



SIGMA

Support for Improvement in Governance and Management

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LAW ON PREVENTION OF CONFLICT OF INTERESTS IN DISCHARGE OF PUBLIC OFFICE OF SERBIA

COMMENTS

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Introduction

The comments of the law are based on the English translation, it may therefore be possible that misunderstanding and misinterpretations may occur.

Serbia is, at this point in time making a great effort to develop and adopt a new administrative legal framework in line with general European standards. The laws under discussion, including the civil service law and the law on government, the law on administration, the law on agencies, the administrative procedures law, etc., include obviously regulations on conflict of interest. This is in particular the case for the law on civil servants.

It is, generally speaking unfortunate that, often due to the international community, governments prepare legislation which overlaps or even contradicts other legislation. To a certain degree this is already now the case with regard to the existing labour legislation applicable to the public service.

As the law on conflict of interest has been adopted, it seems that it would be advisable to wait some more time before commenting on this law in order to take account of the practical experience made when implementing it. In addition, the new civil service law which in an advanced drafting stage should be taken into account, the more as the disciplinary regulations of the civil service law will most likely introduce procedures different from those foreseen in the Law on conflict of interest.

General Comments

In general, the law is a good starting point for regulating the very critical and sensitive issue of conflict of interest.

Contrary to the CoE comments we think that the law should cover even less groups of persons. This is to say that we fully agree with the fact that the judiciary should be regulated in a separate piece of legislation, but that we would also strongly support a separate regulation of conflict of interest for elected persons, e.g. members of parliament.

In particular, members of parliament as well as members of municipal councils, are elected because they stand for certain interests, finally this is the basis of politics. What is needed is actually that these interests are clarified and transparent. While it seems unacceptable for a civil servant to on the one hand advise some private sector firm and receive money for it, and on the other hand decide as administration on requests of this firm, the issue is much more complicated for a member of parliament.

In fact conflict of interest legislation should respect the democratic principle of separation of powers. The role of the legislature, the executive and the judiciary being different, this fact has to be reflected in the law.

If the law is being revised while taking account of the new administrative legal framework which is being developed, the link between this law and the criminal code should be clarified; in particular it maybe advisable to give the board explicitly the right to give cases to the prosecutor and possibly some limited investigation rights. In this context, it could be necessary to review and amend the criminal code to align it with European.

As concerns the disclosure of assets, it seems that the law may not be fully implementable for the time being, given that the property registries are not yet fully operational. It may have been better to avoid impossibilities of compliance as non-implementation of existing laws may have a more negative effect in the long run than non-regulation.

Summarising, a review and/or amendment of the law should be postponed to a later date.

Specific comments

Art. 3 If elected officials stay under this law, there could be a necessity to create something like a “second chamber” of the Board for them.

Art. 5 is unclear; it should be ensured that both the organs are informed and give their approval.

Art. 6 closed listings are usually problematic as then some issues may not be covered; as a drafting technique it could be good to have a general clause at the end: e.g. “and similar issues”

Art. 8 it could be too strict to exclude related persons from the management, if this is possible in EU countries

Art. 9 as the regulation includes public enterprises and as a civil servant can be appointed to head such an institution, I do not see a problem with this article

Art. 10 this article (para 2) seems to contradict art 8, possibly this is the translation.

Art. 12 Art 13 there could be serious implementation problems with this article

Art 14 it is unclear what property registry means in this context. In most continental EU states the property registry is with the courts (which in Serbia is still the case for Voivodina) whereas in the rest of Serbia they seemingly have to be rebuilt); does this article mean that there will be two registries? This could lead to inconsistencies

Art 18 The competencies of the board should be reviewed (in line with above and the CoE comment.)

Art 19 should there not be a representative from the parliament and from the local authorities on the Board?

Art. 25 ff. The procedures of the Republican Board seem to be in conflict with regulations of parliament (immunity) and the future civil service law as there has to be a disciplinary procedure and a court procedure. A public announcement without a disciplinary or court procedure may violate the rights of the civil servant and or the parliamentarian and could produce court cases against the board.

Publishing decision in the media may be expensive; if it has to be published in the official gazette, then there should be a special part for it as otherwise it could hamper transparency more than it would add as the official gazette should be limited to laws and general rules and regulations.

