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**PROJECT AGAINST CORRUPTION IN ALBANIA (PACA)**

# Technical Paper:
# Methodology for Corruption Screening of Legal Acts and Draft Legal Acts for Albanian Legal Drafters

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## A. Introduction and definitions

Among other factors, corruption is favored by imperfect legislation. Public servants draw their powers and influences from laws. When legal regulation of their duties is ambiguous and prone to various interpretation, public servants are tempted to adopt the most convenient interpretation, which can either be the broadest, when confers them an empowerment, or the narrowest, when it confines them to an obligation.

The state and its servants guarantee the enforcement of laws to all members of the society. For this reason, ambiguous regulation of rights, obligations and liability of individuals provides the opportunity for the public servants to doubt the meaning of the law and to adopt various interpretations. In doing so, public servants may act in good faith or may act depending on corrupt motivations offered by the private individual or entity interested in the most convenient interpretation of the legal provision.

Observance of the good drafting rules of the "Law Drafting Manual: A Guide to the Legislative Process in Albania" prevents many corruption risks of defective legislation. Legal provisions have to be as clear and accurate as possible. Otherwise, they can leave room for abusive interpretation by public servants vulnerable to corruption and encourage individuals to resort to corrupt stimuli to see their rights and legitimate interests fulfilled.

Usually, corruption risks slip in the laws absent any direct intention of the drafters and corruption acts may not necessarily come out as a result of passing such laws. However, these risks create a corruption pressure on public servants and private entities, as they keep the door open for corruption and it is therefore wise to prevent instead of undertake them.

This Methodology is aimed to serve as a corruption prevention tool and is based on the concept of corruption proofing of legal acts and draft legal acts that has been successfully employed in other countries.

There are two methods to prevent corruption risks in emerging legislation. The first method is for the drafters to know the corruption risks and to avoid these while working on the draft. The second method is for specialized experts to screen the draft for corruption risks after the draft is finalized by the author, but not passed yet and is susceptible to final improvements. This method is more complex and implies working not only on the draft's text, but also on its explanatory memoranda and other accompanying documents. Sometimes, it requires additional information and research. This Methodology depicts the use of the second method. It is applicable for the expert reviewing of draft legislative acts, draft regulatory acts, including of central and local administration authorities.

The corruption proofing expert review based on this Methodology can be carried out regarding draft integral acts, as well as drafts of amending, completing and repealing such integral acts. The Methodology can also be applied in the process of expert reviewing of the currently in force legislative and regulatory acts.

It is recommended to apply this Methodology repeatedly on the same draft, if considerable alterations have occurred in it in the course of the legislative process, i.e., between the

adoption of the final draft by the Government and its preparation for adoption in the first reading in the Parliament, or between the adoption of the draft in the first and the second reading in Parliament.

Conclusions reached on the basis of this Methodology should exclude allegations of willful including in draft acts concrete corruption risks. The Methodology should not be used to detect and present possible corruption schemes. The examples used in it do not indicate on the fact that such provisions have generated in the past or are generating in the present corruption practices, the examples only illustrate that such processes might occur.

For the purposes of this methodology, the following terms shall mean:

**corruption risk** – possibility resulting from legal provisions of favoring the occurrence of corruption acts in the course of implementation of these provisions;

**corruption proofing** – process of expert reviewing of the draft laws and of other regulatory acts in the view of identifying the rules which favor or might favor corruption risks;

**corruption proofing expertise report** – written evaluation prepared by an expert as a result of conducting corruption proofing;

**expert** – person who possesses theoretical knowledge and practical skills which allow him/her to recognize the corruption risks in a regulatory act text;

**Manual** – Law Drafting Manual: A Guide to the Legislative Process in Albania;

**Methodology** – Methodology for Corruption Screening of Legal Acts and Draft Legal Acts for Albanian Legal Drafters.

## B. Who and when should apply the Methodology?

This Methodology should be applied by an expert, who meets the following criteria:

- is a lawyer, preferably with legal drafting experience;
- is not an author of the draft he/she intends to screen for corruption risks;
- is able to carry out corruption proofing of the draft and prepare a corruption proofing expertise report after the draft is finalized by the author, but before it is passed in the final reading by the adopting authority, while the draft is still susceptible of final pre-adoption improvements;
- is specialized in certain areas of law and conducts corruption proofing of drafts in his/her area of expertise. An example of fields of expertise division is: a) constitutional order, public administration, justice and home affairs; b) budget and finance; c) economy and commerce; d) education, mass-media and cults; e) social protection etc. The areas of law can be divided according to the domestic classification of legislation, or according to the specialization of the Parliament's commissions, or according to other acceptable criteria;
- knows the Methodology and has undergone special training on corruption proofing.

The experts who apply this Methodology can be representatives of the public authorities or of the civil society. It is possible for both, public authorities and civil society to apply this Methodology concomitantly, even on the same drafts, but preferably at different stages of the legislative process, i.e. a public authority to use it before the final draft is approved at the Government's level, while an NGO to use it once the draft is tabled to the Parliament, or vice versa.

Given the fact that this Methodology should be applied on drafts which are final at one of the legislative drafting process, the most recommended entities to apply it are:

- The Parliament's staff;
- The Council of Ministers' staff;
- NGOs.

It is also possible to assign the application of this Methodology to a chief ministry involved in the legislative process, such as the Ministry of Justice. However, this would require allowing it additional time to carry out corruption proofing of drafts after these have been circulated to other ministries for opinions and improved by the draft author.

