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PROJECT AGAINST CORRUPTION IN ALBANIA (PACA)

TECHNICAL PAPER

COMMENTS ON DRAFT AMENDMENTS TO CONFLICT OF INTEREST AND ASSET DECLARATIONS LAWS PASSED BY THE COUNCIL OF MINISTERS IN JULY 2012

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Introduction

On 9 July 2012 the Albanian Council of Ministers approved draft amendments to two laws of key importance for preventing and combating corruption – the Law on the Prevention of Conflict of Interest in the Exercise of Public Functions and the Law on the Declaration of Assets and Audit of Assets and Financial Obligations of Elected and Some Public Officials. This document provides brief comments on the amendments. The main conclusions of the assessment are that:

- i) The amendments to the Conflict of Interest Law are all desirable, but amendments are missing to address several of PACA's most important recommendations.
- ii) While a number of the amendments to the Asset Declarations Law are positive developments, the most important amendments – which widen the range of officials subject to asset declaration obligations and expand the required content of declarations – are likely to render HIDAA unable to perform effective full audits of such declarations.

1. Conflict of Interest Law (CIL) Amendments

The proposed amendments to the CIL would introduce significant changes in the law. In our opinion all of the amendments are positive steps, but additional amendments would be required to address several important recommendations of PACA.

Regarding the amendments approved, the following comments are provided. Note that numbers of articles refer to the articles in the proposed consolidated amended law, not the articles of the 'amending law'.

- The amendments would abolish the obligation of public officials to make annual 'declarations of interests'. This is a sensible step: officials are already obliged to make annual declarations of assets, and additional declarations of interests therefore make little sense. However, the final amendments should ensure that other provisions of the law do not continue to refer to such declarations, as for example Article 42.3 of the current draft does.
- The provisions prohibiting solicitation of gifts/advantages (Article 23.1) would be amended to delete the clause 'when this may cause the emergence of a conflict of interests of any kind'. This is a well-advised amendment; however, it would also be advisable (as recommended in PACA's original Technical Paper on the law) to define clear thresholds of value above which gifts are unacceptable or refer to any existing thresholds established by other legal acts.
- The amendments would ensure (in Article 37.9) that institutions must inform HIDAA on measures taken to address and resolve conflict of interest situations. This is a desirable amendment, as HIDAA currently has very little information on what institutions actually do to carry out their responsibilities under the law.
- The amended Article 41 would clarify who can initiate actions by HIDAA envisaged by the law (for example audits of assets of an official on the basis of information provided by the public), including HIDAA itself. This amendment seems advisable for the purposes of clarification.

- The amended Article 42 would elaborate the competencies of HIDAA slightly more, in particular by specifying its role in initiating launching legal actions in public institutions, and establishing its right to secure information from public institutions. This amendment is clearly desirable.
- Sanctions for violations of the law have been stiffened considerably. In the event that HIDAA finds that officials have violated the law, this amendment should increase the deterrent effect of the law.

Regarding recommendations of PACA that have not been taken into account, the following are of particular importance

- Definitions in the law remain problematic or over-complex. In particular, the definition of conflict of interest is too extensive and embraces issues (such as honesty, dedication and punctuality) that are not directly related to conflict of interest in a legal sense. PACA's original Technical Paper recommended clearly that the definition be modified to bring it in line with the definition in the Law on Rules of Ethics. The subsequent sub-division of the definition of conflict of interest into several categories ('factual', 'seeming', 'possible' conflicts of interest, etc) further complicates matters, and is likely to do little to clarify the concept of conflict of interest for the public officials who are subject to the law, and are not used in analogous laws in other countries.
- The law still regulates elected officials - in particular MPs, but also local elected officials - in a similar way to permanent public officials. PACA underlined clearly in the original Technical Paper that this is NOT in line with international good practice. Elected (and therefore non-permanent) officials should not be subject to as strict prohibitions on private activities and interests, and the emphasis for such officials should be on disclosure of interests rather than extensive prohibitions.
- The provisions of the law (Article 40) that allow for the invalidation of contracts or official acts that were carried out under a situation of conflict of interest remain. For reasons explained in the original Technical Paper, we remain very uneasy about this provision; we strongly recommend that it be clarified considerably to ensure that: i) acts are only invalidated where actual wrong-doing is very clear (which is not always the case where a conflict of interest is present); ii) decisions whether to invalidate acts or not take into account the other consequences of such a decision - for example where a highway has been half constructed.

