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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Draft Law on the organisation and functioning of the Council of Ministers of the Republic of Albania

Comments by Mr Georg Nolte (Substitute Member, Germany)

I. General Comments

1. The following comments are based on the translation of the draft dated October 18, 2000, document CDL (2000) 80 rev. Parts of the translation are not easy to comprehend. This is true in particular of Art. 3 (Definitions). The following comments therefore do not refer to this article.

2. In Germany, as in many other countries, the rules concerning the organization and the working rules of the Council of Ministers (Federal Government, Bundesregierung) are not contained in parliamentary legislation but in rules of procedure which are being decided and issued by the Federal Government itself (Geschäftsordung der Bundesregierung). Although Parliament could, to a certain extent, regulate the organization and the working rules of the Federal Government, it would have to respect a „core area of autonomous decision-making of the executive" (Kernbereich exekutiver Eigenkompetenz). Thus, the Federal Government possesses a right of self-organization. This guarantee of autonomous decision-making is rooted in considerations of separation of powers but it is also justified by reasons of administrative efficiency. While the concept of separation of powers can be conceived differently by different constitutions, considerations of administrative efficiency can carry similar weight in different countries. Since the Albanian Constitution does not seem to require formal legislation for the rules of procedure of the Council of Ministers the drafters might want to consider whether so much of the procedure of the Council of Ministers should actually be regulated by formal legislation.

II. Specific comments concerning the draft law

1. **Art. 5 (Structure of the Council of Ministers):** Some flexibility with respect to the organizational structure and denomination of the ministries appears to be reasonable. Political priorities may change, there may be an interest to merge two ministries, a new task may emerge which does not fit easily within the existing structures. The German Ministry for the Environment, for instance, was created after this task was not anymore considered to be a proper part of the classical Ministry of the Interior. There may even be an interest to satisfy a certain political party by giving it not one of the ministries listed but a ministry under a new name. For these reasons, Variant I seems to be preferable. The drafters may even want to consider whether not to require that the decision to denominate the Ministries be taken by a Parliamentary Law but to leave this task to the Council of Ministers for autonomous decision-making.

2. **Art. 6 (Formation of the Council of Ministers):**

   a) It is very doubtful whether draft article 6 (2) is in conformity with Article 96 (2) of the Albanian Constitution. Art. 96 (2) does not expressly provide that the President must, when he appoints a Prime Ministers for a second time, do so „on the proposal of the party or coalition that have the majority in the Assembly". There are good reasons why Article 96 (2) should not be interpreted to implicitly contain such a requirement. The lack of a majority for the first candidate indicates that there is perhaps, as yet, no clear party or coalition of parties that has the majority in the Assembly. In such a situation it appears reasonable that the President should try to make an independent effort to find a candidate who might be approved by a majority. The proposed draft would exclude such an option.

   b) It is even more doubtful whether draft Article 6 (3) is in conformity with Article 96 (3) of the Albanian Constitution. Article 96 (3) of the Constitution appears to provide that the

initiative for a third effort to create a Prime Minister must come from the Assembly and that it is only after the Assembly has elected a candidate that the President will appoint this person to be Prime Minister. Art. 6 (3) of the draft law turns this around: it begins with the appointment and gives the President the formal right of initiative. Article 96 (3) makes more sense if, for the third and last effort to find a Prime Minister, the initiative is entirely with Parliament. The last effort before a possible dissolution should be under the responsibility of the Parliament alone.

c) In any event, the draft article as it stands does not envisage the possibility that no clear majority exists in the Assembly. Therefore the President of the Republic should have an autonomous right to propose a candidate for Prime Minister to the Assembly (as Article 96 (2) of the Constitution on proper reading provides).

d) There are no rules about the status of a Prime Minister who has been appointed by the President of the Republic but who has not (yet) been approved by the Assembly. Is it understood that he has the full powers of a Prime Minister even if the Assembly is ultimately dissolved because there is no majority for the approval of a Prime Minister?

3. Art. 8 (Competencies of the Council of Ministers):

a) para 1 (g): It is suggested to exchange the word „in its first meeting“ by „as soon as it is possible to hold a meeting“. This would clarify that the Assembly must meet at the next possible occasion.

b) para. 2 (b): It appears unusual that the Council of Ministers, as a collective body, would negotiate and sign international agreements. For sake of clarity, language should be included that the competent minister negotiates and signs treaties in the name of the Council of Ministers. This is the legislative technique which is used, for instance, in Art. 8 (3) (b). In any case, from a systematic point of view, para 2 (b) fits better under para 3 because it concerns foreign policy and not national security, defence policies and the constitutional order.

c) para 2 (c): The term „measures“ is not mentioned in Art. 3 which defines terms. Perhaps this is a problem of translation. In any case, this sentence appears too broad. A formulation such as „according to the Constitution and all applicable laws“ should be included.