Bellow is presented the sequence of the legal drafting stages in case that corruption proofing is carried out by the Ministry of Justice or by the Committee of Ministers:

1. Preparing the draft by the author
2. Circulating the prepared draft to other ministries and agencies for opinions;
3. Revision of the draft by the author following the opinions expressed on the draft;
4. Corruption proofing expertise report by the Ministry of Justice / Council of Ministers;
5. Second revision of the draft by the author following the recommendations of the corruption proofing expertise report;
6. Adoption of the version of the draft to be presented to the Parliament by the Committee of Ministers.

## C. Preparing to write the corruption proofing expertise report

Preparing to produce the corruption proofing expertise report, the expert shall read:

**1. Pertinent laws related to the draft**. For example, in case of an amending law, the expert should read first the text of the law subject to amendment. If it is a new draft integral law repealing an existent one, the expert should read first the existent law. Than, he/she should compare the quality of the current version of the integral law proposed to be amended by the draft and the new provisions suggested by the draft

**2. Explanatory memorandum of the draft**, in order to identify the goal of the proposed draft, the seriousness of the draft and of the drafters' intentions.

It is important to identify the goal stated in the explanatory memorandum and than to compare this goal to the goal and objectives stated in the text of the draft (in case of integral acts). It is important to check whether the draft has an unstated goal, resulting from its provisions and to confront it with the stated goal for possible mismatches.

The seriousness of the draft and of the drafter's intentions can be inferred from the seriousness of the explanatory memorandum. The explanatory memorandum of a serious draft should always comply with the requirements of the Rules of the Council of Ministers and section 3.8 of the Manual. Special attention has to be paid to statements in the explanatory memorandum related to:

- ensuring compliance of the draft with other legislation;
- establishment of new public authorities or public offices;
- changes proposed to the current regulation of the public authorities' duties;
- justification of the draft's solutions;
- who will benefit from the draft and how;
- who might be damaged by the draft and how;
- financial coverage of the draft.

**3. Text of the draft**, having in mind the questions: Can a public servant interpret abusively this provision? What can a public servant or individual do bad with this provision? Whenever the text of a provision raises doubts, the checklist of corruption risks from Annex 1 to this Methodology should be consulted in order to identify the concrete corruption risk(s) of provisions. It is possible to identify corruption risks which are not included in the checklist.

**4. Other relevant information:**
a) official information: legislation in the field; official publications (printed or electronic, including web resources); data of the state statistics department, public reports of the official (state and international) institutions; court practice; archive materials, including closed or limited access sources.

b) unofficial information: written and electronic mass media; publications (books, reports, studies, assessments etc.) developed by private persons and institutions, by (local and international) non-governmental organizations; unofficial web pages (web pages, portals, databases, forums).

## D. Corruption proofing expertise report

The common structure of the corruption proofing expertise report comprises four parts:

I. General Evaluation

II. Justification of the Draft

III. Substantive Evaluation of Corruption Risks

IV. Conclusions

### *I. General Evaluation*

The General Evaluation helps to get an idea about the drafter, the category of the draft and the goal of the draft. Each of these sections is useful for corruption proofing purposes.

1. **Author of the draft**, both author of legislative initiative and immediate draft's author. (Manual section 1.2.2)

Knowing who the drafter is, it is possible to assess whether that authority will be charged in the end with the enforcement of the draft and if so, to determine whether it was trying to establish most convenient instead of best rules in the draft. This knowledge also helps to determine further whether the drafting authority was trying to enlarge its discretionary powers, promote departmental interests that are not necessarily in the best public interests or whether the draft promotes interests of individuals/entities linked to the high officials of the drafting authority.

2. **Category of the act** and whether the chosen category is justified. (Manual section 1.2.1);

Evaluating whether the category of the act was correctly selected provides understanding of the place of the drafted legal act in the general legal system. This is important for ensuring coherence between legal provisions of the draft and those of other legislation.

Special attention should be paid to the cases when the drafter has chosen a category of the future legal act that is lower as compared to the category of other legal acts with which the draft will be in immediate interaction. In this case, it is important to be careful regarding possible conflicting provisions.

On the other hand, if the proposed category of the draft is too high, it is important to pay attention to the interests, especially departmental interests of the drafting authority, which are being advanced by the draft. It is possible for the drafting authority, in favorable political circumstances, to try to secure itself a convenient situation of a higher legal power than it should be, and therefore to promote, for instance, a draft law, instead of a draft governmental act, or a draft organic law, instead of the draft ordinary law.

3. **Goal of the act** stated in the draft or in the explanatory memorandum and whether these are consistent. (Manual section 3.3.3)

The stated goal(s) should be compared with the actual goal resulting from the text of the draft and in case of inconsistencies – these should be mentioned.

Determining the goal of the draft is very useful for corruption proofing purposes. Once the goal is identified, it is easier to make the rest of the corruption proofing related assessment, bearing in mind the stated goal. This helps to monitor whether all the provisions in the draft serve the stated goal, or whether there are other provisions in the draft serving a different, unstated goal. If so, it is important to give special consideration to these other provisions in order to determine if it is merely a problem of poor drafting, or whether the drafter is not entirely sincere about what is aimed to be achieved by the draft.

### *II. Justification of the Draft*

Evaluating the contents of the draft's explanatory memorandum is highly important for corruption proofing. The following information regarding the draft's justification should be included in the corruption proofing expertise report: compliance of the explanatory memorandum with the legal requirements, sufficiency of the reasoning contained in it and quality of the financial justification.

4. **Explanatory Memorandum accompanying the draft** should meet the requirements of Article 19 of the Rules of the Council of Ministers and Manual section 3.8.

Explanatory memorandum which is poorly drawn up usually speaks about similar quality of the draft. Poor quality is not necessarily an indicator of drafter's mal-intentions. Usually it is only a sign that insufficient time was devoted to the drafting process, due to reasons such as workload of the drafter, pressing drafting deadlines imposed by the Council of Ministers or the Parliament. However, the expert should be very careful with the text of the drafts accompanied by a formal explanatory memorandum, as these are frequently affected by unintended corruption risks, such as faulty reference and delegation provisions, concurrent provisions, gaps, ambiguous linguistic formulation, lacking administrative procedures etc.

