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Technical Paper

OPINION ON THE LAW 'ON THE PREVENTION OF CONFLICT OF INTEREST IN THE EXERCISE OF PUBLIC FUNCTIONS' AND PROPOSED AMENDMENTS

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INTRODUCTION/EXECUTIVE SUMMARY

This opinion provides comments on and recommendations on the 2005 Law on the Prevention of Conflicts of Interest in the Exercise of Public Functions of the Republic of Albania, as amended up to 11 May 2006. The opinion has been formulated as assistance to the High Inspectorate for the Declaration and Audit of Assets, which submitted to PACA a set of proposed amendments to the Law in April 2010. This opinion provides comments not only on the proposed amendments but on the Law as a whole, as the expert believes that there are problems in the Law that require serious attention in the current process of drafting amendments.

The expert feels it necessary to note that the translation of the Law is poor in places (for example articles 26.4, 37.6). Notwithstanding this, the main findings/recommendations of this opinion are the following:

- Analysis should be conducted to identify problems in implementation of the current law before tabling amendments. In particular, an analysis of the compatibility/complementarity of the Conflict of Interest Law and Law on Rules of Ethics in the Public Administration should be conducted.

- The law provides problematic definitions of key terms, in particular of 'conflict of interest' and 'decision-making', which could have important negative knock-on effects for implementation of the law's other provisions.

- Related to this, the law displays a level of complexity that is unnecessary for the effective regulation of conflict of interest issues. This concerns for example the elaboration of the definition of conflict of interest, or the definition of officials with obligations under the law. The structure could be simplified considerably – which would have the important consequence of making it more comprehensible for ordinary public officials.

- The law displays a tendency to try and categorically regulate all possible conflict of interest issues, with the consequence that some provisions impose unjustifiable burdens on public officials or their relatives.

- The law imposes obligations on elected officials (MPs, mayors and heads of Regional Councils) which are difficult to justify in the light of international best practice, and can be expected to either lead to circumventions/violations of the law or dissuade talented individuals from seeking public office. Restrictions on the external activities of elected officials need to be less strict than for permanent officials. Arguably, conflict of interest regulations for MPs in particular should not be implemented by an executive agency.

- The law includes far-reaching provisions on the invalidity of acts taken or contracts closed under conditions of conflict of interest. Such provisions need to be nuanced and balanced to take into account the possible damage that may be caused by the reversal or cancellation of such acts or contracts in particular cases.

1 KEY COMMENTS ON THE LAW

The expert has the following general comments and recommendations on the Law.

1.1 Research and analysis

As a most general comment, the expert believes that a proper process of research/analysis and consultation should be conducted before finalising proposed amendments to the Conflict of Interest Law. The amendments received from HIDAA, although of considerable importance, do not touch upon other issues identified in this technical paper, issues that a cursory reading of the law would suggest are key.

Such an analysis would take into account the experience from conflict of interest proceedings that have taken place to date, in order to identify where are the main practical problems in clarity of the law, the obligations imposed on officials by the law, verifications of declarations of interest, and enforcement. In addition, it would be useful to compare the resources that HIDAA possesses with those that are needed to conduct proper verification on the number of declarations that must be verified according to the law. Last but not least, it would also be of value to assess whether institutions to which the law applies have issued the necessary subordinate legislation required under Article 46, and whether they have clearly designated officials responsible for implementation of the law as implied by Article 41.

1.2 Compatibility with the Law on Rules of Ethics in the Public Administration

The Conflict of Interest Law is not the only legal regulation of conflict of interest and related issues for public servants. In addition, the Law on Rules of Ethics in Public Administration also directly regulates conflict of interest issues, together with other areas that the Conflict of Interest Law covers, for example the acceptance of gifts and other favours. The expert has the impression that little attention has been paid to ensuring the two laws complement each other rather than creating confusion. In particular:

- According to the Law on Rules of Ethics, 'A conflict of interests is a situation in which an employee of the public administration has a personal interest such that it affects or might affect the impartiality or objectivity of the performance of his official duty.' This definition, which is essentially taken from the Council of Europe Model Code of Conduct for Public Officials, is not the same as the more complicated definition in the Conflict of Interest Law (see below), which creates legal uncertainty.