2. Asset Declaration Law (ADL) Amendments

The main focus of the proposed amendments to the ADL is to widen (or in some cases at least specify more clearly) the range of officials with the obligation to declare their assets, and to also expand the content of what must be declared. Specifically:

- The range of officials would be widened to explicitly include judges of the Constitutional Court and High Court, the Chair of the High State Audit, the General Prosecutor, the Ombudsman, members of the Central Electoral Commission, members of the High Council of Justice and the Inspector General of the High Inspectorate for the Declaration and Audit of Assets, deputy prefects, members of

regulatory authorities, officials at management level of the General Department for the Prevention of Money Laundering, tax and customs officials in charge of revenue collection, the Governor of the Bank of Albania, the deputy-governor and the members of its Supervisory Council, and heads of public institutions under/depending from the central institutions at the regional level. Moreover, the duty to make declaration would also be extended to legal and physical persons which, following audits, are found to be persons related/connected with the obliged subjects under the law.

- The assets and interests that must be declared would be expanded considerably to include *inter alia* gifts/preferential treatment exceeding a value of 10,000 ALL, commitments to profit-seeking activities, and all expenses exceeding 500,000 ALL.

Second, the amended law would specify (Article 25/1) that full audits - i.e. checking the accuracy of the information provided in declarations, not just their internal consistency - will be conducted every two years for very senior officials, three years for a wide range of others (such as judges and prosecutors), and four years for other members of collegiate bodies who are not audited every three years. For all other officials subject to the law, at least 4% of the total must be audited every year, with the percentage for each sub-group determined by risk assessment and individual subjects selected by lottery. In addition, HIDAA may conduct a repeat audit if there are doubts about the veracity of information provided.

As already underlined in the original PACA Technical Paper from 2010 on the ADL and proposed amendments to it, we believe that the current circle of officials who are subject to the law is already probably too wide. The three components of the amendments summarised above increase the audit burden, and we believe it is simply very unlikely that the institution has the capacity to conduct full audits of the range of officials and in the specified frequency provided for by the amendments. Full audits require work-intensive comparison of the information on assets of each public official with a number of other sources of information such as the Immovable Property Register, vehicle register, ALUIZNI as well as other institutions such as the tax authorities or private financial institutions. We strongly believe that HIDAA should either narrow the range of public officials covered by the law, or establish rules on the frequency of audit that ensure that it must audit a decent sample of senior public officials or highly risky categories of officials, and that it is not prevented from doing so properly by the overall number of officials it must audit.

With respect to the other proposed amendments, these are summarised below with the expert's comments

- The obligation of officials to make a declaration of assets before taking up their function/position is more explicit/elaborated (Article 5/1). The amendments would also reintroduce the obligation to make a declaration on leaving office (Article 7/1). In addition, periodic (annual) declarations of assets would – following the first declaration – only contain changes in assets and liabilities, not a full new statement. The expert regards all three of these changes as sensible.
- The amendments appear to establish that the Inspector-General may be reappointed to the same function again, and clearly state that s/he has the right on leaving office to be appointed to the same or equivalent function held prior to his/her term of office. The expert regards both of these amendments as sensible.

- The amendments introduce clearly (Article 25/2) the duty of HIDAA to launch an administrative investigation in cases where audit results show that assets are not accounted for by declared sources of income, or there are indications that the official is hiding assets or has withheld legally required information. This is a necessary provision to ensure follow-up on violations. However, the draft Article 25/2 states that the administrative investigation procedure will be conducted in accordance with the Code of Administrative Procedures. PACA noted in its original Technical Paper that the procedures for such investigations should not be determined only by reference to the Code, and that amendments to the ADL should establish a process that is tailored to HIDAA's needs and guarantees the procedural rights of public officials.
- The draft Article 27 establishes deadlines within which officials must respond to requests from HIDAA for clarifications of information provided in declarations. This is clearly an advisable amendment.
- Administrative sanctions for violations of the provisions of the ADL would be reintroduced into the law (Chapter IV), bringing an end to the curious situation in which sanctions were determined using the conflict of interest law following the repeal of the sanctions provisions of the original ADL. This is clearly a positive development. Moreover, the amendments would appear to ensure that HIDAA (Inspector General) can directly impose sanctions (in Article 40.2) – again, a desirable amendment.