5. **Sufficiency of the reasoning contained in the Explanatory Memorandum.** This section of the corruption proofing expertise report is based on Article 19, c) of the Rules of the Council of Ministers and Manual section 3.8.

The expert should be particularly careful with solutions provided by the draft which lack any argumentation in the Explanatory Memorandum, or when this argumentation is false. Especially the last case should trigger the expert's attention to the respective draft's provisions, as it is possible for the drafter to pursue hidden intentions about them. These might also be the provisions which do not fall under the incidence of the draft's stated goal.

In this section of the corruption proofing report the expert should present his/her findings on the argumentation of the draft contained in the explanatory memorandum and to determine, in the end, whether the reasoning of the draft is sufficient, serious and valid.

6. **Financial justification** of the drafts is required by Article 81 of the Constitution, Articles 14 and 20 of the Rules of the Council of Ministers and Manual sections 3.8 and 3.8.3.

The financial implications of the draft are important for future implementation of the draft, especially if it implies public costs. The draft law which lacks financial evaluation of its costs is sentenced to inefficiency and causing unnecessary legislative inflation. Legal provisions with no financial coverage can serve as a good excuse for public servants to decline their duties and to deny fulfillment of individual rights and legitimate interests. Alternatively, public servants could seek corrupt stimuli in order to provide necessary assistance. Therefore, it is better to postpone the passing of a draft until it can be provided with necessary financial support, than to pass a law that will not produce (expected) effects.

While conducting corruption proofing, the expert should be very careful in case of the drafts which require financial coverage, but which:

- lack a financial justification (either separate or included in the explanatory memorandum);
- have insufficient or formal financial justification;
- place the burden of incurring the implementation costs on public or private entities / individuals, without prior consultation of their opinion or to their direct detriment;
- imply exaggerated costs in relation to the public interest.

### *III. Substantive Evaluation of Corruption Risks*

The most important part of the corruption proofing expertise report is the detailed analysis of the corruption risks contained in the draft's provisions. However, it is not always possible to capture corruption elements in concrete provisions, but only in the draft as a whole. For this reason, this part of the corruption proofing report, before the section on detailed analysis of the draft's provisions, makes a general diagnosis of the corruption risks of the entire draft: promotion of interests/benefits contrary to the public interest, damages contrary to the public interest which might be inflicted, compatibility of the draft's provisions with the provisions of the national legislation, linguistic formulation of the draft and regulation of the public authorities' activity.

7. **Promotion of interests/benefits contrary to the public interest.**

Any draft promotes general, group or individual interests and benefits, but not all of them do so observing the public interest. In this section of the corruption proofing expertise report the expert should state whether the draft promotes interests and whether this is done in the public interest. Whenever the draft promotes interests contrary to public interest, the expert should state it. If possible, the expert should identify the interests of which subjects are advanced by the draft. Otherwise, the expert should limit himself/herself to explaining why the promotion of these interests is contrary to the public interest.

8. **Damages contrary to the public interest which might be inflicted through the enforcement of the act.**

Frequently, drafts which promote interests contrary to the public interests have the potential to cause damages contrary to the public interest. The expert should state the possible damage and, if possible, identify the category which could be damaged by the draft. In the end, the expert should make the assessment whether the anticipated damage to be brought by the draft is according to the public interest or not.

**9. Compatibility of the draft with the provisions of the national legislation.**

In this section, the expert should state in general whether the draft is compatible with other laws or not. If the expert identified laws which are not repealed by the draft, but contradict its provisions, he/she should list these laws. Usually, the detailed analysis of each case of contradiction is reserved for section 12 of the corruption proofing expertise report. However, in case of major contradictions, the expert can state in general lines the areas of these contradictions.

**10. Linguistic formulation of the draft.**

In this section of the corruption proofing expertise report, the expert should state in general whether the language of the draft complies with the legal drafting rules. For these purposes, Manual section 3.4 is useful. The detailed analysis of each case of defective use of language, amounting to corruption risks, is reserved for section 12 of the corruption proofing expertise report.

**11. Regulation of the activity of the public authorities.**

In this section of the corruption proofing expertise report the expert should state whether the draft touches upon aspects of public authorities' activities, duties, competences, administrative procedures etc. If so, the expert should state what public authority is involved, what duties and competencies are provided or withdrawn, what procedures are set etc. and announce his/her attitude towards the regulation of these aspects, namely if he/she has major comments regarding the corruption risks of these regulations or not. The detailed analysis of each case of objection towards the aspects of administrative authority's activity is reserved for section 12 of the corruption proofing expertise report. In this section, the expert can articulate broader objections that cannot be expressed in article by article detailed analysis from section 12.

**12. Detailed analysis of the corruption risks contained in the draft's provisions.**

For the benefit and ease of the corruption proofing expertise report's users, this section organizes all the comments and objections in a table.

| No | Article of the draft | Text of the draft | Expert's Objection | Corruption Risk | Recommendation |
|---|---|---|---|---|---|
| 1) | 2) | 3) | 4) | 5) | 6) |

On each line of the table, the expert should indicate (from left to right): 1) the number of order of his/her objections included in the detailed analysis, 2) the number of the article, paragraph and point to which he/she objects, 3) excerpt from the text of the relevant provision to which he/she objects, underlining the problematic parts, 4) explanation of the expert's objection and why this raises a corruption risk, 5) indication of the concrete corruption risk(s) from the list (see Annex 1) or of a new corruption risk, 6) expert's recommendation on how to remedy the risk, i.e. completing, replacing, altering or removing the text of the draft.