- The two laws also have overlapping provisions on how to deal with conflicts of interest, offers of gifts/favours and so on. While the expert has not conducted an analysis of whether the provisions are identical, it is recommended that such a review should be conducted to ensure that the two laws are consistent.

1.3 Definitions

The expert has the following comments on key definitions provided by the law.

1.3.1 'Conflict of interest'

The law defines conflict of interest (in Article 3.1) as 'a situation of conflict between the public duty and the private interests of an official, in which he has direct or indirect private interests that affect, might affect or seem likely to affect, in an incorrect way, the performance of his public responsibilities and duties.' Article 3.2 then defines 'performance of duties in a correct way' as decision making 'in which the public official acts in conformity with the law, with honesty, impartiality, responsibility, dedication, punctuality, in the defence, in every case, of the public interest and the legal rights of private persons, as well as for the preservation and strengthening of the credibility and dignity of the institution where he works, of the state in general and of the figure of the official.'

This expert believes that this definition is problematic because it includes standards of behaviour that are in fact unrelated – or not necessarily related in specific cases - to the issue of conflict of interest. In particular, 'honesty', 'conformity with the law', dedication', 'punctuality', or 'preservation/strengthening of the credibility of the institution' are wider standards which belong in a code of conduct (such as the Law on Rules of Ethics). These standards may be violated even where no conflict of interest situation arises. An official may act without dedication, late, and even (in certain cases) in violation of the law while preserving impartiality and objectivity. It is recommended that the definition of conflict of interest is appropriately limited, for example in line with the definition provided in the Law on Rules of Ethics.

The Law complicates matters further with definitions of several sub-categories of conflict of interest, namely:

- Factual conflict of interest: where the private interests of the official affect, have affected or might have affected in an incorrect way the performance of his/her official duties and responsibilities.

- Seeming conflict of interest: where his/her private interests 'seem, on their face or by their form, as if they have affected, affect or might affect the performance of official duties and responsibilities in an incorrect way, but in fact the influencing has not occurred, is not occurring or cannot occur.

- Possible conflict of interest: where the private interests of the official might in the future cause a factual or seeming conflict of interest to appear, if the official were promoted to certain duties and responsibilities.

- Case-by-case conflict of interest: where one of the first three types of conflict of interest appears in a particular decision-making process.

- Continuing conflict of interest: a situation in which a conflict of interest might appear repeatedly and/or often in the future.

These definitions give rise to two main problems. Firstly, 'factual conflict of interest' confuses conflict of interest situations with actual or perceived wrong-doing. A conflict of interest constitutes a situation, not an action, and the existence of a conflict of interest situation in itself implies nothing about the integrity or otherwise of the

official concerned. Indeed, one of the prime objectives of conflict of interest regulation is to provide rules/guidelines on how officials should address conflict of interest situations where they arise. Perhaps most important, the extensive definitions provided in the Conflict of Interest law do not appear to add anything of substance that would affect the implementation of the law, and the expert recommends strongly that the law adopts the definition provided in the Law on Rules of Ethics. Not least, this would make it much more easy for the officials who are subject to the law to understand the law.

1.3.2 'Private interests'

Article 15 provides an extensive and complicated account of the types of private interests officials must declare periodically. The article clearly attempts to cover any possible private interest that could ever give rise to a conflict of interest. For example, Article 1 b) includes 'any other legal or civil relationship' as a private interest, while Article 1. ç) includes 'recognized relationships of friendship or enmity'. In doing so, however, the article loses comprehensibility due to the fact that a private interest can literally be any attribute of an official. Article 4 illustrates where this may lead by stating that 'It is deemed a cause for the emergence of a conflict of interest any type of private interest of an official from those defined in this article, every tie or inter-relationship between two or more of them, if because of this interest or because of the extension outside of the required restrictions of this interest, a situation with a conflict of interests appears, according to the definitions of points 1 and 4 of article 3 of this law.'

