



**SIGMA**

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**DRAFT LAW ON CONFLICT OF INTERESTS IN THE EXERCISE OF PUBLIC FUNCTIONS OF ALBANIA**

**COMMENTS**

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## BACKGROUND

This document sets out detailed comments on the draft law on Conflict of Interest in the Exercise of Public Functions at the request of the Council of Europe in November 2004.

The comments are based on the draft law as translated by the Anti-corruption Unit in the Albanian Ministry of State, dated 7 October 2004. The draft law was accompanied by an Explanatory Note on the draft also prepared by the Ministry. Also provided were detailed analytical comments in two documents provided by the Albanian Coalition against Corruption [ACAC].

## SUMMARY

These comments consider the proposed draft law from the point of view of policy and administrative implementability. It should be noted that the draft has been provided in translation and that at several points the translation is problematic.

In general, the stated purpose of the draft law is to “harmonize and standardize” the already numerous provisions relating to conflict of interest carried by other laws, so as to achieve two purposes: to develop an overall material law on conflict of interest “reflecting Albanian reality”, and to regularize the identified anomalies and inconsistencies and gaps in the existing legal framework.

In our view this objective is not fully achieved.

In addition, the draft law’s attempt to deal universally with all forms of “conflict of interest” and all categories of public official, including both elected and officials, and civil servants, introduces potentially serious difficulties which should be avoided. Clarity would be improved greatly, for example, by making separate statutory provision for elected officials.

Further, the scope of the draft law should be restricted to conflicts of interest – that is between officials’ duties and their personal-capacity interests. In our view, the draft law, in attempting to deal with responsibility-conflicts between various forms of public office introduces a real possibility of confusion. It is our view that, where it is considered necessary to provide specific prohibition against public officials occupying or performing the functions of more than one public office (because of incompatibilities between those functions), such a measure should be legislated separately.

It appears that the drafters of the proposed law had regard to the OECD *Guidelines on Managing Conflict of Interest*, in particular the definition and ‘general principles’ approach to conflict interest recommended by the Guidelines. In general the present draft law attempts to amalgamate the ‘general principles’ approach of the OECD *Guidelines* with the existing Albanian law, which deals with specific incompatibilities and prohibitions: this combination of drafting approaches leads to a complex draft which often lacks clarity.

On occasions, the draft also lacks policy coherence: an example of this difficulty arises in the context of sanctions for breach or failure to comply. It appears to be the case that the only sanction for willful breach of this law is to be dismissal from public office. While this may be appropriate in the case of serious or flagrant breaches, especially for senior civil servants or Ministers, for the most part this level of sanction would appear to be unnecessary, and would probably prove to be counter-productive in practice.

It is understood that this law may conflict in various ways with (for example) the disciplinary provisions of the Civil Service Law, and possibly other laws. A comparative review of all Albanian laws which may potentially be affected by the proposed law is beyond the scope of this advice, but this is an issue which should be given attention.

The draft also makes provision for administrative procedures to implement the various provisions, many of which are quite minor. It would simplify the draft considerably, and assist in the process of making procedural changes from time to time, if administrative procedures were to be contained in regulations rather than in the body of the law itself. In general, administrative procedures should be regulated by the general law (Albanian Law of 1999) wherever possible. Any special procedure representing a departure from the general provided by this law should be clearly

justified; otherwise a multiplication of potentially confusing and conflicting administrative procedures is likely to be the result.

The current draft raises issues concerning the repeal and amendment of various existing provisions in other laws which the draft law is intended to replace. The enactment of additional supporting legislation is also foreshadowed as being necessary to give effect to the proposed law. In our view it would assist clarity of interpretation and legal certainty if, at minimum, the necessary consequential amendment measures were to be included in the present draft.

The draft law represents a worthwhile attempt at consolidation and clarification of the existing complex legal position in relation to conflict of interest. The focus of the draft on prevention is appropriate. However the draft would benefit from further focusing on the key issues of conflict between public and private interests, as opposed to conflicts between various official responsibilities or duties.

It would also be advantageous, in our view, if the draft were to make clearly separate provisions for the distinct classes of public official, to whom different policy and procedural considerations apply. Alternatively the introduction of a separate law on Conflict of Interest specifically providing for elected officials should be considered.

In our view it is inappropriate and potentially misleading to attempt to regulate for conflicts of interest in relation to elected officials, who are not 'employees' of the State as civil servants are, and who are required to meet different tests of performance, accountability, and public confidence from those which apply to civil servants. The contexts in which conflicts between the official responsibilities and private interests of elected officials are likely to arise are also qualitatively different from those likely to confront civil servants and other employees of the State. While the general principle may be the same – *Conflicts of Interest should be avoided, and resolved appropriately if they arise* – the mechanisms, tests, and sanctions which are appropriate to elected officials, civil servants, and other appointed officials are very different.

In our view also, the draft's focus on administrative and procedural matters should be kept to a minimum, and as far as possible such procedural matters should be carried in regulations to the Act.

