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AN ANALYSIS OF THE CURRENT FRAMEWORK FOR ENSURING THE EXCHANGE OF INFORMATION BETWEEN THE HIGH COUNCIL OF JUSTICE AND THE HIGH INSPECTORATE FOR THE DECLARATION AND AUDIT OF ASSETS

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Introduction/Executive Summary

This paper analyses the current framework in place for ensuring the auditing of the judges' assets and interests as well as the exchange of information to that effect between the High Council of Justice of Albania (*henceforth HCJ*) and the Albanian High Inspectorate for the Declaration and Audit of Assets (*henceforth HIDAA*).

The analysis spans relevant provisions of the Law No. 9049 of 10/04/2003 "On the Declaration and Audit of the Assets, Financial Obligations of the Elected Officials and Certain Public Officials"[1] (*as amended by Law No. 9367 of 07/04/2005, Law No. 9475 of 09/02/2006 and Law No. 9529 of 11/05/2006*), Law No. 9367 of 07/04/2005 "On the Prevention of Conflict of Interest in the Exercise of Public Functions[2] (*as amended by Law No. 9475 of 09/02/2006 and Law No. 9529 of 11/05/2006*), the 2004 Cooperation Agreement between HCJ and HIDAA on Information Exchange, the 2010 Joint Declaration of the two institutions on Transparency of Assets of Judges and (*as a background*) and the HCJ Regulation No. 195/2/a of 05/07/2006 "On the Organization and Functioning of the Judicial Inspectorate"(*as amended*).

By the time this Paper was released in September 2012, further amendments to the two basic laws that underpin HIDAA's operation (*the Assets Declaration Law and the Conflict of Interests Law*) were pending approval in the Albanian Parliament. These amendments have also been taken into account in the analysis given the imminence of their approval and their relevance for the subject.

Following the analysis of the current framework and the proposed amendments mentioned above, the expert concludes as follows:

1. The effectiveness of the auditing of the assets' declarations of judges is diluted by the extended coverage of the assets declaration law and the scanty cooperation between HIDAA and HCJ. As a result of the sheer number of officials whose declarations must be audited, HIDAA is not able to sufficiently concentrate its "fire power" on the judges.

2. The effectiveness of the full audits on judges (full audits are conducted every year on the declarations of at least 4% of the entire population of officials who have the obligation to declare assets, with the officials to be audited being selected by lottery) is questionable for two reasons:

- Firstly, the full audits are not performed on a reasonable and representative number of judges. In view of the fact that the selection of declarations for full audit is completely random, it is possible that not even a single judge is subjected to a full audit for years;

- Secondly, the lottery system fails to recognise the extent to which judges are at risk of corruption.

3. The system of varied frequency of full audits which aims to subject the most important officials to closer scrutiny periodically, as regulated in the current law, also fails to recognise the particular exposure and propensity of judges to corruption. Subjecting

[1] Assets Declaration Law;

[2] Conflict of Interest Law.

judges to full audits only if and when their declarations are randomly picked by the lottery, or every 3 (three) years for judges of the courts of appeal, is clearly inadequate in view of the features of the judicial function and the public uproar on judicial corruption.

4. The discretion of the Chief Inspector of HIDAA to impose full audits on judges, as regulated in the current law, has the potential to enhance the effectiveness of the auditing of judges' declarations. However, it needs to be supported by better cooperation and coordination with the HCJ.

Thus far, bilateral cooperation between HIDAA and HCJ has failed to make up for the regulatory shortcomings identified in points 1-3 above. The upcoming amendments to the Conflict of Interest and Asset Declarations laws (see Section 1.3) represent an important step in the efforts to increase the effectiveness of the audits on judges. However, these amendments fall short on two of the four factors identified above. Namely, they do not bring about a reduction in the number of officials under the obligation to declare assets, thus allowing for more focus on the judges, and do not ensure more frequent audits of the assets of judges. Although this second shortcoming is mitigated by the introduction of the power of the Inspector General to perform risk assessments and apply full audits accordingly, the retention of the requirement to audit at least 4% of all officials subject to the law inevitably limits the extent to which HIDAA can focus its resources effectively on key categories of officials, including judges.