This section of the corruption proofing expertise report is mandatory only when the expert has objections to concrete provisions of the draft. However, if he/she did not find any corruption risks in it or if he/she disagrees with the entire draft and does not see any chances to improve it, this section of the corruption proofing expertise report should be skipped. All the other general considerations will be expressed by the expert in the previous sections of the corruption proofing expertise report.

### *IV. Conclusion*

In this part of the corruption proofing expertise report the expert should summarize all the major problems of the draft: related to the general evaluation, explanatory memorandum reasoning and financial implications, promotion of interests or infliction of damages contrary to the public interest, contradictions with other laws, defective language of the draft, problems related to the regulation of the public authorities, mention the most frequent or most problematic corruption risks encountered in the draft. In the end, the expert should state his/her main recommendations and summarize whether the draft can be promoted in the proposed version or whether it is needed to improve it and what are the general stakes of not improving it. The conclusion should be concise and not exceed two or three paragraphs.

## E. Corruption risks

To recognize the corruption risks in draft legislation, these have been divided into seven categories counting a total of possible 36 risks. These categories are:

I. Coherence of the draft and its interaction with other legislation
II. Manner of exercising public authority duties
III. Public interest and manner of exercising rights and obligations
IV. Transparency and access to information
V. Accountability and responsibility
VI. Control mechanisms
VII. Language

Bellow is an explanation of all the corruption risks included in these categories, referring to the relevant parts of the Manual, the use of which may prevent such risks in draft legislation.

### *I. Coherence of the draft and its interaction with other legislation*

#### 1. Faulty reference provisions

Both external and internal reference provisions are considered faulty when it is hard or impossible to identify the other provisions they refer to or when these refer to inexistent legislation. Identification of faulty reference provisions is easy when the following expressions are used: "in compliance with the legislation in force", „under the law", „in the prescribed manner", „according to the legal provisions" etc. The danger posed by this risk is that the public servant may apply different pieces of other legislation or parts of the draft and may abuse this discretion when the reference is unclear.

For correct use of reference provisions in the drafts, please refer to the Manual section 3.5.

#### 2. Faulty delegation provisions

These are provisions of the draft that grant to another authority an unjustified competence to establish independently binding rules, regulations, bans and exceptions. Delegation of regulatory competences is unjustified and dangerous when:

- given to the same authority that will enforce, control and/or punish for failure to observe rules it shall set based on the delegation provision, and;
- given to an authority that still does not exist, generating uncertainty in the social relationships regulated by the draft until that authority is created;
- the law sets "half rules", delegating the regulation of the other half to another authority, usually the one that is expected to enforce it. A similar situation is when the law sets the rule and delegates another authority to establish either all or more exceptions from it;
- such competences are contrary to the status of the delegated authority or are given by another / higher law to the legislator.

Faulty delegation provisions generate other risks: enlargement of discretionary powers, random establishment of deadlines for service provision, excessive requirements for exercise

of some rights, etc. Identification of this risk is possible when the following expressions are used: „following the rules/procedure/term set by the Ministry/another authority", „according to the conditions established by…", „under the conditions established in its Regulations", „other exceptions/conditions/acts, established by…", etc.

For correct use of delegation provisions in the drafts, please refer to the Manual sections 1.4 and 3.3.7.

**3. Concurrent provisions**

These are provisions creating a legal conflict. The conflict can appear between the provisions of the draft (internal conflict) and between the provisions of the draft and of other laws, national or international (external conflict). External conflict of legal provisions can appear between legal acts of the same legal power (i.e. between two organic laws), between acts of different level, between codes and other legislative acts.

The legal conflict hinders the correct enforcement of laws and creates preconditions for public servants to enforce the "convenient" provision in a particular situation, as they have the discretion to make an abusive choice of the applicable provision.

To avoid concurrent provisions, Manual sections 3.3.9 and 3.3.10 are helpful.

**4. Gaps**

These are the legislator's omissions in regulating aspects of social relationships, which emerge from objective reality or other provisions of the same draft.

The legislative gaps are also called "legislative voids". The danger of this corruption risk lies in the incertitude it generates in the social relationships, especially those referring to rights' enforcement mechanisms, fulfillment of obligations, ambiguity of public servants' duties and administrative proceedings they are responsible for etc., situations when the authorities responsible for the enforcement of the respective law can use of this deficiency to commit abuses.

## *II. Manner of exercising public authority duties*

**5. Extensive regulatory powers**

These are the duties that endow a public authority with the rights to legal regulation in areas exceeding their competences. Regulatory powers are considered excessive, if the area of the executive authority's legal intervention coincides with the legislator's area of intervention. The executive branch has the task to adopt legal acts aimed at enforcing the law and not at completing it.

Usually, the extensive regulatory powers as a corruption risk can be found in draft laws developed by the Government, which allows the authority responsible for the enforcement of this law (immediate author of the draft) to establish convenient rules for itself. Extensive regulatory powers are frequently found in non-exhaustive listing of rights and duties of the public authorities, of procedural aspects etc., the provision containing in the end a derogation

providing for the establishment of exceptions other than those envisaged in the law, other rights, obligations, and procedural aspects through departmental acts.

To avoid this corruption risk, please refer to Manual section 3.3.7.

**6. Excessive duties or duties contrary to the status of the public authority**

These are powers which exceed the competences or contradict the status of the public authority that is assigned these powers.

The identification of this element is possible by checking the framework-laws regulating the fields in which the executive public authority is working, as well as the act determining its status and main duties.