The draft law's focus on 'Incompatibility' between various forms of public office should be reduced or removed altogether, unless a particular incompatibility involves some aspect of private interest which would render it necessary to treat the matter as a true 'conflict of interest' under the definition adopted by this draft.

## **COMMENTS ON INDIVIDUAL ARTICLES**

In the following section, comments are restricted to those articles which raise more significant policy and technical issues.

### ***Article 1***

The purpose of this law is stated as 'the prevention and regulation of conflict between public and personal interests of a public official in the exercise of his functions, in order to guarantee impartial and transparent decision-making that is in the interests of the public, to increase its trust in public institutions'.

This article would be improved if it referred to "public duty and personal interests", as defined, rather than to "public and personal interests".

### ***Article 3***

Paragraph 1 refers to 'unfairly' as part of the definition of conflict of interest. It would be more appropriate to use the term 'adversely' instead.

Paragraph 2b is so broadly drafted as to include the entire world: it is not clear that this paragraph is necessary.

Paragraph 3 is drafted as an exhaustive list: this is likely to prove inadequate in practice, as new forms of gift or benefit emerge which are not covered by this list. It should be redrafted so that the specific items mentioned are listed

only as examples of the classes or kinds of thing that qualify for treatment as a gift. Further, the clause is weakened by the 'state of mind' test included in the end of the clause, not least because this test prevents the clause from being applied to third-party gifts made to or for the benefit of an official through an intermediary.

#### **Article 4**

Paragraph 1 relates to 'acts of public decision-making' other than decisions associated with passage of legislation. It is not clear what this exemption intends to achieve, and it appears to be the case that in this form the exemption would negate the effect of the law in its application to elected officials, for the major part of their public functions.

It is this attempt to provide for elected officials, whose functions are qualitatively different from those of appointed officials or career civil servants that shows the need for separate statutory provision. The same consideration in general applies to military personnel.

#### **Article 5**

The article generally provides a list of private interests for the purposes of definition: this may be a translation matter, but it appears that the list "includes" the items specified and is thus not exhaustive, while not providing a generic definition. This approach potentially weakens enforcement of the provision.

#### **Article 6**

It is not clear why this provision has been included here: as a statement of ethical or professional duty it could be more appropriately included in the civil service law for appointed and employed officials, and treated separately in specific legislation relating to elected officials, or in a code of ethics in the absence of such a law.

#### **Article 7**

See comment on article 6

#### **Article 8**

It is not clear how this clause applies to elected officials.

#### **Articles 9, 10, 11, 12**

These clauses generally contain a mixture of provisions relating to private interests and public duties which are incompatible with other public functions. Various public duties are defined here as incompatible with other public functions. It would be preferable to deal with all measures relating to elected officials of whatever kind in a separate statute, both for the sake of legal clarity and in the interests of providing appropriate sanctions for breach or failure to comply with the provision.

#### **Article 16**

The general approach taken by the article in requiring *ad hoc* declaration of conflicts of interest is appropriate. Paragraph 1 appears to be affected by translation and cross-referencing issues. Paragraph 2 refers to "designated circumstances", without clarification. This approach potentially weakens enforcement of the provision.

#### **Article 17**

It is not clear what is intended in providing individuals with a "right" or a "duty" to identify the presence of personal interests on a third party basis. This lack of detail potentially weakens enforcement of the rights and protections provided by the clause. In particular there needs to be some indication as to the relevant process for making such an identification.

#### **Article 18**

While it appears to be the policy intention that this article should provide a basis in evidence for dealing with personal interests identified from sources other than an individual's own declaration, it is not considered appropriate that information obtained from "media sources" should be treated on the same basis as information obtained from "every other lawful source", especially as the onus is on the official to disprove the allegation.

Unless this matter is provided for by another law, it is also not clear how such information may be taken into account in determining whether an offence has been committed by official who is alleged to be in breach of or failed to comply with the act.

#### **Article 19**

In general, placing a positive duty on superiors to monitor and investigate subordinates' interests is appropriate.

The drafting of this article however places a potentially impossible burden on a subordinate to disprove some kinds of allegation, for example a false media report to the effect that the official has accepted and retained a particular gift.

#### **Article 21**

Paragraph 1 restricts access to information to those matters covered by paragraphs 1 and 2 of article 5. It is not clear why this restriction has been applied, especially as it appears to have the effect of limiting public access to matters in which the public at large may have a legitimate interest.

#### **Article 23**

Paragraph 5 would be usefully clarified by specifying that newly-acquired interests, as well as interests which have been disposed of within the reporting period, are both required to be declared. If not already provided elsewhere, it would be desirable that the source of any acquired interest or asset, and the destination of any disposal, should both be declared.

#### **Article 28**

The policy intention that stands behind paragraph 1 is unclear, in particular in relation to officials who benefit from taxation advantages of the specified kind through their investment in public commercial ventures. At minimum this example would not appear to constitute a conflict of interest as defined, unless some other issues arise, for example, self-dealing in privileged official information for personal advantage.