The expert believes that the attempt to exhaustively define all possible types of private interest is both unnecessary and confusing, and suggests that it would be sufficient to adopt a definition of private interests such as that of the Council of Europe Model Code of Conduct, according to which '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.' Such a definition is sufficiently encompassing without being never-ending, and would serve as a better basis for officials to build an understanding of what is required of them and act accordingly. The latter, rather than surveillance and enforcement, is the primary objective of good ethical regulation.

1.3.3 'Decision-making'

Article 4.2 of the law defines what is meant by 'decision-making' – the key activity in and for which conflicts of interest are regulated under the law. Again, the definition is complicated, and is cited here in full:

- 4.2.a): decision-making for an act will be considered, in every case, the last moment of the decision-making process during which the final content of the act is decided;

- 4.2.b): decision-making for an act will also be considered those preliminary moments of decision-making according to letter "a" of this point, which are fundamentally important and determining for the final content of the act;

- 4.2.c) an official has fundamental and definitive competency for any act if his participation in, effect on and position in the decision-making for this act according to letters "a" or "b" of this point determine the content of the act.

The definition limits decision-making to 'participations' by an official in final or preliminary decision-making, where such participation 'determines the contact of the act'. The scope of 'decision-making' is defined in Article 4.1 – for example including participation in decision-making on administrative acts and contracts.

The problem with the definition is that in contrast with other provisions of the law it appears to adopt an overly narrow interpretation of what constitutes 'determining the content of an act'. For example, if an official who has an interest in company X expresses an opinion as a member of a body allocating subsidies that company X should receive a subsidy, and the body in fact votes to allocate such a subsidy, it is not clear whether the official's participation has 'determined' the decision. The expert feels strongly that it is important (and more simply) for conflicts of interest to be regulated for any level of formal participation in decisions, whether that participation was fundamental to the final decision or not. Indeed, the law should also allow for conflict of interest to constitute informal interventions in a decision-making process even where an official is not formally participating.

1.4 Coverage and complexity

The problems with definitions reflect a tendency in the law towards unnecessary complexity, with a number of provisions appearing to be more complicated than necessary. Other examples include the following:

- Article 7 requires officials to make advance declarations of interests that might give rise to a conflict of interest in a particular case. This could be written much more briefly as the straightforward duty of an official to notify to superiors of the relevant institution interests that may give rise to a conflict of interest in a specific case.

- Article 14, which defines which officials are obliged to make periodic declarations of interest; the Article does so by referring to categories listed in the Law on the Declaration and Control of Assets, Financial Obligations of Elected Officials and certain Public Officials combined with a reference to categories listed in Article 27 to 33 of the Conflict of Interest Law. It would be easier for officials to understand the obligations to which they are subject if the Article simply listed clearly the officials/categories of officials who are subject to the obligation to make declarations.

The expert believes that provisions such as these could be made much more comprehensible, and that in general the law could be simplified considerably. More generally, the structure of the law could be made much more accessible, for example by dividing it into main sections such as: Definitions; Prohibitions on functions and activities; Resolution of conflict of interest situations; Declarations of interests; Verification/investigation of declarations and allegations; Sanctions.

Related to the issue of complexity, the expert feels that the law attempts to regulate every possible conflict of interest situation that could ever arise. However, this can only be done – if at all – through an extremely complicated legal regulation which may have perverse consequences. For example, extremely detailed regulations may - for persons who intend to engage in wrongdoing - simply serve as a useful guideline on how to circumvent the restrictions (for example by ensuring that assets/interests are registered to persons not covered by the law). Last but not least, the attempt to regulate all possible cases may lead simply to over-regulation; the examples of Articles 21.6, 24.1 and 25.2 mentioned in Section 3 of this opinion illustrate the absurd circumstances that may be created by attempting to categorise all possible conflicts of interest without leaving any room for common sense interpretation in practical application.