**7. Duties set up in a manner that allows waivers and abusive interpretations**

These are powers of the public authorities which are formulated ambiguously, determining the possibility of interpreting them differently in different situations, including interpreting them in the preferred version or derogating from them. The unclear formulation of the powers of the public authority generates the possibility for an official to choose the most convenient interpretation of his/her powers, without considering other legitimate interests and the spirit of law, that he/she shall comply with in performance of his/her duties.

**8. Parallel duties**

These are duties of a public authority that are established in the draft, while other similar or identical duties of other public authorities are regulated in the same draft or in other legislation.

Parallel duties create give rise to competence conflicts between the authorities vested with parallel duties or create the risk for both responsible authorities to decline their competence.

Parallel duties also appear in the situations when the adoption of certain decisions is assigned to two or several public authorities (joint decisions). The level of this risk increases when provisions allow overlapping competences of public servants within the same authority or from distinct public authorities, or when several officials are in charge of the same decision or action.

**9. Regulating an obligation of the public authority by using discretionary formula as "may", "has the right", "can", "is entitled" etc.**

These formulas amount to corruption risk only when formulate as a right what is intended to be an obligation/duty of the public authority or servant.

The danger of this risk lies in the officials' discretion that appears when using such discretionary descriptions of their competences, which should be established in an imperative manner. This discretion can be used by the officials in an abusive way, so as to avoid performing exactly his/her legal obligations due to the discretionary character of regulation of his /her competences.

The danger of this corruption risk further increases when there are no criteria to identify under what circumstances the official “has the right” or “can” and in what circumstances he/she has not the right and cannot perform the duties.

For appropriate use of modal verbs, please refer to Manual section 3.4.20.

### 10. Exercising duties of setting up rules, controlling their implementation and applying sanctions

This is the empowerment of an executive authority with competences to establish rules, to verify their observance and to punish the legal subjects for violation of these rules.

The corruption danger of this element has two sides. On one side, the authority / public servant may abusively promote or damage, with corrupt intentions, the interests of some persons held to apply the rules imposed by this authority. On the other side, the persons bound to comply with the rules set by the authority, can feel easily tempted to corrupt the representatives of this authority in order to avoid control or sanctioning, as all the competences are cumulated by the same authority of the public administration.

### 11. Non-exhaustive, ambiguous or subjective grounds for a public authority to refuse to act

This is the partial establishment of cases when an authority can refuse to carry out certain actions, to execute certain obligations.

Usually, the list of grounds for the refusal to carry out certain actions by an authority is left open either by using reference provisions to an unspecified legislation or delegation provisions which establish that the list of grounds for refusal is to be completed by an internal administrative act of the public authority.

### 12. Lack/ambiguity of administrative proceedings

This is either absent or confusing regulation of the administrative procedures managed by public authorities. When the administrative procedures are regulated insufficiently or ambiguously, there arises a dangerous discretion of the responsible official to develop procedural rules which are convenient to his/her own interests, contrary to the public interest.

Lack/ambiguity of administrative procedures appears whenever the text of the draft mentions or implies the existence of a mechanism / procedure, but:

- fails to develop them;
- uses vague reference provisions to unclear legislations that would regulate such procedures;
- uses delegation provisions to transmit the task of regulating the administrative procedure or a part of it to the directly responsible authority;
- uses ambiguous linguistic formulations to describe them;
- establishes discretions of the public officials regarding various aspects of the procedure, without determining criteria for using such discretions by public servants.

An example of how to set up clear administrative procedures is the procedure of entry into force of the draft, which is described in Manual section 3.3.12

### 13. Lack of specific terms

This is either absent or confusing regulation of administrative terms. Concrete administrative terms are lacking when these are not set, are not clearly articulated or are determined based on confusing or ambiguous criteria.

The lack of concrete terms always leaves room for abusive interpretations on the behalf of the public officials. Thus, there arises the excessive discretion of the public official to assess and determine in each case separately which terms are convenient, both for his own actions, as well as for the actions of other subjects of law to whom these terms are applicable.

An example of how to set up clear administrative terms in case of entry into force of the draft, is described in Manual section 3.3.12

### 14. Unjustified terms

These are administrative terms which are too long or too short, which makes difficult the exercise of rights and interests, both public and private.

The terms are considered to be too long, when the actions that should be undertaken within these timeframes are very simple and do not require much time. At the same time, the pursued interest may be of a cannot-wait nature. When the law gives the right to the public authority to take measures inside terms which are too long, the interested persons are tempted to motivate through corrupt means urging the taking of the respective measures by the responsible public officials.

The terms are considered too short when the actions to be fulfilled are too complicated and require longer time in order to be fulfilled than the term set by the draft. Establishment of too short terms for the public authorities lead inevitably to the violation of the terms, while such terms set for natural persons and legal entities – to unjustified complication of their possibilities of making use of their rights and pursuing their legitimate interests.

An example of how to set up justified administrative terms in case of entry into force of the draft, is described in Manual section 3.3.12

### 15. Failure to identify the responsible public authority/subject the provision refers to

This is the legislator’s omission to expressly indicate the public authority stipulated in the legal provision, even when the authority is identifiable from the draft context.

The danger of this corruption risk is similar to the establishment of parallel duties and could generate conflicts between the public authorities that simultaneously are assumed to fall under the incidence of the provision (especially when it provides rights and empowerments), or declining by the authorities the competences conferred through law (in case of obligations, responsibilities and tasks). This makes it difficult for the individuals and legal entities to exercise their legitimate rights and interests.

The failure to identify the public authority the provision refers to can be identified together with the element of lack/ambiguity of administrative proceedings.

This risk will not occur if the prescriptions of Manual section 3.3.5 are followed.

### *III. Public interest and manner of exercising rights and obligations*

#### 16. Exaggerated costs for provision's enforcement as compared to the public benefit

These are the financial and other expenditures, public or private, needed for the implementation of the provision, the amount of which is higher if compared to the advantages obtained by the society or individuals as a result of this provision's enforcement.