Further it would be useful to clarify paragraphs 2, 3, and 4 by the application of a "public interest test", similar to that provided in article 10 paragraph 3.

In addition, the exemption provided in paragraph 3 for creative, teaching, scientific, educational, cultural, and sporting activities is sufficiently broad to allow conflicts of interest to arise for those elected and appointed officials whose official duties involve activities in these areas, such as grant-making and regulatory functions. This exemption should be reconsidered.

#### **Article 29**

The policy intention behind this article appears to be to create a form of "blind trust" for a class of official and their interests. In particular, under the provision as drafted it is not clear that the official concerned is required to pass complete control and secrecy of dealings to a third party, as would be required by an effective blind trust.

As drafted, this article permits the official concerned to maintain knowledge of the state and location of his interests, which would be sufficient to permit a conflict of interest to arise in relevant circumstances. This could thereby compromise public trust in the integrity of the official's decision-making or institution, contrary to one of the principal objectives of the law.

### **Article 30**

The regulation of circumstances under which officials may receive gifts in connection with their official functions is always a difficult matter. In policy terms this clause is adequate, but would benefit from clarification of a number of matters.

In particular, the scheme proposed would be improved, in our view, by a requirement to cumulate the value of any and all gifts received over 12 month period, so that where a number of gifts individually comply with the imposed limit, they may be considered as a group on the basis of the total value involved. When the total value passes the permitted limit, all such gifts should be subject to adequate regulation and control.

Setting the limit of acceptability and the value of one month's pay is increasingly regarded as too generous, and thus invites abuse. If the objectives of the act in promoting public confidence are to be advanced, it would be preferable to set the acceptable limit at a truly nominal level, such as one day's pay-equivalent.

Paragraph 8 appears to be intended to assist the investigation of corrupt offers of gifts: while the policy intention is appropriate, the clause as drafted requires reconsideration, especially in relation to the coherence and practicability of the provision. For example paragraph 8c appears to ignore the possibility that the offer of a corrupt gift might also provide a bogus receipt, falsely stating its "worth" so as to evade this provision.

### **Article 31**

While the requirement on officials to declare potentially corrupt or improper offers is appropriate in principle, the clause as drafted appears to assume that all such offers will be clearly identifiable as corrupt, or otherwise in breach of the law. In practice, such offers will often be made in ambiguous circumstances, so as to make the application of this provision uncertain. In attempting to catch "every influence or attempted influence", this clause places an impossible burden on officials, especially in cultures where attempts to influence official decision-making may take many different forms, many of which are legally or culturally approved.

### **Article 32**

The article generally follows the advice set out in the OECD guidelines. It would be improved however by a clear provision allowing the employer to direct an official to dispose of an offending personal interest, rather than merely "transfer" it, in order to resolve a specific conflict which was unacceptable for the employer.

### **Article 33**

The policy objective of the article appears to be to protect those officials who give relevant information in support of the objectives of the act, and to encourage compliance with article 17 in particular. However in our view the drafting of paragraph 2 is too narrow to achieve this objective, and should be broadened to prohibit *any* public official from taking such action, whether they work within the organisation of the person providing the information or not.

In addition, paragraph 1 is not clear as to what is intended by "well grounded information". In particular it should not be required of public officials who provide information about conflicts of interest (which in most cases will not have been declared as required) to provide proof that the conflict exists. While it is desirable to prevent abuse of this provision, it is suggested that it should be a sufficient test to require that officials providing such information should have only "an honest belief held on reasonable grounds" that a conflict exists.

The draft should also make clear that the protections afforded by this clause to persons who provide such information are permanent, and are not reduced or lost if the claim is subsequently either disproved or unable to be proved, provided that the test outlined above has been met.

### **Article 35**

It is noted that the range of competencies and functions provided for the monitoring institution does not include carrying out investigations and making decisions for the purposes set out in article 33. If these powers do not reside elsewhere, they could usefully be included here.

#### **Article 37**

While it is desirable to be able to cancel decisions made by officials which are compromised by a serious conflict of interest, the scope of paragraph 1 is so broad as to permit abuse and otherwise unintended outcomes.

For example, under paragraph 1, a major public procurement decision could be cancelled if any of the officials involved in the decision-making process was found to be subject to a conflict of interest as defined here, no matter how minor. It is necessary that this provision preserve the option for management to take action other than cancellation of a tender in order to deal with a situation where a conflict has emerged, but, although "real", the conflict has had no impact on integrity of the decision-making process.

Paragraph 3 appears to provide an absolute requirement of dismissal, no matter how minor the offence involved. This is unlikely to be effective in practice, and may undermine the overall scheme of the act.

Paragraph 4 appears to be in conflict with article 39 paragraph 4.

Paragraphs 5 and 6 appear to intend a reference to an article 30.

It is assumed that paragraph 8 will be supported by an amendment to the Criminal Code in due course.

#### **Article 38**

Paragraphs 2 and 3 appear to intend a reference to an article 37.

#### **Article 39**

Paragraph 4 refers to "potential conflicts of interest situations". Potential conflicts are not defined in the draft law.