1.5 Regulation of elected officials

A major problem with the Conflict of Interest Law in its current form is that it regulates in a similar way both permanent officials of public administration on the one hand, and elected representatives on the other. In particular, Article 28 of the law prohibits members of Parliament from 'exercising private activity that creates income in the form of a natural commercial person, partnership of natural commercial persons of any form, the free professions of legal attorney, the notary public profession, licensed expert or consultant, agent or representative' of profit-making organizations. Article 29 applies similar restrictions to mayors and heads of regional councils.

The expert has the following comments on these provisions.

- Applying blanket prohibitions on external private activities of elected officials is clearly not in line with best practices. Elected officials are by definition temporary and not professional (in the sense of their position being an occupation with at least in theory permanent career characteristics), and the application of conflict of interest standards to them as strict as those for permanent civil servants is highly unadvisable. If elected officials are forced to cease all private activities (including business ones), this may make them more vulnerable to corruption by lowering their standard of living. It may also reduce their ties with the community. Such prohibitions (if enforced) are a massive disincentive to seeking elected office, since an elected official may have no viable occupation to return to on leaving office. It is strongly recommended that elected officials are not subject to such strict restrictions on activities as permanent officials/civil servants, although obligations to declare interests should be similar.

- The expert is not entirely comfortable with an executive body (HIDAA) exercising the power to verify the declarations of MPs. While this is not a major criticism, it may be noted that it is more standard practice for legislators to regulate themselves with specific codes of conduct and interest declaration regimes.

1.6 Whistleblowing: obligations without protection

Article 8.a makes it a duty for public officials to offer information on the private interests of a public officials, particularly if the official has knowledge of the interests of his superiors. This article does not specify to whom public officials should provide such information, although the expert assumes that this means an obligation to provide information to the institution in which s/he works or to HIDAA. The expert is concerned at the implications of making it a duty of officials to report on other officials, especially their superiors, due to the obvious danger of retaliation of persecution. **Article 20** of the law states that public officials (or subjects) offering information about conflicts of interests not declared by those to whom the law applies earn 'special administrative protection': the official on whom information is provided may not exercise 'administrative actions with punitive effect' over the informant 'nor be a legal obstacle to the obtaining of legal rights by the latter because of the giving of information. Any measure against the informant carried out for another legal reason can only be imposed by an official directly superior to the one on which information was provided.

The expert believes that these provisions oblige officials to provide information on their superiors without providing them with any real protection against retaliation. Even if Article 20 were to be effectively enforced, 'administrative actions with punitive effect' are only a narrow category of actions that a superior may take against a subordinate. In the absence of proper whistleblower protection, obligations to inform on superiors are not advisable.

1.7 Invalidity of acts/contracts

Article 40 of the law defines all administrative acts and contracts issued 'under the conditions of a factual or seeming conflict of interest' as invalid, and civil contracts entered into by officials with the institution in which they work (as elaborated by Article 21) are without legal consequence. Without going into the finer details of Article 40, the expert wishes to stress that blanket invalidity provisions are unadvisable. Such provisions need to be nuanced: in particular, the gravity of a particular case of conflict of interest, and in particular its impact on an act/contract needs to be balanced against the possible damages that could be imposed by the invalidation of an administrative act/contract. This needs to be done on a case-by-case basis, and in some cases the damages of reversing an act or invalidating a contract may be so large compared to the damage created by the conflict of interest that the public interest is best served by maintaining the validity of the act/contract.

2 OTHER COMMENTS ON EXISTING PROVISIONS

The expert has the following additional comments on specific articles of the Law not mentioned in the comments above.

Article 10. This article concerns the role of institutions in gathering information on the interests of officials who work for them. The article authorizes the institution to report to the public official information obtained on him/her (Article 10.ç) and to give

the official the possibility to prove the contrary if the official so requests (Article 10.d). These provisions are formulated as rights of the institution, yet it would seem logical and fair for them to be formulated as obligations – i.e. that the institution must report to the public official information obtained on him/her and provide him/her with the opportunity to rebut such information.

