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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

ON THE DRAFT LAW
ON THE PREVENTION OF CONFLICT OF INTEREST
IN THE INSTITUTIONS

OF BOSNIA AND HERZEGOVINA

On the basis of comments by:

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I. Introduction

1. The Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina (LCol) was imposed by the High Representative in 2002, then adopted by the Parliamentary Assembly of BiH in 2002 in the same text, corrected in 2003 and amended in 2004. Further to a request by the President of the Central Election Commission and the OSCE Mission to Bosnia and Herzegovina the Venice Commission adopted an opinion on this law at its 75th Plenary Session (Venice, 13-14 June 2008). In its opinion (CDL-AD(2008)014), the Commission found that the Law presents several shortcomings which should be addressed by the authorities of Bosnia and Herzegovina. It also found that the regulation of the conflict of interest in Bosnia and Herzegovina raises issues of constitutional nature, related to the state competence for conflict of interest at entity level.

2. In 2009, the authorities of Bosnia and Herzegovina prepared a new draft law, which however was rejected in the 1st reading by the parliament in early 2010. On 29 January 2010 the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina requested an expert assessment by the Venice Commission of the draft law on prevention of conflict of interest in institutions of Bosnia and Herzegovina (CDL(2010)015).

3. *The present opinion was draft on the basis of comments by Messrs Tuori and Kask, and was adopted by the Commission at its Plenary Session (Venice, 2010).*

II. General comment to the draft law

4. The present Opinion has to be seen as a follow-up to the first opinion given on the Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina (CDL-AD(2008)014). It will focus on issues where the Commission had expressed critical views in its previous opinion.

5. As a general comment, the Commission commends the fact that the new draft Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina (hereinafter: the draft LPCol) has followed many suggestions expressed by the Commission in its previous opinion. It notes, however, that several issues previously raised have not been addressed.

6. The Commission thus wishes to recall that better rules on Conflicts of Interest for Holders of Public Office should – at least in theory – lead to more trust, greater accountability, more integrity and less unethical behavior/corruption. They should also provide a tool for identifying and resolving potential conflicts of interest, and also:

- Increase public confidence in the government.
- Demonstrate the high level of integrity of the vast majority of Government officials
- Deter conflicts of interest from arising because official activities would be subject to public scrutiny
- Deter persons whose personal finances would not bear up to public scrutiny from entering public service, and
- Better enable the public to judge the performance of public officials in the light of their outside financial interests.¹

¹ Cf. Regulating Conflicts of Interest for Holders of Public Office in the European Union, p. 32, (http://ec.europa.eu/dgs/policy_advisers/publications/docs/hpo_professional_ethics_en.pdf). Cf. CDL-AD(2008)014, § 18.

III. Analysis of the draft law

A. The definition of “conflict of interest” and principles of conduct

7. Pursuant to Article 1(2) of the draft LPCol, a conflict of interests is defined in quite broad terms, in that it covers not only *actual* conflicts of interest, but also *potential* ones. Such a broad definition reflects the Council of Europe² definition and is to be welcomed as even a situation that *looks* like a conflict of interest may suffice to undermine public trust.

8. Article 2 of the draft LPCol gives a list of principles guiding the conduct of public officials such as impartiality, integrity, transparency, and inspires their ethical conduct. There are however many other principles which make an important part of the European standards in order to guarantee the rule of law and the right to good administration. Yet, some principles are stated repetitiously in Article 2, e.g. legality in §§ 3 and 5, or responsibility in §§ 3, 4, 5 and 8.

9. Regarding more specifically the principle that public officials must act in the interest of citizens (Article 2§1), although such principle is conform to the rule of law, it could be redrafted in a more general wording, as also the interests of persons without citizenship and legal persons have to be protected.

10. Article 2§6 includes a new provision, which lays down that in the exercise of their public offices, public officials “*must adhere to the ethics of the profession and office they are exercising*”. This provision would amount to legalization of ethical duties whose contents may be quite vague. What also remains unclear are the possible legal consequences of a breach of these duties. The same is true for Article 2§4 according to which “*public officials shall be politically accountable to the authority or citizens who have appointed or elected them*”.