As Board decision must include the possibility to appeal, it should be clarified that they can be published only if they are not appealed. If they are appealed, they I assume that there are judgement collections. Personally, I do not see a reason why they should be published at all.

Art. 30 it is unclear what “enable public inspection” means; enable whom?

Art. 31 It does not seem right that the Republican Board only reports to the Parliament. Should it not on civil service cases also report to the government? How about cases from Voivodina and or local authorities, should they not be reported there?

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Annex: Law on Prevention of Conflict of interest in Activities of Public Officials of Latvia: some features and lessons learned

In the light of the implementation of the Law on Conflict of Interest of Serbia, this note presents some features of the law on Prevention of Conflict of Interest in Activities of Public Officials of Latvia (thereafter 'Law') and some lessons learned from its implementation in the particular context of Latvia.

The Law was adopted in April 2002 by the Latvian Parliament. The implementation is managed by the Corruption Prevention and Combating Bureau of Latvia since February 2003. The rationale behind the adoption of a dedicated Conflict of Interest Law in Latvia was primarily the need to demonstrate a strong commitment of the political leadership to step up the fight against corruption. The political will was essential to introduce the existing law but also to implement it. Before, conflict of Interest in the public service was regulated by the Corruption Prevention Act. However, the relevant provisions were considered inefficient. The law had a narrow scope and was not properly implemented. The new Law focuses on the procedures how to resolve conflict of interest and restrictions of activities and decision-making; it assigns to an existing independent institution, with special powers, the function to manage the implementation. The experience shows that the implementation and enforcement are crucial and challenging tasks to really make the difference and require continuous political will.

Some features of the Law

A broad scope: Latvia has opted for a law that applies to all public officials, including elected officials and holders of judicial office. The Law in Latvia addresses the president and deputies of the parliament down to any official with rights to issue an administrative act. The law includes civil servants, chairs of local government councils, members of councils of state owned companies, police, judges, prosecutors, etc. In addition, the Law covers those to whom the state or a local government has delegated functions as set out in the law. This allows addressing the conflict-of-interest as a general problem of the public sector as a whole.

Differentiated prohibitions and restrictions: Restrictions and prohibitions are different to different category of officials: what is restricted and prohibited to the president, members of the parliament and the government, heads of public institutions, members of local governments or to a civil servant vary. For instance, members of parliament, elected members of local governments can be affiliated with offices in public, political and religious organisations and work as teachers, scientists, doctors or perform creative work, while civil servants can not be affiliated to a public, political and religious organisations but can work as teachers, scientists, doctors or perform creative work.

Focus on positive resolution of conflict-of-interest: the Law in its articles 11 and 12 introduces restrictions and prohibitions to prepare administrative acts, supervise, control, take part in an investigation or take disciplinary sanctions or involve in contracts involving the public institution in circumstances when such action represent personal interest to public official or his relatives. Among other, the Law provides for a prohibition to issue administrative acts concerning enterprise in which an official has worked before; this restriction is valid for two years. Addressing the most common conflict-of-interest situations, these are one of the key provisions of the Law.

Focus on commitment of managers of public institutions and individual responsibility: according to the article 20, managers of state and local government institutions have the primary responsibility to insure that officials are not in conflict of interest in their respective institutions; article 21 stipulates that the individual officials should be aware of potential conflicts of interest and disclose them. This is also a key provision. However, due to a rather low level of understanding, especially among local officials, its implementation is a challenge.

Transparency of assets and income and control of their legality: the Law sets out the system of declarations of public officials in Latvia. It consists of declarations of financial, commercial and other personal interests and – a mechanism to control whether declared income and property are legally acquired. This mechanism is supported by the institution in charge of the control – the Corruption Prevention and Combating Bureau. The institution requires resources and special powers. For instance, the experience in Latvia has showed that authorities in charge of control of declarations required access to bank information. It was obtained in 2004 by amending the law on Financial Institutions and on the Corruption Prevention and Combating Bureau. Also, co-operation with other state institutions, especially the tax authorities, prosecutor's office and security police is key to success in Latvia.