Article 12. This article purports to be about the right of the public to be informed of case-by-case registrations on the private information of public officials, yet does not refer to any type of provision of information to the public. It is apparent that Article 12.1 has been abrogated, and this may mean that a change in the title of the Article is needed.

Article 14.1. In addition to the comments on this article in Section 1, the Article refers largely to Article 3.1 of the Asset Declaration law, which includes 'directors of independent public institutions'. However, to the expert, there is no definition of Independent Public Institution anywhere in Albanian law.

Article 15. Article 15 defines the types of private interests that officials must declare periodically – essentially, assets as required by the Asset Declaration law, gifts and favours over a certain threshold value, and engagement in any private activities with a profit-making purpose. Article 15.3 adds that "Private interests of the kinds other than those defined in article 5 of this law may be required to be declared periodically, if this is possible and appropriate for subcategories of interests within these types, according to the definitions of the Inspector General [of HIDAA]". The expert is not sure of the meaning of this article, as it appears to allow the addition of private interests not listed in Article 5, but only if these fall under sub-categories of private interests within the meaning of Article 5. It is recommended to clarify this Article if the problem is not one of translation. The expert also wishes to note that the categories of private interests to those that should be declared should be left to the law or sub-legal acts, and should not be 'expandable' simply at the discretion of the Inspector General.

Article 19.1. This Article states that declarations of interests according to the law are official documents and may be made available to the public under the Law on Right to Information about Official Documents. The expert recommends that if the intention of this provision is to ensure that declarations are made public, then the Law should state clearly that they are made publicly proactively, and in what manner (for example provided on the website of HIDAA).

Article 21.5. Article 21.4 ç) states that an official who is subject to a conflict of interest may nevertheless enter into a contract with the institution in which he functions, where this 'is essential for the performance of the public function and there is no alternative'. Article 21.5 states that where this happens the institution must 'ask for the consent of the nearest supervising institution' and 'notify the High Inspectorate and make the contract public where there is no such institution or asking for consent would conflict with the principle of the independence of the institution'. This article needs to make clear whether in the first case the consent of the supervisory institution must be received. In the second case, it is important that 'independence' is clearly defined.

Article 21.6. This article prohibits members of the organs of regulatory authorities or the Competition Authority, including the Governor, Deputy Governor and members of the Supervisory Council of the Bank of Albania from entering into any contract with a commercial entity that falls within their sphere of jurisdiction. Where the contract is for the receipt of services the contract is permissible provided the services are not provided 'in a special manner' or on preferential terms, and the permission of the relevant Regulatory Authority is requested in advance; the absence of a response from the Authority within 30 days is considered as consent. This provision also applies to a wide range of persons in relation to which the official has an interest of any kind, including for example the official's spouse, adult children and parents of the official and spouse (Article 24.1). It also applies to contracts between a company and the institution involved, where the official or any person in relation to which s/he has an interest owns a stake in the company (Article 25.2).

The expert feels strongly that this provision may lead to absurd consequences, and should be made less restrictive. For example, a member of the regulatory authority for telecommunications or a member of his close family will not be allowed to have a mobile phone contract with a company that provides mobile telephone services without a 30-day wait for permission from the regulatory authority. Such extensive restrictions applying to small-scale contracts for essential items are difficult to justify, and the expert believes that the purpose of the law should be to address significant conflicts of interest in order to prevent larger-scale abuses.

Article 23. This Article regulates the receipt of gifts, favours and promises of preferential treatment. It prohibits officials from accepting such benefits 'given because of his position, form an individual, natural person or private legal entity when this may cause the emergence of a conflict of interest of any kind.' It also, largely using the provisions of the Council of Europe Model Code of Conduct for Public Officials, defines what an official should do when offered such benefits.