11. In the Venice Commission’s opinion, neither public officials nor Central Electoral Commission (CEC) could predict how these provisions will be applicable in practice. Usually, ethics of administration is stipulated not in a law but in recommendations (e.g. Model code of conduct for public officials³).

12. The principle of independence of officials set out in Article 2 § 7 also remains too broadly defined and its legal significance unclear. The Commission suggests to regulate in more precise manner the mentioned “relationship of dependence”.

B. Incompatibilities

13. In its previous opinion, the Commission underlined that “*there exists a clear distinction between general incompatibilities on the one hand, and specific situations of conflict of interest on the other hand. The general incompatibility of members of government is connected to issues such as general confidence in the political system /.../ while specific situations of conflict of interests are instead normally addressed in ordinary legislation, be it in organic or other laws on incompatibility, or else by administrative law provisions on legal incompetence in concrete matters*”.

² Recommendation (No. R(2000)10) of the Committee of Ministers of the Council of Europe “on Codes of Conduct for Public Officials”, Adopted by the Committee of Ministers at its 106th Session on 11 May 2000, Article 13.

³ Appendix to Recommendation No R (2000) 10, *cit.*

14. The draft LPCoI has kept provisions on both general incompatibilities and specific situations of conflict of interest. For example, while Article 4 is titled “Incompatibilities”, also Articles 5 and 6 and, perhaps, Article 9 too, deal with general incompatibilities as well.

15. Article 4§4 includes a new provision on general incompatibility, which lays down that *“involvement in a private enterprise under circumstances that create a conflict of interest is incompatible with the exercise of public office as a public official”*. In general, this provision can be welcomed. However, the wording of Article 4§4 does not stipulate clearly the circumstances in which a public official has to resign according to Article 4§5. Conflict of interest might not always be a consequence of general incompatibility but, especially in cases of incompatibility of public and private activities, a case-by-case situation. Even when conflict of interest does not appear from the duties of public official in general, some specific situation might lead to conflict of interest. It would not be obligatory to resign in this case from the office in private enterprise, but referral of duties as provided in Article 7§2 could be applied.

16. Also, its relation to Article 6§2, which defines incompatibility on the grounds of involvement in a private enterprise in much stricter terms, is not clear. Would Article 4 §5 be applied in this case and would an obligation to resign from such service in private sector within 30 days be applicable ? Or is Article 4 §5 applicable only in case of incompatibilities provided in Article 4? Further, the time-limit for returning to previous service in private enterprise is not clear either: if a public official has not been serving in such post before, he or she would be allowed to join the private enterprise after the contract or business with government authorities is finished. Should Article 4 §5 be applied, a public official who has resigned from such private enterprise may not re-enter such service even after the contract or business with government has been terminated.

17. The Commission recommends to clarify and redraft these provisions and to clearly keep apart general incompatibilities and specific situations of conflict of interest by, for instance, dividing the law into chapters. It also recalls Recommendation R(2000)10 that provides a narrower definition of general incompatibilities:

2. The public official's private interest includes any advantage to himself or herself, to his or her family, close relatives, friends and persons or organisations with whom he or she has or has had business or political relations. It includes also any liability, whether financial or civil, relating thereto.(...)”

C. “Pantouflage”

18. The Commission notes that Article 5 of the draft LPCoI still lacks an adequate provision on the so-called *pantouflage*, that is, the improper migration by public officials from the public to the private sector⁴. In this regards, the Commission recalls the importance of preventing pantouflage, as underlined by GRECO:

“In addition to the fundamental goal of promoting public trust, the most common goals of a system to address the movement of public officials from public service to the private sector are: (1) ensure that specific information gained while in public service is not misused (2) ensure that the exercise of authority by a public official is not influenced by personal gain, including by the hope or expectation of future employment; and, (3) ensure that the access and contacts of current as well as former public officials are not used for the unwarranted benefits of the officials or of others. In some degree, almost any individual who carries out a public function, whether he or she is elected, appointed, or hired under contract, whether serving full-time or

⁴ See CDL-AD(2008)014, §§ 30-34.

part-time, whether paid or unpaid, should be accountable to some standards designed to help meet these goals.”⁵

19. The Commission strongly recommends to clarify the concerned provisions and specifically limit the movement of elected officials, executive officeholders and advisors from the public to the private sector.