Focus on monetary sanctions: The officials breaching the Law are held liable according to the existing laws. Additional sanctions that the Law introduces are monetary sanctions. They require the amount of illegal income or equal amount to the value of illegally acquired property to be returned to the state budget by the official.

Central authority: In charge of implementing the Law is the Corruption Prevention and Combating Bureau. This is one of its key tasks, part of its work in the field of prevention of corruption. In this field the Bureau is also assigned to control political party financing, control breaches in public procurement procedures and provide education and training on corruption, ethics and political financing. The Bureau's Division for Examination of Officials Declarations and Prevention, Disclosure and Verification of Cases of Conflict of Interest is in charge. This Division's functions include monitoring compliance with the Law and other restrictions provided in the legislation, through centralizing and verifying declarations, on one hand, and letters, complaints other information, on the other hand, and, if necessary, impose administrative sanctions. For instance, in first 6 month of 2004, 223 complaints were received concerning the Law; in response 131 investigations were carried out and 300 declarations verified. 35 officials were charged and sanctions were imposed in 29 cases.

Implementation and by-laws: the experience in Latvia shows that a commentary to the Law and its dissemination might have been a good starting point to insure all public officials to whom the law applies are aware of its existence and their responsibilities.

The following by-laws and decrees can be mentioned as examples:

Structure and functions of the Corruption Prevention and Combating Bureau are described in the law on the Corruption Prevention and Combating Bureau adopted by the Parliament and in a decree of the Cabinet of Ministers adopted to insure the structure and functions of the Bureau are in conformity with the Law on Public Service. More specifically the structure and functions of the Division for Examination of Officials Declarations and Prevention, Disclosure and Verification of Cases of Conflict of Interest are set out in a by-

law on functions and structures of the structural units of the Bureau, adopted by its Council;

Procedures how to fill, submit, register and centralise the declarations of public officials and the lists of public officials, adopted by the Cabinet of Ministers. This by-law includes also the form of declaration; it specifies publicly available parts. The by-law requires from heads of state and local authorities to provide lists of public officials and defines which institution is in charge of centralisation of lists;

Setting up a working group to develop a strategy to improve income control of physical persons in Latvia, a decree of the Cabinet of Ministers. The group consists of Corruption Prevention and Combating Bureau, Criminal Police, State Police Analytical and Methodological Division, Prosecutor's General Office, Foundation of Tax Payers Rights and Interests, State Income Service (tax authority), public data inspection and the Ministry of Finance.

Some lessons learned

The scope of public officials appears to be too broad. The Law does not specify vulnerable officials or categories that should be addressed as a matter of priority. Hence, it does not allow a proper control of all declarations;

For many specific breaches there is a lack of sanctions. For instance, legislation does not provide for sanctions when conflict of interest is not reported, when a manager allows an official to take a second job or when an official takes the second job but does not report the existence of a personal interest or else: for incomplete or false declarations;

A particular weakness is lack of restrictions and sanctions as regards political decision-making. The relevant parts of the Law do not apply to the adoption of decisions by the members of the government or the members of the parliament. For instance, voting a law or passing a by-law in private interest is not restricted by this law. A code of ethics of the parliamentarians is discussed as an alternative solution;

The legislation does not provide for means to approve existence of links among income and property of public officials and their relatives or partners nor does it define the starting point for calculating income. Many officials are aware of these gap and appear to transfer income and buy property on the name of their relatives and partners or declare income and property as donations and gifts of their relatives or partners who are not public officials but still subject to the law on income tax;

An efficient implementation requires combining efforts and data bases. While the implementation should be managed by a central authority, it is a matter of support of committed managers of public organisations, internal controls and work of other public institutions, such as tax authorities, land, and enterprises registers. For instance, in controlling asset declarations functions can be split among tax authorities (accuracy of data) and central authority (existence of conflict of interest);

Not all conflict of interest situations can be regulated. The central authority and managers should be ready to determine appropriate solutions and judge on ethical dilemmas what is often a challenging task in a context of lack of practice.;

Two thirds of administrative infringements were committed by local government officials. Low level of ability of public officials to identify their conflicts of interest and lack of procedures appears as the main reason. For instance, an official in a municipality can have a conflict of interest and might want to withdraw from a decision but he is often neither aware of the existence of such conflict nor has a procedure to withdraw.

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