



Crime Problems Department  
Directorate General I –Legal Affairs  
25 November 2004

Programme against Corruption and Organised Crime in South-eastern Europe (PACO)  
Implementation of Anti-corruption Plans in South-east Europe (Impact)

**Expert Opinion**  
**on the**  
**The Prevention of Conflicts of Interest**  
**In the Exercise of Public Functions**

*By:*  
*Ms Vera Devine, Belgium*

## Table of Content

<b>1</b>	<b>INTRODUCTION.....</b>	<b>3</b>
<b>1.1</b>	<b>GENERAL COMMENTS.....</b>	<b>3</b>
	a) Relationship of the draft law to existing legislation.....	3
	b) Scope of law .....	3
	c) Exemptions .....	3
	d) Feasibility of one single law .....	4
	e) Definitions .....	4
	f) Enforcement .....	4
	g) Prevention.....	5
<b>2</b>	<b>DETAILED COMMENTS .....</b>	<b>5</b>
<b>2.1</b>	<b>CHAPTER 1 GENERAL PROVISIONS.....</b>	<b>5</b>
	Article 1 Purpose of the Law .....	5
	Article 3 Definitions .....	5
	Article 4 Field of Implementation.....	6
	Article 5 Personal Interests .....	6
	Article 6 Principles of the Activity of a Public Official.....	6
	Article 7 Actions and Conduct Prohibited for a Public Official .....	6
	Article 8 Conduct of a Public Official in Conflict of Interest Situations .....	6
<b>2.2</b>	<b>CHAPTER 2 INCOMPATIBILITIES .....</b>	<b>7</b>
	Article 9 General.....	7
	Article 12 Incompatibilities for Those Elected to Executive Functions at the Local Level.....	7
	Article 13 Incompatibilities for Those Elected to Executive Functions at the Local Level.....	7
<b>2.3</b>	<b>CHAPTER 3 PROCEDURES AND MEANS FOR THE IDENTIFICATION OF CONFLICTS OF INTEREST.....</b>	<b>7</b>
	Articles 17 and 18 .....	7
	Article 22 .....	7
	Article 23 Periodic Declaration.....	7
	Article 28 Restrictions on Obtaining Income.....	8
	Article 29 Participation in Commercial Companies .....	8
	Article 30 Gifts .....	8
	Article 31 Notification of Influence on Impartiality .....	8
	Article 32 Ways of Administering and Solving Conflicts of Interest .....	9
	Article 33 Protection and/or Compensation for Giving Information .....	9
	Article 34 Authorities Responsible for the Administration of Conflict of Interest Situations ..	9
	Article 35 Competencies of the High Inspectorate for the Declaration and Audit of Assets ....	9
	Article 37 Sanctions for the Violations of the Legal Provisions about Conflicts of Interest ....	9
	Article 38 Competencies for Punishment .....	10

**For any additional information please contact:**

Council of Europe, Crime Problems Department  
Directorate General I – Legal Affairs  
67075 Strasbourg CEDEX, France  
Tel +33-3-8841-2354  
Fax +33-3-8841-3955  
e-mail ardita.abdiu@coe.int

**The views expressed in this technical paper are solely those of the experts' one and do not necessarily reflect official positions of the Council of Europe**

## 1 INTRODUCTION

### 1.1 GENERAL COMMENTS

#### ***a) Relationship of the draft law to existing legislation***

The main concern with this draft law is its relation to laws and legal acts already in place. In the background documentation provided by the Albanian Anti-Corruption Unit<sup>1</sup> refers 31 laws and sub-legal acts containing provisions which deal with Conflict of Interest in one way or another.

While the drafters will have had the existing legislation in mind, and while concerns regarding incoherencies and gaps in the existing legislation will have led the drafting process, the text itself is not sufficiently clear on its rationale and objectives. In other words: What is this law going to achieve that can not be achieved through existing laws and legal provisions, even when this would mean addressing incoherencies in and thus improving existing legislation?

If a decision in principle has been taken on adoption of a Conflict of Interest law, then the text needs to make clearer its references to the respective existing legal provisions, explain the relation between this law and the existing laws and clearly point out the gaps it is aiming to fill.

