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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

**ON THE DRAFT LAW
ON CONFLICT OF INTEREST**

IN MOLDOVA

by

Mr Kaarlo TUORI (Member, Finland)

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I Substantive distinctions

1. When drafting a law on conflict of interests, one should be very careful about scope of application of the law and its individual provisions. Distinctions should be made in the substantive, personal and temporal dimensions.
2. It can be questioned whether it is appropriate to include provisions concerning bribery in a law on the conflict of interests or whether these provisions should fall under criminal law (Art. 15).
3. As regards other instances of conflicts of interest a distinction should be made between general and case-by-case incompatibility. The view can be defended that the same law can contain provisions focusing on both levels of incompatibility. However, these levels should be clearly separated in the law's internal systematization.
4. The present draft includes provisions on both general and case-by-case incompatibility. However, the definition in Art. 2 seems to focus merely on case-by-case incompatibility.
5. With regard to case-by-case incompatibility, one should be very clear about the relations between the law on conflicts of interests and the general administrative and procedural regulations on the circumstances establishing civil servants' and judges' disqualification and the effect that such a disqualification has on the validity of administrative or court decisions. According, to Art. 8(4), a mere violation of a duty of information leads to the nullity of the respective administrative decision. Such a rule may cause unnecessary legal uncertainty.
6. One should also consider carefully what kinds of conflicts of interests the law addresses: whether it concerns only conflicts caused by property interests or whether it has a more general focus. In the latter case, in particular, overlappings with administrative and procedural law regulations are possible, even probable. The present draft seems to have chosen the latter approach.

II Person-related distinctions

7. According to Art. 3, the law would have a very large scope of application in personal respect. It would be applied both to persons appointed to their posts – such as civil servants and judges – and to persons elected to their positions and holding a political mandate, such as the President of the Republic, the Members of Government as well as the Members of Parliament and regional and local representative bodies. In addition, persons holding leading positions in state and municipal enterprises would also be covered by the law.
8. The problem with such a very wide scope of application is that the same provisions are not necessarily appropriate with regard to all the different person groups. In addition, the relevant, already existing provisions in other legislation may be differentiated along such lines which the present draft blurs. Thus, the Constitution already involves provisions on the incompatibilities concerning certain public offices: the President (Art. 81(1)), the Members of Parliament (Art. 70(1) and Government (Art. 99(1), as well as judges (Art. 116(1) and 139).

9. It is possible, even likely, that the definition and assessment of both general and case-by-case incompatibilities vary according to the person group in question and the character of the issues they deal with. What is inappropriate with regard to civil servants may be wholly legitimate with regard to members of representative bodies: the latter are even expected to have such ties to civil society, maybe to economy, too, which would be inappropriate with respect to civil servants. It is also of significance whether the authority in question deals mainly with individual or more general regulative (legislative) issues. Even among persons appointed to their posts, distinctions as to the definition of inappropriate conflicts of interest can prove to be necessary. It is not self-evident that, say, the incompatibilities of civil servants and judges should be appraised by exactly the same criteria.

10. Distinctions between groups of persons covered by the draft law are also needed with regard to the consequences attached to violations of the law. Thus, already the Constitution grants some of the persons at issue a certain immunity.

III Temporal distinctions

11. A distinction should be made between a) measures concerning general incompatibilities and the prevention of case-by-case incompatibilities; b) measures concerning an eventual incompatibility at a particular issue under deliberation; c) consequences of the violation of the provisions on either general or case-by-case incompatibility. In all these respects, divergent provisions on different person groups may be needed.

12. Measures falling in group a) may involve either an outright prohibition of certain types of activities or ownership, or the duty to make an announcement on activities or ownership which may cause case-by-case incompatibilities. The latter duty aims at facilitating the subsequent control of undue influences by relevant authorities and – if the announcements are made public – the general public.

13. Measures falling in group b) may involve the duty of the person in question to withdraw from the deliberation of the issue or to inform a supervisory authority on a possible incompatibility.

14. Consequences of the violation of provisions on general incompatibilities may only concern the person at issue; here, again, person-related distinctions are needed. Consequences of the violation of provisions on case-by-case incompatibilities, in turn, may be related either to the person guilty of the violation or the validity of the decision, act or other measure influenced by incompatibility. Consequences should be differentiated according to the measure in question. If the measure involves the use of a competence regulated by the Constitution, constitutional considerations should be given due attention.

IV Organizational and procedural issues

15. The law on conflicts of interest should also include the relevant organizational and procedural provisions, provided that they are not already included in other legislation. In the latter case the law should involve express references to the provisions in question.

16. In organizational and procedural provisions, too, person- and issue-related distinctions are needed: the provisions cannot be similar with regard to, say, the President of the Republic and civil servants.

17. In organizational and procedural respect, a body called the Main Ethics Committee is obviously intended to hold a key position. However, the draft law leaves open the composition, powers and procedure of the committee.

18. According to Art. 21(2), "the leadership of the bodies of the bodies provided in art. 19(1) and the Main Ethics Committee must undertake without delay the measures needed to avoid the conflicts of interests they got acquainted with and to inform the State competent bodies about the discovered violations of the legislation". What the relevant measures are remains unclear.

19. According to Art. 23(2) of the draft, "the Rules of procedure and the composition of the Main Ethics Committee shall be approved by the Parliament". However, the regulation of conflicts of interest remains incomplete without the relevant provisions on the main authority dealing with such issues. In addition, it can be questioned whether it is constitutionally appropriate to let the Parliament to regulate the composition and procedure of the committee in a form other than a law.

V Additional detailed comments

20. The assessment of the draft law is complicated by problems caused by translation.

21. The legal significance of the provisions on general principles in Art. 4-7 remains unclear.

22. It is unclear whether Art. 8 deals with general or case-by-case incompatibilities. This question is crucial for the assessment of the provisions on the consequences of the violation of the provisions in para 1)-3).

23. It is not clear what is meant by "job opportunities" in Art. 12(1).

24. The significance of Art. 14(2) is not clear.

25. The rule included in Art. 17(5) is self-evident and unnecessary. The relevance of Art. 17(7) can also be questioned.