The danger of this corruption risk lies in the waste of public or private means for low value benefits, advantages and interests. In case when the exaggerated costs are incurred by the private subjects, they are tempted to elude legal requirements, resorting to "cheaper" corrupt methods. On the other hand, when these expenditures are to be incurred from public means, the authorities empowered with the implementation of the respective provision can commit abuses or, on the contrary, they turn out to be in the situation when the enforcement of the provision becomes impossible because of the lack of resources.

For planning of balanced costs of the draft, please refer to Manual section 1.5.4.

#### 17. Promotion of interests contrary to the public interest

This is advancing individual or group interests, to the detriment of the general interest of society acknowledged by the State in order to ensure its welfare and development.

The danger of this corruption risk resides in the fact that the drafter is using legislation to satisfy one's individual and group interests, despite of and to the detriment of other legal interests. Usually, the promotion of interests represents an abusive favoring of individuals and legal entities to achieve interests and benefits. The reasons for supporting these interests can vary. For instance, support is offered on the basis of subjective reasons, such as kinship, friendship or another kind of affinity with the person responsible of the development of the draft law. Support can be offered for certain political benefits, aimed at influencing for example, a special category of electorate.

Oftentimes, this risk can be treated as a modality to discriminate all the other legal subjects in a similar legal situation, but that cannot benefit from the positive effects of law provisions serving the interests of favored individual or group (for example: promotion of drafts of waiver from the general law, in order to exempt specific economic units from the payment of fees; promotion of drafts of forgiving the debts or to remove from the State's exclusive public area an asset that is the of interest for certain companies).

#### 18. Infringement of interests contrary to the public interest

This is damaging individual or group interests, to the detriment of the general interest of society, acknowledged by the State, in order to ensure its welfare and development.

The danger of this risk resides in permanent or temporary infringement of interests of certain individuals or groups, while this sacrifice does not contribute to the attainment of a general, common interest.

Usually, this corruption risk is identified together with abusive promotion of group and individual interests, establishment of excessive requirements for exercise of rights and unjustified limitation of human rights.

### 19. Excessive requirements for exercise of rights/obligations

These are exaggerated requirements towards persons who make use of their rights within an administrative procedure and/or before an administrative authority. The corruption risk of this element is determined by the fact that when the person finds it too difficult to observe the set requirements, he/she is tempted to employ corrupt methods of ensuring the use of hisher rights.

The requirements for the exercise of rights / performance of obligations of individuals are considered excessive when there are too many requirements, complicated or difficult to carry out in relation to the nature of right / obligation that is required to be performed or when the burden of these requirements is exaggerated in relation to the counter-performance of the public authority (such as the establishment of too high fees).

The requirements are considered to be excessive also when their list isn't complete and leaves to the public servant's discretion to establish other requirements for individuals to be able to exercise of their rights / perform their obligations.

### 20. Unjustified limitation of human rights

This is a restriction imposed by the draft on opportunities to peacefully enjoy individual rights and liberties, established in the domestic and international legislation.

The danger of this risk lies in legislative undermining of guarantees for the exercise of the rights set in the Constitution of the Republic of Albania, special laws and international tools in the area of human rights' protection, when acceptable grounds for the limitation of these rights, are lacking. According to the European Convention of Human Rights and Fundamental Freedoms, the exercise of certain right can be limited in a democratic society when this is necessary for the national security, public safety, economic welfare of the country, maintenance of public order and prevention of criminal deeds, protection of health or ethics, as well as the protection of other people's rights and freedoms.

Usually, this risk is identified together with the failure of draft law provisions to comply with the national and international legislation, excessive requirements for the exercise of excessive rights/obligations and infringement of interests contrary to the public interest.

### 21. Discriminatory provisions

These are provisions creating a certain situation to the advantage or disadvantage of one subject or of a category of subjects, based on sex, age, property type and other criteria.

Provisions are deemed as discriminatory in two cases. A case is when other individuals/entities from the same category or from other categories, with similar merits, are not created similar advantages. The second case is when the subjects for which the draft worsens their situation, and who present similar characteristics with other individuals/entities, are alone treated so by the draft. Frequent examples can be found in amnesty and tax exemptions laws.

The danger of this risk is that is generates feelings of unfairness in the society and throws shadow on the credibility and impartiality of politicians. For these reasons too, following the prescriptions of sections 3.4.13 and 3.4.14 of the Manual is useful.

### 22. Provisions establishing unjustified exceptions and waivers

These are the provisions-exceptions from the set rule, in absence of justified reasons for the need to introduce exceptions.

The provisions establishing unjustified waivers are kind of „legislative gates", that the public servants „can enter" to deny the legitimate requests and claims of citizens. Usually, the danger of this corruption risk lies in the unjustified discretion of the official or public authority to decide on the application of waiver, determining thus private subjects to motivate the respective official through corruption methods in order to avoid the application of the exception, which influences the term, method or even the possibility to exercise his/her legitimate right or interest.

Oftentimes, the provisions that establish unjustified waivers appear in combination with the reference provisions (for example: „except for the cases provided for in the legislation in force") or with delegation provisions (for example: „except for the cases stipulated in the Regulations of the responsible public authority").

### 23. Unfeasible provisions

These are the provisions that, by virtue of specific circumstances of the regulated area, cannot be enforced, as they do not correspond to the social reality and relations.

Unfeasible provisions have the same effect as the "false promises". The danger of this corruption risk lies in the incertitude of the social relationships, especially those referring to law enforcement mechanisms, situations when the authorities responsible for the enforcement of the respective law can make use of this deficiency to commit abuses.

To avoid unfeasible provisions, Manual section 3.3.6 is useful.