This should be done not least with the law's target group in mind. While the draft law does state the important principle that the prime responsibility for the avoidance of Conflict of Interest lies with the public official him/herself, there also needs to be an acknowledgment of the fact that public officials should be provided with a clear and coherent legal framework and clear guidance on what provisions apply to them. The current draft law should be improved in this respect. This would include a clarification of the hierarchical order of the law in relation to existing legislation.

#### ***b) Scope of law***

The law aims to address the totality of public officials (while there is not even a uniformly accepted and applied definition of who a 'public official' is). There must be a re-consideration of whether or not it is a good idea to try to capture a vast range of different offices – in the draft law spanning from civil servant to the Prime Minister - with very different interests/rationales. There is a case again for reviewing existing legislation and making a distinction at least between professional categories (i.e. civil servants, police etc.) and elected or appointed officials. It appears that one law for all groups will not be able to capture the different circumstances of Conflict of Interest arising for such a variety of categories without a risk of diluting the specifics of the problem and thus compromising the quality of the law.

#### ***c) Exemptions***

With regard to the previous point, there is a particular concern about certain categories of public officials being exempted from important requirements in this law, potentially making the entire law questionable.

Paragraph 1 of Article 22 of Chapter 3 (Procedures and Means for the Identification of Conflicts of Interest), which deals with Special Procedures, stipulates exemptions to the

---

<sup>1</sup> Relevant Legal Provisions on Conflict of Interests and Comments on the Legal Regulation of the Conflict of Interests, 29 September 2003

requirements for declarations of occasional (presumably: actual) Conflict of Interest for the President of the Republic, the Speaker of the Assembly, the Prime Minister, the mayors of municipalities and communes, and officials who are elected and appointed by the Assembly. There appears to be a gap in existing legislation concerning these categories of public officials; however, this gap is not being filled by this draft legislation either. There must thus be a concern over arbitrariness and double legal standards, if elected officials and political appointees are exempted from principles of transparency and accountability.

For the same reason, the earlier paragraph 1 of Article 4 of Chapter 1 (Field of Implementation), is of concern, as it appears to exempt important categories of the legislative process ('voting, approval, participation in and promulgation of normative acts') from the scope of this law. Having in mind that Albania appears to be struggling in particular with state capture, it is surprising that the proposed exemptions seem specifically to avoid installing serious safeguards against this phenomenon and fail to regulate one of the most important areas for the occurrence of actual conflict of interest.

#### ***d) Feasibility of one single law***

Even if it might mean a return to the drawing board, the drafters might reconsider what it is feasible to encode in this kind of law, and what provisions could be left to specific sub-legal acts and guiding materials for the different branches of administration and government that are in charge of managing the implementation of this law and other relevant legislation. This comment stems from the sense that while trying to be exhaustive in listing prohibitions, and specific situations, the law does not sufficiently acknowledge that Conflict of Interest is a phenomenon of a very diverse and dynamic nature. While the principles regulating its avoidance need to be legislated, no one law will capture all its dimensions definitively. There will remain a need for secondary legislation and sub-statutory acts, acknowledging the specific characteristics of the problem for the different groups of officials potentially susceptible to it. One example is the problem of private vs. political interest of elected officials. The diversity of the problem for different categories of public officials needs to be addressed with equally diverse responses and measures taken.

#### ***e) Definitions***

Clear and concise definitions are at the centerpiece of any legislation. The definitions in the draft law are unconventional and thus they do not contribute to its overall clarity. Additionally, no reference is made to definition and use of the core concepts in other legal provisions and whether the definitions in this law might replace or override inconcise or problematic definitions in other legislation.

For reasons of clarity, there would be a strong argument for applying the definitions for Conflict of Interest as developed in the OECD<sup>2</sup>, which have been widely accepted and have a proven track record of applicability.

#### ***f) Enforcement***

There is a lack of clarity about the type and the enforcement of sanctions for violations under this law across all categories of public officials. The sanctions stipulated in the draft law appear to primarily apply to civil servants, however, not to other categories of public officials. The question on who is in charge of overseeing and sanctioning elected officials

---

<sup>2</sup> See Managing Conflict of Interest in the Public Service, OECD, Paris 2003

is for example insufficiently answered. This aspect might simply be inadequately cross-referenced to existing legislation.