Generally, for the current regime of auditing of judges declarations to yield more results better coordination and cooperation between HIDAA and HCJ is needed, notably in the exchange of information relating to the assets and interests of judges. The aforementioned shortcomings of the regulatory framework on the auditing of the judges' declarations should be considered as points of departure for improving cooperation between the two agencies.

1. Current Regulation of the Auditing of Judges' Assets

There is no doubt that judges perform a fundamental public function in society. For that function to be performed effectively, it is essential that judicial powers are exercised free of any bias and with impartiality. Securing judges' impartiality and immunity from bias is a permanent challenge for all judicial systems.

Bias and partiality are essentially caused as a result of various extra-legal factors, including corruption and conflict of interest. There are basically two sets of mechanisms that have been devised to minimise the effect of such extra legal factors on judges' reasoning and decision making.

The *first* set of mechanisms is provided by judicial procedural laws. These laws, invariably, feature procedures and methods which allow the parties to the judicial proceeding to spot any risks to the impartiality of the judge and empower them (*the parties including the judge herself*) to effectively deal with the emerging bias. This method ultimately includes the recusal of a judge from the bench.

The *second* set of mechanisms is broadly ethical. Whereas ethics is a broad notion, there is no question that it includes a regime for the containment of conflict of interest and prevention of corruption. The declaration and auditing of the judges' assets and interests rank high in the list of ethical instruments aimed at achieving judicial impartiality and deterring corruption.

Albanian law establishes a framework for the auditing of judges' assets and the prevention/addressing of conflicts of interests. The relevant applicable legal framework consists of Law No. 9049 of 10/04/2003 "On the Declaration and Audit of the Assets, Financial Obligations of the Elected Officials and Certain Public Officials"[3] (*as amended by Law No. 9367 of 07/04/2005, Law No. 9475 of 09/02/2006 and Law No. 9529 of 11/05/2006*) and Law No. 9367 of 07/04/2005 "On the Prevention of Conflict of Interest in the Exercise of Public Functions[4] (*as amended by Law No. 9475 of 09/02/2006 and Law No. 9529 of 11/05/2006*).

According to the aforementioned laws, all asset declarations, including those of judges, undergo every year a basic form of audit which consists merely of arithmetic and logical controls of the declarations – in other words, checking that the declarations are internally consistent.

Additionally, the assets declaration laws envisage that, following a lottery, 4% of the overall population of officials (*more than 4500 of them including judges*) is randomly selected for a full audit, meaning a verification of the accuracy and veracity of the information provided in the declarations. If selected, judges' declarations will undergo a full audit in the same fashion as other officials.

When it comes to the lottery and the ensuing determination of the group of officials that will undergo full audit, the law does not establish percentages for each category (*say 1% of judges, 4% of civil servants etc*). Establishing a specific percentage for judges, tailored to the population of the group (*roughly 400*) and the assessed propensity of judges to corruption would – other things equal – ensure more effective audit of judges' assets, and make the prospect of an audit a far better deterrent to misconduct by judges. Instead, in the current law the percentage is set globally and interests the entire population of obliged officials.

In addition, Article 17 of the Conflict of Interest Law determines the frequency with which the asset declarations of various categories of officials are audited in depth (*fully*)., as follows:

- every 2 (*two*) years for the members of the cabinet and deputy ministers, members of the regulatory bodies and the top officials such as the President of the Republic, the members of the High and Constitutional Courts etc;

- every 3 (*three*) years for the mayors and the high level civil servants, high ranking police officers and high ranking tax and customs' officers, prefects, ***judges of the courts of appeal*** as well as prosecutors of appeal and those from the Office of the Prosecutor General;

- every 4 (*four*) years for the MPs and heads of central and local government bodies and their collective bodies.

[3] Assets Declaration Law;

[4] Conflict of Interest Law.

All other officials (*including the first instance judges*) are subjected to a full audit *if* and *when* the aforementioned lottery procedure randomly picks their declarations (*4% of the total number of the declarations*).

