to be that, according to the Albanian Code of Administrative Procedures, such discretion (choosing to invalidate or not) is applicable only in those cases when the administrative acts/contracts are defined by the law as ‘relatively invalid’ (which are only one set of administrative decisions), not absolutely invalid (which applies to all other decisions including contracts).
- **Capacity of HIDAA to fulfil its role.** PACA also repeated concerns that have been expressed elsewhere concerning the capacity of HIDAA to fulfil its obligations satisfactorily, given the large number of public officials to whom the conflict of interest and asset declaration laws apply. PACA recommends that an objective assessment of the human/technical capacities required to oversee/enforce observance of the two laws be conducted in the future in order to compare the results of such an assessment with the actual capacities of HIDAA.