The institution of the High Inspectorate is mentioned as the body in charge of overseeing the procession of asset and interest declarations. Yet, there are no references to which other bodies or institutions the High Inspectorate would be cooperating with. This leaves scope for serious concerns about the enforcement of the provisions in this law.

### ***g) Prevention***

Prevention of Conflict of Interest in this law seems to be understood primarily in terms of asset declaration, categorization of gifts, incompatibilities of office etc. However, there is too little information on principles for training and guidance on Conflict of Interest for Public Officials of the different categories.

*Note:* The English translation, on the basis of which the comments were compiled, appeared at times to be ambiguous and inconsistent in the application of definitions and terminology. Some of the comments might be the result of simply misunderstanding.

## **2 DETAILED COMMENTS**

### **2.1 CHAPTER 1 GENERAL PROVISIONS**

#### ***Article 1 Purpose of the Law***

See general comments. This article would seem to need substantial re-drafting reflecting on the real objective of this law with respect to existing legislation. The absence of an accepted consistent definition of public official is problematic.

#### ***Article 3 Definitions***

This paragraph will need cross-referencing to existing legislation containing different definitions. It would need to explain how the definitions in this law relate to definitions in other legislation, whether this law aims at harmonization of diverse definitions, and if so, which definition takes precedence. Alternatively, the law could adopt all existing definitions in other legislation and sub-statutory acts, assuming these are not contradictory.

There are several problems with the definitions applied in this article<sup>3</sup>.

1. Definition of 'Conflict of Interest': what does the distinction between 'direct' or 'indirect' personal interests refer to? The use of 'unfairly' also contributes to blurring and a lack of clarity. The distinction between 'occasional' and 'continuing' is difficult to follow – it would appear that 'occasional' conflict of interest is what in OECD terms would be understood as 'actual' conflict of interest, and 'continuing' conflict of interest is what in OECD terms would be summarized as 'potential' conflict of interest. Yet, although an important category, no mention is made of 'apparent' conflict of interest, although the importance of the issue of appearances is acknowledged in the definition of 'personal interest' as well as in other provisions of the law.

---

<sup>3</sup> As mentioned before, some of these comments might be due to the quality of the translation.

2. 'The OECD guidelines might also be helpful for the definition of what constitutes a 'personal interest'. Paragraph 2a), defining 'Persons who are close', should be more specific in that it should mention also adult children, a category that might need to appear later on the issues of declaration of assets and interests.
3. Definition of Gifts': The current wording appears to be misleading (again, potentially due to the translation) with regards to the inclusion of 'interests, shares, parts of capital and positions in commercial companies' in this section. The use of 'clearly' in '...when it is clearly understood' appears to leave scope for abuse.

#### ***Article 4 Field of Implementation***

1. Paragraph unclear. How are 'acts of public decision-making that create juridical consequences in individual cases' defined? Voting and approval of normative acts are excluded, yet, they clearly are a prime area of potential conflict of interest.
2. Overall, there are a number of problems with some categories of public officials here. While civil servants are included only to the extent to which they hold management functions or authority over issues such as procurement and interface with the public, members of the police are selected according to similar criteria, i.e., 'in management functions at all levels'. Yet it would seem that the issue of conflict of interest and its turning into corruption starts in particular in the police force at much lower levels, i.e. on the level of the 'ordinary' policeman. Not all categories of civil servants have been included in this list. How would this law then apply to a civil servant that does not fall into the categories d) or g), but which have access to, for example, confidential information? The definition of 'political functionary' is unclear.
3. What is the rationale for the over 50% of state capital clause? This would appear to be an excessively high threshold.

#### ***Article 5 Personal Interests***

Paragraph 2: It is not clear why political organizations are exempted from this definition.

#### ***Article 6 Principles of the Activity of a Public Official***

There is a need to cross-reference this principle-stating section with the relevant existing legislation, Codes of Ethics and Codes of Conduct for the different categories of public official.

#### ***Article 7 Actions and Conduct Prohibited for a Public Official***

If this article is an attempt to come up with a comprehensive list of prohibited behavior, it is neither logically structured, nor exhaustive. If it is not exhaustive, the list is problematic in the first place, as it creates the impression that everything outside this list falls outside the scope of this law. The question is whether any such list can be made up. Some of the provisions appear to be touched upon too superficially and might create confusion or contradict other articles in this law. For example, does d) refer to post-employment? If so, is this already regulated elsewhere, in more detail? If not, it might rather fall under incompatibility clauses anyway (chapter 2)?