Finally, the Conflict of Interest Law awards the Chief Inspector of HIDAA the discretionary power to pick and chose any declaration (*including declarations from judges*) and to submit them to a full audit if there are grounded suspicions that the declaration is inaccurate or fraudulent.

This discretionary approach has the potential to enhance the effectiveness of the auditing of judges' declarations if it is invoked reasonably frequently and applied on a reasonable number of judges. It may be used by HIDAA to put more focus on the judges' declarations. However, its limited use on the judges so far is probably an indication of the fact that HIDAA needs a stronger regulatory basis or justification in order to exercise its discretion without being exposed to political and other sorts of attacks.

2. Concerns over the Effectiveness of the Auditing of the Assets of Judges

There is no question that judges perform a very important public function and often do so singlehandedly. They have final decision making power on the issue at hand (*unless an appeal is placed*) and act under minimal scrutiny from the higher echelons of the system. Moreover, judges are not accountable for the substance of their decisions. It is no wonder indeed if judges are prone to corruption. Public perceptions of corruption in the judiciary in Albania are high, and the European Union has repeatedly urged Albania to ensure a "*solid track record*" in criminal prosecution of corruption, including judicial corruption. However, according to statistics on criminal proceedings recently provided by the Ministry of Justice, there has not been a single conviction, judgement or even criminal investigation of any judge for the acceptance or solicitation of a bribe during the years 2009-2012. Asset declarations are a potentially effective tool to bring about change in the fight against judicial corruption. Therefore, it is essential to improve its effectiveness.

In the paragraphs below we discuss some of the limitations of the current legal framework on asset declarations which raise concerns about the effectiveness of the regime on judges.

A *first* reason for concern over the effectiveness of the audits on judges' assets is the fact that Albanian asset declaration laws cover a very wide range of officials. The assets' declarations of more than 4500 public officials, including judges, are to be collected and audited. The inclusion for example of all high and middle level civil servants, directors and commanders of the Armed Forces, Police, the State Information Service and all independent agencies without a proper assessment of the risk level posed by these populous categories of public officials can only have stretched HIDAA's scarce resources. It has been often argued by many local and international commentators, including PACA (ECD/22/2010*)*, that the effectiveness of the assets declaration regime would be higher if the obligation to declare assets and interests would be confined to elected and higher ranking officials, including judges. A sharp reduction in the number of the

officials under the obligation to declare their assets would automatically increase the effectiveness of the auditing of judges declarations.

Secondly, even if HIDAA had the human and technical capacity to effectively audit all the officials currently under the obligation to declare their assets, still it would not be efficient to reserve the same level of scrutiny for all of them. As noted above, not all officials have the same propensity to corruption. Judges' opportunities to engage in corruption are clearly higher than most other public officials. However, the current law does not distinguish categories of officials according to their vulnerability. As mentioned above, Article 17 of the Conflict of Interest Law regulates the frequency of full audits on the various categories of officials. Article 17 provides that full audits on judges of the courts of appeal are performed every three years. Other judges (first instance court judges) are subjected to a full audit only if and when their declarations are randomly picked by the lottery procedure described above. There is no provision to ensure that a reasonable sample of judges (as a high-risk category) is subject to audit. It is therefore possible that no other judges' declarations are selected for audit at all.

As a result, the number of full audits on the judges is clearly insufficient given the size of this category of public officials (*more than 400 of them*) and the elevated risk of corruption in the judiciary.

3. Upcoming Legal Reform and Its Potential to Increase the Effectiveness of Audits on the Declarations of Judges

In July 2012 several important amendments to the Asset Declaration Law and the Conflict of Interest Law were approved by the Council of Ministers. The amendments would have significant implications for audits of the assets of judges.

The proposed amendments, if adopted, would in some respects improve the legal framework governing asset declarations. However, the proposed amendments fail to address two of the weaknesses identified in the previous section.