D. Balance between public and private interest

20. The Venice Commission is aware that all conflicts of interest cannot be eliminated. Therefore, public official's private interests need to be properly identified and managed in an appropriate manner so as to protect the integrity of public decisions.

21. Article 7 of the draft LPCol deals with individual situations of conflict of interest. However, two aspects of it are problematic: first, the specific provisions cover only one type of conflict interest, namely, situations where a public official or an “affiliated” person has a *financial interest* at stake. Situations where a public official has a non-financial interest at stake are not covered by Article 7 of the draft LPCol at all. Second, its application is limited to decision-making (collectively and individually). In the Commission's opinion, the disqualification of a public official on the basis of a case-by-case conflict of interest should be drafted in a general manner.

22. Article 7§3 includes a very generally formulated provision that extends the provisions of the article to “*such situations that involve the affiliated persons that are otherwise affiliated with the public officials, when the official's voting and decision-making objectivity could be compromised*”. The definition of an “affiliated person” is very broad. According to Article 3§i, “‘affiliated person’ shall include a relative or a person who has a personal political, economic or other connection with a public official, which connection could affect the public official's objectivity in work”.

23. While a general clause on the disqualification of public officials is needed, the specific situations expressly regulated should be considerably extended. Guidance for complementing Article 7 can be found in general laws on administration, adopted in many European countries.

24. In this regard, the Commission also refers to the “Guidelines for Managing Conflict of Interest in the Public Service” drafted by the Council of the Organisation for Economic Co-operation and Development (OECD guidelines), according to which:

“1.2.2. /.../

c) Recusal and restriction - Where a particular conflict is not likely to recur frequently, it may be appropriate for the public official concerned to maintain their current position but not participate in decision-making on the affected matters, for example by having an affected decision made by an independent third party, or by abstaining from voting on decisions, or withdrawing from discussion of affected proposals and plans, or not receiving relevant documents and other information relating to their private interest. The option of re-assigning certain functions of the public official concerned should also be available, where a particular conflict is considered likely to continue, thereby making ad hoc recusal inappropriate. Particular care must be exercised to ensure that all affected parties to the decision know of the measures taken to protect the integrity of the decision-making process where recusal is adopted”.

⁵ Eighth General Activity Report of GRECO (2007), Including a section on Revolving Doors / Pantouflage, Adopted by GRECO at its 36th Plenary Meeting (Strasbourg, 11-15 February 2008), § 6. See also Article 26 of the Code of Conduct for Public Officials appended to Rec R(2000)10. Provisions on gifts must also comply with Article 15 of the UN Convention against Corruption, which BiH ratified in 2006.

E. Involvement of close relatives

25. Article 9 deals with the involvement of close relatives. However, the draft provision does not state clearly whether at issue is a general incompatibility or case-by-case disqualification. In this regard, the Venice Commission reiterates its opinion that *“it would be more appropriate to deal with close relatives under specific situations of conflict of interest, that is, on a case-by-case basis and only insofar as there exists an actual or potential conflict of interest”*⁶.

F. Gifts

26. Differing definitions of the term “gift” are now harmonized and merged in Article 3 “Definitions”. The Commission notes that the value of gifts, which the draft LPCol allows elected officials, executive officeholders and advisors to keep without reporting has doubled (from 100 to 200 KM). In the Commission’s opinion, it may be useful to also indicate the allowed frequency of the gifts that may be accepted. This would provide an additional protection as to concerns regarding bribes or other forms of due advantage.