#### ***Article 8 Conduct of a Public Official in Conflict of Interest Situations***

There is a need to cross-reference these provisions with existing provisions in laws such as the Civil Service Law. While the law states the principle that responsibility lies with the public official, there should also be provisions to make sure that the official knows about his/her obligations.

## **2.2 CHAPTER 2 INCOMPATIBILITIES**

There is generally insufficient clarity over the enforcement of the incompatibility provisions for elected officials. (See also comments on Chapter 6 - Sanctions)

### ***Article 9 General***

While the article states that there are existing laws with provisions on incompatibilities, it fails to state the order of precedence.

### ***Article 12 Incompatibilities for Those Elected to Executive Functions at the Local Level***

Paragraph 1a) seems to point not to a personal conflict of interest, but to an organizational one.

### ***Article 13 Incompatibilities for Those Elected to Executive Functions at the Local Level***

Paragraph 2 – there should be cross-references like this in all other relevant places, too.

## **2.3 CHAPTER 3 PROCEDURES AND MEANS FOR THE IDENTIFICATION OF CONFLICTS OF INTEREST**

### **Section 1: Identification and Recordation of Interests in the Case of Occasional Conflicts of Interest**

On use of terminology of ‘occasional’ conflicts of interest - see comments on Article 3 paragraph 1. This section could be more logically structured, i.e., from regular (‘periodic’) declarations to ad-hoc declarations of assets and interests.

### ***Articles 17 and 18***

It is difficult to understand what these articles refer to, maybe due to the translation.

### ***Article 22***

See General Comments c).

### **Section 2: Identification and Periodic Recordation of Personal Interests**

### ***Article 23 Periodic Declaration***

Unclear wording – does ‘this law’ refer to the present draft law? If so, why is paragraph 3, in particular 3a) (‘familial’) and 3g) (‘persons who live with the public official’), of article 5 exempted from being included in this declaration? The declaration should include declarations on private interests by the spouse and adult children, and although Article 27 points out that relatives’ data will be kept confidential and will not be available to the public, this does not preclude that their interests should be part of the declaration.

The way in which the draft law proposes these declarations be made and deposited seems to point to a problem in effective managing of these declarations. While lower level officials appear to submit their declarations to their superiors, it is not immediately clear where superiors' declarations are being filed and how they are dealt with. Yet, there is reason to assume that the more senior the function, the greater the potential for Conflict of Interest. So, who is checking senior public officials? If there is a provision for this in existing legislation, then this should be cross-referenced.

It is also not clear whether the High Inspectorate is also the body in charge for processing elected officials' declarations.

Further, there is a lack of priority in verifying declarations. There would be an argument for speedier verification of the documents relative to the seniority of the official, i.e., the higher a position he or she takes, the faster the declaration should be processed. Starting from a certain level of seniority, these declarations should be open to public access. This level needs to be defined.

#### **Chapter 4: Ways of Preventing and Solving Conflicts of Interests**

##### ***Article 28 Restrictions on Obtaining Income***

Paragraphs 3 and 4 refer to 'specific' and 'particular' legal provisions – where are these to be found?

##### ***Article 29 Participation in Commercial Companies***

Paragraph 1 – 3: if the public official is obliged to transfer his shares, parts of capital etc. to another person, but is still exempted from any decision-making procedure, then it would appear that there is no need for him to transfer his shares in the first place.

##### ***Article 30 Gifts***

As in other places in this draft law, there appears to be an excessive focus on rules where a statement of principles could be in order and where the management of this issue could be dealt with through guidance to staff agency by agency. One such principle should be that even if a gift has a value of less than 10,000 lek, acceptance could lead to an apparent conflict of interest, which can be as bad in the public perception of the official's and the institution's impartiality as an actual conflict of interest.

Paragraph 8 – it is unclear in which circumstances this applies. Has the public official been forced to accept a gift, or has it been dropped at his doorstep? 8c) does not seem to fit logically into this subheading, as it would appear that the value of the gift does not matter if it was given in order to influence the performance of a public official. 8dh) is stating the obvious – the official is required to perform his duties impartially under any circumstances, gift or no gift.