d) para 4 (d): With respect to the „negotiation“ of international agreements, see comment on para 2 (b)

e) para 6 b): It is suggested to specify in greater detail which are the categories of „high political and civil functionaries in the public administration“ which the Council of Ministers may appoint or discharge. The delimitation between the „political appointees“ and those officers who are not subject to removal for political reasons is an important issue in every state under the rule of law. It appears that Article 107 (3) of the Albanian Constitution requires such a delimitation.

f) para 6 (d): The term „measures“ is not defined in Art. 3.

g) para 6 (f): The power of the Council of Ministers to submit international agreements to the Constitutional Court should be limited to those agreements which are not yet binding

for Albania under international law. Otherwise, this procedure could be used to legitimise the breach by Albania of its international obligations. This is provided for in Article 131 (b) of the Albanian Constitution.

4. **Art. 9 (Without title):** The organization and functioning of the individual ministries should not regulated by a Parliamentary law because such rules are too technical, detailed and perhaps subject to frequent change. It would appear to be sufficient if the *basic rules* would be regulated by a decision of the Council of Ministers. A similar a solution is already envisaged in Article 19 of the law, according to which the organization and the functioning of the office of the Prime Minister is regulated by decision of the Council of Ministers.

5. **Art. 10 (Release or Discharge from Duty of the Prime Minister):**

   a) For sake of clarity the first sentence should read: „The Prime Minister is released or discharged *by the President of the Republic* from duty in these cases:"

   b) Also for sake of clarity the list should mention the possibility that the Prime Minister is released or discharged „upon the nomination by the President of the Republic of a new Prime Minister according to the Constitution and the present law". Such a sentence covers a variety of normal situations of change of government, such as after the convocation of a new Parliament.

6. **Art. 12 (Competencies of the Prime Minister):** para (1): The list appears to be rather short. It does not include, for example, the power of the Prime Minister to propose or nominate the members of the Council of Ministers. The President of the Republic has a role at least in the formal appointment of the ministers, see Art. 14.

7. **Art. 13 (Competencies of the Vice Prime Minister):** The first sentence is difficult to understand, perhaps due to a problem of translation.

8. **Art. 14 (Competencies of Appointing and Discharging a Minister):**

   a) para (1): Does „Ministers are appointed and discharged by the President" mean that the President must, on the proposal of the Prime Minister, appoint and discharge or does the President have any margin of appreciation? Is the „proposal" by the Prime Minister binding on the President? Similarly imprecise language has given rise to controversy in Germany. Perhaps the language should be more precise. In this respect, Article 98 of the Albanian Constitution also needs some clarification.

   b) para (2): In Germany and some other parliamentary systems, the discharge of a minister is not subject to examination or approval by Parliament. The reason is that the Chancellor (Prime Minister) should be able to govern with Ministers which he trusts and that he should not be forced to govern with Ministers who more or less openly oppose the policy or the decisions for which he is responsible before Parliament. The draft law, as well as Articles 98 (2) and 102 (2) of the Constitution, appear to be somewhat contradictory in that respect: on the one hand the Prime Minister is given the power to resolve disagreements between ministers (Art. 12 (d)), on the other he is not able to discharge a ministers with whom he disagrees but who is supported by the Assembly. See also comments to Art. 17.

9. **Art. 15 (Incompatibility):**

   a) Under the German Constitution a Minister may not pursue *any* gainful activity, even beyond for-profit companies, during his term of office (Art. 66 Grundgesetz). Such a provision prevents corruption and the possibility of undue influence by certain special interests. Perhaps the scope of the constitutional incompatibility (Article 103 (2)) should be slightly enlarged by the draft legislation.

   b) Why are Art 103 (1) and (3) of the Albanian Constitution not mentioned in the draft law?

10. **Art. 16 (Conditions for Being a Minister):** It is unusual to require, as a condition for a political appointment, as minister, „higher education" and „work experience in the exercise of civil and political functions for a period of time no less than seven years". It appears doubtful whether these requirements are compatible with Article 103 (1) of the Albanian Constitution. Although the state clearly has an interest to be governed by educated and enlightened people, such a clause is prone to abuse (it is rather vague) and it creates the risk to dissatisfy and alienate important political forces which should be integrated into the political fabric.

11. **Art. 17 (Discharge of a Minister):** See comment (b) to Article 14. For the reasons indicated above there should be a possibility to discharge a minister with whom serious political differences exist or who has merely committed „simple" violations of the Constitution and laws. The political interest to have a stable government should be sufficient in most of the cases to ensure that the composition of the Council of Ministers remains stable. The Albanian Constitution does not seem to impose such limits on the discharging of a minister.

12. **Art. 19 (Organization and Functioning):** Perhaps only the *basic rules* of the office of the Prime Minister should be regulated by decision of the Council of Ministers.