## *IV. Transparency and access to information*

### 24. Lack/insufficiency of access to information of public interest

This is the absent or insufficient regulation of the person's possibility to get know or to be informed about data, facts, circumstances of personal or general interest and which normally should be accessible without undertaking special efforts.

The presence of this risk in draft laws means lack of mechanism for offering information of public interest to interested people. Even if this information is of interest to the society it cannot be provided by the authorities because the legislation does not clearly set the obligation to provide it. The consequence of such provisions is maintained "obscurity" over the information that regards or can interest a person or the general public. Thus, the subject interested in finding out information will treat mistrustfully and suspiciously the public authority because it is allegedly "hiding something". Further, he/she might consider that the public servants of the authority could use the information they have access for private aims, contrary to the public interest. On the other hand, the person interested in information can try to employ corrupt means to find out the respective information.

This risk is oftentimes detected together with the risk of ambiguous formulation that allows abusive interpretations and lack/ambiguity of administrative proceedings.

**25. Lack/insufficiency of transparency in functioning of public authorities**

Lack/insufficiency of transparency in functioning of public authorities is a deficiency of the draft threatening the transparency of public authority's functioning, its activity following to be performed in an obscure framework.

Lack / insufficiency of transparency of the public authority's functioning are identified in case of lack or inadequacy of:

- provisions and procedures of ensuring the access of the general public to information regarding the implementation of the draft, submission of thematic, periodical reports;
- provisions on reporting on the results of the public authority's activity and results before the society;
- provisions ensuring the informational transparency of the public authorities by using informational technologies (web pages and resources, their reduced quality, open databases, interactive forms for the citizens and legal entities to address to the public authority etc.)

**26. Lack/insufficiency of the access to information on the legal act**

This is the regulation of some aspects of legislative interest by regulatory acts of the executive authorities which are not made public. This element is identified in case of:

- the provisions and procedures for ensuring the information of people on the rights and obligations they have;
- the provisions for ensuring the access of people to the information needed to exercise the rights and obligations they have.

Oftentimes the lack/insufficiency of access to information on legal act is identified in parallel with delegation provisions.

## *V. Accountability and responsibility*

To avoid corruption risks from this category, please refer to Manual section 3.3.8.

**27. Lack of clear accountability of public authorities for the violation of draft provisions**

This is the omission or ambiguity in regulating the responsibility that a public authority or its officials shall bear for the violation of draft provisions. This deficiency consists in the fact that the provisions referring to the liability of public authorities and officials are merely declarative and lead to impossibility of enforcing them and therefore to the insufficient accountability of public servants for the failure to observe the draft's provisions.

Oftentimes, the accountability of authorities/officials is stipulated in reference provisions, without even specifying the area of legislation.

**28. Lack of clear and proportionate sanctions for the violation of draft provisions**

This is the omission of establishing sanctions for violation of legal provisions, the ambiguity of sanctions for violations or establishment of too severe or too mild sanctions for the committed infringements.

When clear sanctions are lacking or when insignificant sanctions for the violation of draft provisions are set, the risk that emerges is that violators of the draft will realize their impunity for abuses committed while enforcing the law. On the other hand, if the sanctions for the violation of legal provisions are unclear or disproportionate, the exaggerated discretion of authority applying these sanctions appears.

**29. Mismatch between the violation and sanction**

This is establishment of sanctions inappropriate to the danger of the committed violations.

The mismatch between violation and sanction is manifested either through establishment of some punishments that are too mild against the regulated violations or through establishment of too severe punishments in case of minor violations.

The danger of this corruption risk usually consists in imposing sanctions which are too harsh, leading to inequity of punished subjects, who, being aware of the punishment, can try to employ corrupt methods in order to avoid sanctioning.

**30. Confusion/duplication of types of legal liability for the same violation**

This means establishment of liability for violations that have already been regulated elsewhere and established other types of liability or concomitant establishment of several types of liability for the same violation.

Confusion/duplication of types of legal liability for the same violation determines corruption risks because it gives too large discretions to the finding and sanctioning authority to decide on the type of liability or even on whether to bring apply both types of liability, while the violator is tempted to resort to corrupt methods to influence this decision.

**31. Non-exhaustive grounds for liability**

These are grounds for liability that are ambiguously formulated or their list is left open, so that they allow various interpretations of the cases when the liability comes up.

The danger posed by this risk is the too large discretion of the authority that would make the determination of the ground for liability, discretion that the authority can use in order to make the liable individual/entity understand that it is possible to interpret the ambiguous and/or non-exhaustive provision to his/her detriment. Under these circumstances, the person will look for corrupt methods to stimulate the public servant to interpret favorably the legal provision. Nevertheless, if the authority will not "make the person aware" of its broad discretion to interpret the draft's provisions, the unclear grounds for holding liable can serve itself as an indicator of the possibility to settle the respective issue is a "private agreement".

## *VI. Control mechanisms*

### 32. Lack/insufficiency of supervision and control mechanisms (hierarchic, internal, public)

This is the omission or inefficiency of the regulations related to oversight and control over the activity of the public authorities in the areas in which personal interests of the public officials to commit abuses are a consideration or in areas of increased interest for the citizens.

While assessing the control mechanisms, consideration should be given to provisions regarding the internal and hierarchic superior controls, reporting provisions. Also, procedures of ensuring the public control in the field are important.

This risk is frequently encountered when:

- no clear procedures of control on the implementation of the draft's provisions were provided;
- the restrictions and/or interdictions for the public official get involved in patrimonial and/or financial relations are inexistent or inefficient;
- possibilities of conducting parliamentary, judicial or administrative controls is lacking;
- provisions regarding public control, through petitioning, complaining, civil society organizations' oversight etc. are lacking.