- First, the amendments do not bring about a reduction in the number of public officials under the obligation to declare their assets and interests (*as mentioned above this is regarded as one of the factors that undermines the effectiveness of the auditing of judges*).
- Second, the frequency with which audits must be conducted on judges remains unchanged – i.e. every three years for judges of the courts of appeal, and the lottery system for other judges.

On the positive side, the power of the Inspector General to initiate a full audit of any official subject to the Asset Declarations Law is preserved. Moreover, in addition to the overall percentage of declarations that undergo full audit at the end of the lottery procedure and the fixed frequencies of full audits on certain officials (*every 3 years for the judges of the courts of appeal*), the amendments provide that varied percentages be decided by the Inspector General for each category of public officials based on the risk assessment and the population of each category. If

the present patterns of corruption in the judiciary persist, this mechanism can in theory enable HIDAA to perform risk assessments and concentrate auditing on judges declarations;

In sum, the amendments are therefore conducive to some improvement in the auditing of judges' assets, but do not address the main weaknesses in the current legal framework. The effective implementation of the legal framework – whether amended or not - is dependent upon enhanced cooperation between HIDAA and HCJ.

4. The 2004 Cooperation Agreement and the 2010 Joint Statement

The Asset Declarations Law and the Conflict of Interest Law set up a system in which HIDAA is vested with overall leadership and monitoring authority over the policies and working methods governing the declaration of assets and management of conflict of interest by public institutions (*article 42 of the Conflict of Interests Law*). It also provides methodological leadership to the other responsible authorities, such as the HCJ, in performing the tasks related to the declaration of assets and interests.

On the other hand, the HCJ is the responsible authority for the implementation of policies and procedures related to the declaration of assets and interests by the judges. Briefly, the HCJ's obligations in this process are to:

- provide judges with asset declaration forms[5], alert them to approaching deadlines and collect their declarations;
- report to HIDAA on any assets/interests of judges (*other than those declared by them*) it manages to identify from sources such as public registries, media and complaints by the public in accordance with article 8 and 9 of the Conflict of Interest Law; and
- play an active role in collecting information on the judges' assets/interests in accordance with article 10 of the same law.

Given the competencies of the two institutions and the pressing need to address judicial corruption in Albania, it is essential that the competencies of the HCJ in the assets declaration process are interpreted as broadly as possible and implemented with determination. This seems to have been the intention of the heads of both institutions when they signed a Cooperation Agreement in July 1, 2004 and a Joint Statement on October 13, 2010. The two documents reiterate the general commitment of the two institutions to cooperate for the purposes of auditing the declarations of the judges' assets and interests, and include the following initial steps towards establishing procedures for cooperation.

<u>The 2004 Cooperation Agreement</u>:

- A commitment by the HCJ to forward to HIDAA all information that is relevant to the judges' declarations of assets (*paragraph 2*). However, the regulation provided on this issue by article 10 of the Conflict of Interest Law is more detailed, making this paragraph

[5] Starting from 2011 the asset declaration form was filled out electronically.

of the Cooperation Agreement somewhat obsolete.

- Designation of a contact point (*paragraph 3*).

- A commitment to set up joint working groups for auditing the judges' declarations when necessary (*paragraph 5*).

The 2010 Joint Statement

- Announces the establishment of a joint working group for the performance of in-depth investigation of the judges' sources of income (*paragraph 1*);

- Announces the intention to scrutinise the complaints against judges as a possible source of information for hidden assets (*paragraph 2*);

- Announces the commitment to exchange information (*paragraph 4*); and

- Advertises HIDAA's toll free number and the email address unedenoncoj@hidaa.gov.al as coordinates for the submission of information by the citizens (*paragraph 5*).

While the two documents constitute important initial steps, they clearly do not fulfil the role of a full memorandum of understanding/cooperation. Specifically, they do not set up standing (on-going and permanent) automatic mechanisms of cooperation or detailed procedures of communication which would compensate for the weaknesses in the legal framework identified earlier in this Technical Paper.

In order to establish such mechanisms and procedures, PACA therefore proposes the adoption of a new, Memorandum of Cooperation, provided as a separate annex to this Technical Paper.