13. **Art. 24 (Discharge of the General Secretary):** If the General Secretary is appointed by the Council of Ministers his position is obviously conceived as one of political trust. It should therefore also be possible to discharge him for simple lack of political trust and not, as it is provided in Art. 24 of the draft law, only for serious and justiciable failures.

14. **Art. 26 (Meetings of the Council of Ministers):** Perhaps a provision should be included according to which the Council of Ministers may invite, on certain occasions, higher government officials to attend a meeting of the Council of Ministers if, on a certain point, their expertise may be helpful in their decision-making process. Such a rule would not appear to be incompatible with Art. 100 (3) of the Albanian Constitution, as properly interpreted.

15. **Art 27 (Extraordinary Meetings of the Council of Ministers):** The provision fails to envisage the case that the Prime Minister is unable to act. Such a situation is not covered by the situation of his „absence" since, even then, the Vice Prime Minister may only act „on his order".

16. **Art. 30 (Guaranteeing Impartiality of the Members of the Council of Ministers):** A government is not a court. While it is certainly advisable to include a rule according to which a minister who has a personal interest in a matter should be obliged to lay this open it would seem to go too far to exclude such a minister altogether from the deliberations. A judge can be replaced by another judge, the position of a minister is based on the personal and political trust in the specific person.

17. **Art. 41 (Programming and Reporting).** It is possible that such a Programming and Reporting system is too demanding or would be undercut by many short-term initiatives.

18. **Art. 42 (Acts of the Council of Ministers):** If an urgent decision with the force of law that is not approved by the Assembly loses its juridical force from the beginning can this lead to criminal or other liability for those who have relied on the decision?

19. **Art. 45 (Legality of Acts):** The authorization for delegated legislation should not only be express but it should also give certain indications concerning the content and the purpose of the delegated legislation. This is an important requirement of democratic governance which is recognized in many European States.

20. **Art. 47 (Entry of Acts into Force):**

    a) para (1) Why should normative acts of the Council of Ministers receive juridical force no later than 15 days after they are published in the Official Journal? It is hard to see a convincing reason for this. To the contrary, there may be good reasons to publish normative acts in the Official Journal well in advance before the actually enter into force.

    b) para (2): What are the „organs of public information"? All or only certain organs?

    c) para (3): It should be clear that if an individual act is directed to change the legal situation of an individual such an act only enters into force when the act has been communicated to the individual concerned. As it stands, the draft does not make this sufficiently clear.

21. **Art. 49 (Repeal of Individual Acts):** According to general principles of administrative law there are legal limits to the repeal of individual acts. Legitimate expectations have to be taken into account. Perhaps a savings clause to that effect should be included.

22. **Art. 50 (Administrative Appeal of Acts):**

    a) The term „interested subjects" appears to be very broad. This may be a problem of translation. Perhaps the term „affected subjects" should be used.

    b) A time-limit of one month may be unrealistic. Perhaps three months is better.

23. Art. 51 (Judicial Appeal of Acts): This provision only foresees which courts are competent but not under which conditions they are competent. Are other questions, such as, for instance, demand the examination of normative acts of the Council of Ministers for the incompatibility with the Constitution, regulated elsewhere?

III. Additional suggestions

The German rules on the procedure of the Federal Government (Geschäftsordnung der Bundesregierung) contain the following rules which may be of interest for the drafters:

1. § 3 lays down a duty of every minister to inform the Chancellor about developments which may be important for the general direction of state policy.

2. § 5 lays down a duty to keep the Federal President informed about the activities of the Federal government.

3. § 9 lays down the right of the Chancellor to define and delimit the competence of the individual ministers.

4. § 11 provides that the Ministry of Foreign Affairs must be kept informed about the contacts with representatives of foreign states or international institutions.

5. § 13 establishes duties of ministers to indicate their whereabouts and requires the agreement of the Chancellor for periods of absence which are longer than three days.

6. § 14 provides that absent ministers may be represented by certain other ministers in the Council of Ministers.

7. § 16 provides for a duty of the ministries to consult among themselves before an issue is brought before the Council of Ministers.

8. § 20(2) provides for the possibility of a written procedure for certain acts and decisions of the Council of Ministers. This is an important practical provision.

9. § 21(3) lays down a duty to leave enough time for consultation before a decision can be taken.

10. § 22 provides that the Chancellor may not only be represented by the Vice Chancellor, but also by the oldest ministers in case he is unable to attend a meeting of the Council of Ministers.

11. § 23(2) gives the possibility that the minister can be represented in the meeting of the Council of Ministers by the highest ministerial official, a secretary of state,

12. § 24 provides that a meeting of the Federal Government is valid if more than half of its members attend and a decision is valid if the majority of those present (**not** of the members) vote in favour.

13. § 26 provides for a right of suspensive veto of the Ministers of Finance and Justice in their respective field of competences. Vetoed decisions become valid if they are taken again by a majority of the members of the Council of Ministers.

14. § 27 provides rules concerning the writing of the minutes of the meetings and their confirmation by the ministers.