G. Declaration of assets and income

27. A new Chapter II on “Disclosure” (articles 13 to15) provides for the obligation of the public officials to file to the CEC BiH the reports on their property and income as well as the property and income of their close relatives. The reports will have to be prepared in accordance with the Rules prescribing the detailed contents of the reports and the format and layout of the form on which the report is submitted, to be enacted by the CEC BiH (article 14). This provisions are to be welcomed.

28. The Commission notes however that the provisions on “disclosure in contracting”, “disclosure of enterprise information” and “disclosure of government authorities investment” were removed from the draft LPCol.

29. Supporting institutions and procedures will play a key role to ensure that the standards of the draft LPCol are effectively implemented. The Commission reiterates its recommendation given in its previous opinion that the law should provide for mechanisms allowing financial declarations to be effectively reviewed for both *repressive* and *preventive* purposes. The financial declarations could be used by the CEC in a proactive way, to provide individual counseling on the prevention of conflict of interest and incompatibilities (see CDL-AD(2008)014, §§ 40-41).

H. Publication of statements and reports

30. The draft LPCol does not foresee how the data in the Register of Income and Property shall be made available to the public: whether by publishing the content of the register (e.g. on the Internet) or only in individual cases, upon individual request. The effectiveness of the aim of the law or the limitation of the right to privacy of the public official and his/her family members is not clear from the general rule on the publication (Article 15 § 2). The draft law would benefit from such clarification.

31. Further, it could be argued that publication of the income of the close relatives who cohabitate in the same household with the public official might restrict their right to privacy disproportionately. Although publication of the data concerning public officials and their close relatives property and income would help to find out the possible cases of bribery, it has

⁶ Cf. CDL-AD(2008)014, §27.

negative consequences for those persons as well. It would be suggested to publish only the salary of public officials, not those of their close relatives.

I. Sanctions

32. The removal of the sanction of ineligibility to stand for an elected office from the draft LPCol is welcome. It corresponds to the view expressed by the Commission in its previous opinion.

J. The application of the LPCol at the level of the entities

33. In its previous opinion, the Commission noted that the conflict of interest does not fall under the competence of the State but underlined the importance of a uniform regulation throughout the country. It also pointed to strong arguments that favor that the implementation of entity laws on the conflict of interest is also entrusted to the Central Election Commission (cf. CDL-AD(2008)014, §§ 60-70)

34. Article 22§1 of the present draft LPCol enables the entities to authorize the CEC to implement their laws. § 2 of the same Article provides that if the entities so do, they “*shall have to harmonize their laws with the provisions of this Law accordingly*”. In view of the lacking legislative competence of the BiH, such an obligation appears problematic, regardless of the desirability of substantive harmonization.

K. Conclusion

35. The new draft LPCol addresses a certain number of the main concerns which the Venice Commission expressed in its previous opinion on the Law on Conflict of Interest in Governmental Institutions of Bosnia and Herzegovina in this respect, and they are therefore to be welcomed.

36. A certain number of issues remains problematic as not all the previous recommendations have been addressed by the new draft LPCol. The following recommendations remain valid:

- General incompatibilities and specific situations of conflict of interest should be clearly kept apart, and current provisions related to general incompatibility clarified as indicated.
- The current general incompatibility relating to the involvement of close relatives of elected officials, executive officeholders and advisors in certain public functions should rather be considered as a case-by-case incompatibility.
- Provisions on general principles of conduct of public officials should be clarified and modified as indicated.
- Provisions aiming at prohibiting the improper movement of elected officials, executive officeholders and advisors to the private sector (“*pantouflage*”) should be introduced.
- Adequate mechanisms allowing financial declarations to be effectively reviewed for both repressive and preventive purposes should be introduced in the LPCol.

37. The Commission has been informed that the Inter-Agency Working Group intends to resume its work on the draft LPCol. The Commission welcomes this initiative and remains ready to provide further assistance in this task.