How would an accumulation of gifts of less than 10,000 lek be treated according to this law?

##### ***Article 31 Notification of Influence on Impartiality***

If influence peddling is a criminal offence under the Albanian Criminal Code, it should be referred to. More correctly, the heading of this article should probably be 'Notification of Attempt to Influence Impartiality'



### ***Article 32 Ways of Administering and Solving Conflicts of Interest***

Yet again by excluding the highest public officials from crucial provisions of this law, it risks doing more damage than good. There must be serious concerns about double standards. The provisions as they stand currently leave the door wide open for state capture.

### ***Article 33 Protection and/or Compensation for Giving Information***

Given the importance of whistleblower protection mechanisms, this article is not doing justice to the issue.

Paragraph 2 is unclear (see footnote 1)

Paragraph 3 – is there a whistleblower protection act in place (if so, it should be cross-referenced), or is this a sub-statutory act that will be elaborated?

## **Chapter 5 Institutions Responsible for the Prevention of Conflicts of Interest**

### ***Article 34 Authorities Responsible for the Administration of Conflict of Interest Situations***

Paragraph 2 – which law, sub-statutory act or rules is this paragraph referring to?

### ***Article 35 Competencies of the High Inspectorate for the Declaration and Audit of Assets***

There should be additional provisions for cases of actual conflict of interest, i.e. cases of bribery or influence peddling whose punishment would be subject to the Criminal Code and should be referred by the High Inspectorate to the state prosecution for investigation.

## **Chapter 6 Sanctions**

There should be a statement of principles on sanctions - they should be dissuasive and proportional. The sanctions seem to be either

There is no guidance on sanctions in the case that the state has suffered financial damage through a decision that was taken in a conflict of interest situation. Such provisions should be included.

### ***Article 37 Sanctions for the Violations of the Legal Provisions about Conflicts of Interest***

Paragraph 1 states that 'The acts and contracts in which public officials take part under conditions of a conflict of interests are invalid.' It would appear to be unrealistic to enforce this in every case. Would this mean that, for example, large public procurement contracts with substantive and lengthy tendering procedures would need to be re-tendered under any circumstances? Or are there provisions that would put other considerations forward, such as the cost of re-tendering and the consequences suffered by the public as a result of the delay in the implementation of a project?

Paragraph 2 – At which point would the 'failure to declare personal interests' be established and could not be excused with a failure to declare it in time?

Paragraph 3 – Reference should be made – and is rightly made in paragraph 9 - to the Criminal Code, as some violations will be falling under the corruption offence. However, removal from office can not be the one solution for what in practice will be a variety of

cases and circumstances. Each individual case has to be assessed on its own merits – and dismissal will often be a disproportionately harsh sanction. It is also not clear who would be in charge of the dismissal; for example, who would dismiss an elected member of parliament?

Paragraph 4 – this seems to be a very lenient sanction. It appears to leave the official the option of never declaring incompatibilities and risking, if discovered, the relatively low fine without any further consequences. This provision seems to abandon the principle of responsibility of the public official to respect the provisions in this law. At the same time, it is not clear who would be in charge of enforcing these sanctions, in particular for elected officials.

Paragraph 5 – appears to be referring to Article 30 (concerning Gifts), not 29. Again, the sanctions seem to be disproportionately light.

Paragraph 6 - is unclear. Does this refer to Article 29, which covers Participation in Commercial Companies? If so, again, the sanctions would appear to be very light.

Paragraph 7 – unclear what this paragraph refers to. Reference is made to sanctions for a selected group of public officials, yet it is not mentioned what happens to the categories of officials not covered by that law.

### ***Article 38 Competencies for Punishment***

Paragraph 2 – apparently a typing error – reference should be to the respective paragraphs in Article 37.

Paragraph 2, 3, 4 are either unfortunately worded (or translated), or give the impression of being very arbitrary. They seem to imply that it is the prerogative of the superiors to impose the proposed sanctions. They do not indicate where these sanctions are being codified.

Paragraph 5 – Appeals procedures need considerably more thought than the issue is given here. There are strong arguments for intra-institutional, extra-court appeals procedures for public officials.

\* \* \*