In the opinion of the expert, this article mixes the acceptance of gifts and other favours on the one hand with reasons or potential reasons for accepting them on the other. This greatly complicates the implementation of such regulations, and international best practice is clearly to simply prohibit the acceptance of gifts or favours whose value exceed a certain threshold – irrespective of whether they are 'likely to result in a conflict of interest'. A curious consequence of the provision as it stands is that very large gifts are permissible if an official can argue that they do not give rise to a conflict of interest. The expert believes it would be better to apply a standard prohibition on the acceptance of gifts that (individually or in sum) exceed a certain threshold per year, without the complicated accompanying provisions the law currently contains.

In addition, it is also unusual to include provisions that are essentially guidelines (Article 23.3) in a binding legal act, rather than in a Code of Conduct as recommended by the Council of Europe. Legal acts imply duties whose non-observance implies concrete sanctions; how this would be applied for example to Article 23.3 b), which exhorts officials to try to identify the person offering the gift/favour and his/her motives and interests, is debatable.

Article 41. This Article defines those responsible for the implementation of the law, namely: HIDAA; the superiors of officials within a public institution; the directorates, human resources departments or units specially charged, according to the need and possibilities of every institution; and supervising institutions. Given the complexity of the law, the expert wishes to note that either the law or another binding regulation should mandate the designation of an ethics officer within each public institution responsible for coordinating the implementation of conflict of interest regulation, including the provision of guidance to officials. Ideally, the official would also be responsible for the coordination of ethics policy as a whole (including anti-corruption policies) for the institution.

3 COMMENTS ON PROPOSED AMENDMENTS

The expert has the following comments on the proposed amendments formulated and provided by HIDAA.

Article 15.6. This article would be amended in such a way that officials who are subject to the duty to submit periodic declarations of interests would also have to do so for a period of two years after leaving office. The expert has mixed feelings about this provision. Where post-service obligations are imposed on officials, these are usually limited to the prohibition on taking up employment or interests in entities which fell within their sphere of regulation/supervision etc. Sat the very least, the proposed amendment in practice will be very difficult to enforce, possibly requiring extensive surveillance of officials after they leave office. As the law is currently worded, it would not seem to be enforceable at all, as the sanctions defined in Article 44 apply to officials who the duty to make declarations, not persons who have left public administration. It is recommended to limit post-service restrictions to prohibitions on taking up certain positions rather than continuing to make declarations.

Article 18.1. In the context of an administrative investigation, a proposed amendment would empower HIDAA to make use of necessary data from all state and public institutions and public and private legal entities, and the latter would 'be required to respond within 15 days from the presentation of the request of the Inspector General. The expert is not sure if there is an error in the translation, but this proposal seems to mandate institutions only to respond but not to provide the data requested. If so, the proposal requires clarification to ensure that information must be provided; among other things, a proposed amendment to Article 44 e) would impose sanctions on persons/institutions who fail to provide information requested, although the duty to provide information is not clearly stated in the proposed addition to Article 18.1.

Article 42.3. A proposed addition to this Article on annual reports of institutions subject to the law is worded in the English translation as follows: 'On the basis of the annual report, the Inspector General draws evaluations and recommendations related to the implementation of this law, mandatory to be complied with by the responsible authorities and public institutions. The Inspector General is notified in advance on the appointment, movement or termination from the functions of the authorities responsible.' The expert believes that recommendations can not by nature be

mandatory. The second sentence is incomprehensible and does not appear to be related to the rest of the article.

Article 45. Regarding disciplinary sanctions, a proposed amendment states that 'The High Inspectorate is informed on the actions undertaken by the respective institutions' regarding the imposition of sanctions for violations of labour regulations or regulations on the status of officials. It appears to the expert that this provision should be worded more clearly to state that each institution has a duty in its annual report (or when deemed relevant) to inform HIDAA of sanctions applied.

4 CONCLUSION

This Technical Paper has provided an extensive critique of the current Conflict of Interest Law. In the opinion of the expert, the law exhibits some major problems, ranging from key definitions to the legal consequences of conflict of interest situations. These problems require not minor amendments but a more radical overhaul of the law.