### 33. Lack/insufficiency of mechanisms to challenge decisions and actions of public authorities

This is the omission or inappropriate character of internal or judicial procedures to challenge the public authorities' decisions and actions, as well as of the representatives of these authorities.

The danger of this risk lies in the absolute and indisputable discretion of the public authority to address a certain issue of private or public interest, without the possibility for the interested persons to subject the authorities' actions to control.

This corruption risk can be identified together with other risks, such as concurrent provisions, legislative gaps, ambiguity of administrative proceedings, lack/insufficiency of the access to data of public interest and unjustified limitation of human rights.

### *VII. Language*

To avoid corruption risks from this category, please refer to Manual section 3.4.

#### 34. Ambiguous expression that allows abusive interpretation

This is the expression from the draft that is unclear or equivocal and thus allows abusive interpretations.

Linguistic expressions become corruption risks to the extent to which they provide opportunities to apply the provision in the preferred interpretation, depending on the interest of the people in charge of implementation and control.

The text of drafts must meet the technical, legal and linguistic requirements, the requirements established in Manual sections 3.1, 3.4.1, 3.4.6, 3.4.12.

#### 35. Use of different terms for same phenomenon or use of the same term for distinct phenomena

This is the inconsistent or incoherent use of notions in the draft's text by employing synonyms to refer to the same phenomenon and/or by employing the same notion in order to refer to distinct phenomena.

The danger posed by this risk resides in the fact that upon application, the inconsistently used terminology may elicit vicious practices of interpretation of the meaning of the provision, namely:

- treating as distinct phenomena the same phenomenon, as it was called differently in the law; and
- treating as distinct phenomena the same phenomenon, as the law produced a confusion of two different terms in the text of the regulation.

Such faulty provisions may lead to abuses on the behalf of the representatives of both, the public and the private sectors.

To avoid this risk, Manual sections 3.4, 3.4.2 are useful.

#### 36. New terms which are not defined in the legislation or the draft

This is the use of terms which are not acknowledged in the legislation, which are not clearly explained in the text of the draft and which lack broad common understanding that would confer to these terms single and uniform meaning.

The danger of this risk is posed by the appearance of diverse practices of interpretation of these terms, practices which can also be abusive, especially when they imply the application of the provisions containing such terms by the public authorities. Nevertheless, it has to be stated that such defective formulations may be equally used by private individuals/entities in order to advance illegitimate interests.

The proper use of new terms is presented in Manual sections 3.3.4, 3.4.2-3.4.5.

## Annex 1: Checklist of common corruption risks in draft legislation

### I. Coherence of the draft and its interaction with other legislation

1. Faulty reference provisions
2. Faulty delegation provisions
3. Concurrent provisions
4. Gaps

### II. Manner of exercising public authority duties

5. Extensive regulatory powers
6. Excessive duties or duties contrary to the status of the public authority
7. Duties set up in a manner that allows waivers and abusive interpretations
8. Parallel duties
9. Regulating an obligation of the public authority by using discretionary formula as "may", "has the right", "can", "is entitled" etc.
10. Exercising duties of setting up rules, controlling their implementation and applying sanctions
11. Non-exhaustive, ambiguous or subjective grounds for a public authority to refuse to act
12. Lack/ambiguity of administrative proceedings
13. Lack of specific terms
14. Unjustified terms
15. Failure to identify the responsible public authority/subject the provision refers to

### III. Public interest and manner of exercising rights and obligations

16. Exaggerated costs for provision's enforcement as compared to the public benefit
17. Promotion of interests contrary to the public interest
18. Infringement of interests contrary to the public interest
19. Excessive requirements for exercise of rights/obligations
20. Unjustified limitation of human rights
21. Discriminatory provisions
22. Provisions establishing unjustified exceptions and waivers
23. Unfeasible provisions

### IV. Transparency and access to information

24. Lack/insufficiency of access to information of public interest
25. Lack/insufficiency of transparency in functioning of public authorities
26. Lack/insufficiency of the access to information on the legal act

### V. Accountability and responsibility

27. Lack of clear accountability of public authorities for the violation of draft provisions
28. Lack of clear and proportionate sanctions for the violation of draft provisions
29. Mismatch between the violation and sanction
30. Confusion/duplication of types of legal liability for the same violation
31. Non-exhaustive grounds for liability

### VI. Control mechanisms

32. Lack/insufficiency of supervision and control mechanisms (hierarchic, internal, public)
33. Lack/insufficiency of mechanisms to challenge decisions and actions of public authorities

**VII. Language**

34. Ambiguous expression that allows abusive interpretation
35. Use of different terms for same phenomenon or use of the same term for distinct phenomena
36. New terms which are not defined in the legislation or the draft

## Annex 2: Standard structure of corruption proofing expertise report

**CORRUPTION PROOFING EXPERT REPORT**
**on the draft**
[name of the draft]

**General Evaluation**

**1.** Author of the draft

**2.** Category of the act

**3.** Goal of the act

**Justification of the Draft**

**4.** Explanatory Memoranda accompanying the draft

**5.** Sufficiency of the reasoning contained in the Explanatory Memoranda

**6.** Financial-economic justification

**Substantive Evaluation of Corruptibility**

**7.** Establishing and promotion of interests/benefits contrary to the public interest

**8.** Damages contrary to the public interest which might be inflicted through the enforcement of the act

**9.** Compatibility of the draft with the provisions of the national legislation

**10.** Linguistic formulation of the draft

**11.** Regulation of the activity of the public authorities

**12.** Detailed analysis of the corruption risks contained in the draft's provisions

| No | Article of the draft | Text of the draft | Expert's Objection | Corruption Risk | Recommendation |
|---|---|---|---|---|---|
| | | | | | |

**Conclusions**

## References

Developing this Methodology, the following sources have been used:


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